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1928

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1928

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1928

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ALL INDIA REPORTER

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COMPARATIVE TABLES

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Hints for the use of the following Tables

Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1928 with corresponding references of the ALL INDIA REPORTER.

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Table No. III.—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER for 1928 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

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N. B.—Column No. 1 denotes pages of I. L. R. 9 LAHORE.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 9 Lahore=All India Reporter.

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23	" " 157	188	" " 944	317	1927 " 513	448	" " 369	576	1928 " 554
27	" " 117	191	1927 " 570	322	" " 792	451	" " 238	581	1929 " 55
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35	" " 178	203	" *PC* 191	333	" " 40	462	" " 638	588	1928 " 375
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67	1928 " 154	217	" " 819	347	" " 76	467	" " 831	597	" " 873
76	" " 216	224	1928 " 432	352	" " 305	470	" " 224	602	1927 " 141
85	1927 " 657	244	1927 " 858	356	" " 247	487	" " 924	608	1928 " 320
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TABLE No. II

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N. B.—Column No. 1 denotes pages of other JOURNALS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

10 Lahore Law Journal=All India Reporter.

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21	" " 51*a*	183	" " 250	292	" " 482	370	" *L* 428	493	" " 49
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40	" " 289	207	" " 354	302	" *L* 759	382	" *Notes* 44*e*	505	" " 57
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63	" " 306	237	" *Notes* 69*c*	319	" *L* 829	408	" " 272	525	" " 61
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8	1928 *L* 291	119	1928 " 240	252	1928 " 109	359	" *L* 342	486	" " 858
14	" " 125	122	" " 82	254	" " 489	364	" " 595	489	1927 " 452
27	1927 " 890	125	" " 427	260	" *Notes* 70*b*	366	" *Notes* 44*f*	510	1928 " 232
30	1928 " 164	126	" " 65	262	" " 39*c*	368	" *L* 49	515	" " 259
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45	1927 " 880	132	1928 " 83	271	1928 " 119	385	" " 245	533	" " 844
46	1928 " 90	142	1927 " 577	273	1927 " 833	388	" " 724	534	" " 934
50	" " 235	148	" " 348	276	1928 " 105	392	" *PC* 106	536	" " 909
52	" *Notes* 35*f*	151	1928 " 92	280	" " 112	396	" *L* 121	537	" *Notes* 56*b*
54	" " 65*d*	154	1927 " 642	282	" " 114	399	" " 119	539	" " 55*f*
56	1927 *L* 887	162	1928 *Notes* 40*d*	284	1927 " 706	401	" " 543	541	" *L* 637
58	" " 872	165	" *L* 320	287	1928 *Notes* 66*d*	403	" " 608	544	" " 831
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68	" " 246	196	" " 708	300	1928 " 116	429	" *PC* 172	554	" " 20
69	" " 72	199	" " 477	302	1927 " 821	434	" *L* 243	567	" *Notes* 10*d*
70	1927 " 540	204	" " 691	305	1928 " 115	436	" *Notes* 62*b*	569	" " 13*a*
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74	1927 " 448	215	1928 *Notes* 14*f*	308	" " 792	439	" *PC* 122	571	" " 904
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112	" " 539	237	1927 " 731	333	" " 196	475	1928 " 305	613	" " 959
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29 Punjab Law Reporter = All India Reporter —(*Concld.*)

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30	" *M* 166	219	" *L* 296	308	" *P* 253	425*a*	" *L* 239	512	" *C* 230
32	" *Notes* 47*b*	220	" *L* 276	310	" *O* 212	425*b*	" *L* 186	513	" *B* 117
33	" *Notes* 26*f*	221	" *B* 28	311	" *O* 207	427	" *P* 241	518	1927 *L* 853
34	" *L* 185	225	" *B* 22	312	" *N* 255	429	" *Notes* 11*a*	520	1928 *B* 136
35*a*	" *Notes* 14*a*	226	" *B* 33	313	" *N* 242	430	" *L* 638	521	" *L* 34
35*b*	1927 *L* 516	228	" *C* 228	314	" *B* 59	431*a*	" *M* 473	522	" *B* 177
38	1928 *L* 134	229	" *Notes* 69*f*	315	" *B* 64	431*b*	" *S* 106	525	" *O* 215
39	" *L* 97	230	" *O* 221	317	" *B* 184	437	" *C* 83	527	" *C* 416
40	" *L* 180	232	" *A* 139	320	" *B* 78	445*a*	" *M* 391	529	" *B* 135
41	" *Notes* 23*f*	233	" *A* 128	322*a*	" *B* 77	445*b*	" *A* 300	530	" *L* 95
43	" *M* 147	234	" *Notes* 55*b*	322*b*	" *M* 194	446	" *A* 287	531	" *C* 260
47	" *Notes* 49*c*	235*a*	" *L* 294	324	" *M* 331	448*a*	" *A* 215	532	1927 *L* 862
48	" *M* 135	235*b*	" *L* 660	325*a*	" *M* 369	448*b*	" *A* 268	533	1928 *B* 140
49	" *C* 27	236	" *L* 64	325*b*	" *P* 326	449	" *Notes* 66*a*	534	" *Notes* 68*b*
63	" *M* 196	238	" *Notes* 60*c*	334	" *A* 84	450	" *A* 211	535	" *B* 140
65	" *L* 66	239	" *P* 100	336	" *A* 182	451	" *A* 213	536	" *L* 850
68	1927 *O* 627	244*a*	1927 *O* 632	340	" *A* 254	452	1929 *O* 86	537	" *M* 846
69	1928 *Notes* 34*a*	244*b*	1928 *A* 128	342	" *A* 622	453*a*	1928 *M* 479	538	" *L* 844
70	" *O* 112	245	" *C* 97	343	" *L* 507	453*b*	" *Notes* 63*c*	539	" *M* 494
71	" *M* 55	248	" *Notes* 57*b*	345	" *Notes* 58*b*	454	" *Notes* 33*c*	540	" *Notes* 52*b*
72*a*	" *Notes* 17*a*	250	" *L* 278	347	" *L* 544	456	" *M* 859	541	" *M* 624
72*b*	1927 *M* 1115	251	1927 *M* 1193	348	" *L* 257	457	" *Notes* 59*f*	543	" *O* 306
73	1928 *Notes* 24*c*	252	1928 *Notes* 31*f*	350	" *L* 496	458	" *M* 833	544	" *B* 145
75	" *P* 213	254	" *L* 664	351	" *M* 275	459	" *Notes* 84*f*	545	" *B* 143
77	1927 *M* 542	256	" *L* 110	353	" *A* 207	461	" *M* 864	546	" *C* 430
79	1928 *P* 115	257	" *M* 167	357	" *A* 261	464*a*	" *L* 687	551	" *B* 162
81	" *P* 120	258	" *P* 293	361	" *C* 387	464*b*	" *C* 183	555	" *R* 118
86	" *N* 113	259	" *P* 249	362	" *L* 448	465*a*	" *P* 480	561	" *N* 257
88	1927 *A* 724	260	" *P* 143	366	" *L* 546	465*b*	" *O* 241	566	" *B* 152
90	1928 *Notes* 15*b*	261	" *P* 201	369	" *Notes* 30*d*	466	" *P* 203	567	" *P* 562
92	" *A* 1	262	1927 *A* 707	371	" *L* 114	469	" *Notes* 62*b*	570	" *A* 671
94	" *O* 122	263	1928 *A* 118	372	" *Notes* 59*e*	470	" *S* 142	572	" *Notes* 47*e*
97	" *A* 55	265*a*	" *A* 266	373	" *P* 347	472*a*	" *L* 759	573	" *B* 138
99	" *P* 124	265*b*	" *L* 332	374	" *P* 359	472*b*	" *A* 280	574	" *Notes* 63*a*
102	" *O* 104	267*a*	" *L* 119	377	" *L* 533	474	" *Notes* 61*f*	575	" *N* 219
106	" *P* 162	267*b*	" *L* 329	378	" *L* 657	475	" *N* 162	577	" *L* 193
111	" *P* 161	270	" *Notes* 36*a*	381	" *Notes* 69*a*	478	" *Notes* 45*d*	581	" *N* 186
113	" *M* 160	271	" *A* 191	382*a*	" *L* 50	479*a*	1929 *L* 41	583	" *L* 78
114*a*	" *M* 169	272	" *A* 185	382*b*	" *Notes* 60*a*	479*b*	1928 *Notes* 61*b*	584	" *M* 928
114*b*	" *P* 166	273	" *A* 194	383	" *B* 52	481	" *L* 272	585	" *L* 232
115	" *R* 49	274	" *A* 95	384	" *N* 135	488*a*	" *Notes* 12*e*	587	" *M* 969
117	1927 *L* 710	275	1927 *A* 610	385	" *L* 676	488*b*	" *C* 237	588	" *Notes* 14*f*
119	1928 *O* 281	276	1928 *Notes* 31*a*	386	" *L* 282	485	" *Notes* 60*f*		
123	1929 *M* 403	277	" *Notes* 21*e*	388	" *Notes* 58*a*	486	" *N* 172	589*a*	" *N* 217
124*a*	1927 *A* 791	279	" *L* 319	389	" *M* 495	487*a*	1927 *L* 820	589*b*	" *M* 49

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CrLJ)	A. I. R.	CrLJ)	A. I. R.	CrLJ)	A. I. R.	CrLJ)	A. I. R.	CrLJ)	A. I. R.
590	1928 *M* 591	683	1928 *B* 139	772	1928 *Notes* 54*d*	896	1928 *N* 135	1066	1928 *Notes* 55*a*
591	" *Notes* 44*c*	684	" *L* 865	773	" *P* 649	897	" *B* 208	1007	" *P* 446
593	" *L* 277	687	" *L* 853	775	" *L* 818	899	" *L* 245	1008	1929 *L* 67
594	" *Notes* 46*e*	689*a*	" *L* 851	778	" *L* 921	901	" *B* 244	1009	1928 *O* 430
595	" *R* 115	689*b*	" *PC* 264	779	" *L* 109	902	" *N* 284	1016	" *B* 348
597	" *Notes* 57*e*	693	" *L* 861	780	" *L* 551	904	" *B* 240	1017	" *P* 193
599	" *R* 117	694	" *C* 410	783	" *M* 918	905	" *L* 230	1017	" *L* 531
601	" *L* 840	697	" *L* 724	784	" *A* 548	908	" *B* 224	1019	" *L* 476
602	" *L* 445	698	" *L* 856	785	" *N* 337	909	" *Notes* 82*e*	1022	" *C* 675
603	" *R* 113	700	" *P* 337	786*a*	" *C* 531	910	" *A* 680	1028	" *L* 759
605	" *L* 259	701*a*	" *L* 844	786*b*	" *M* 506	912	" *R* 296	1031	" *Notes* 54*a*
609	" *N* 213	701*b*	" *R* 150	790	" *P* 491	913	" *P* 473	1031	" " 55*d*
612	" *P* 551	704	" *L* 469	794	" *A* 706	917	" *C* 381	1032	" *L* 540
613	" *P* 574	705*a*	" *L* 863	795	" *C* 339	922	" *B* 205	1033	" *S* 166
617	" *A* 60	705*b*	" *C* 309	798*a*	" *Notes* 44*b*	924	1929 *S* 9	1035	" *P* 497
618*a*	" *R* 112	710	" *M* 847	798*b*	" *C* 569	927	1928 *C* 645	1041	" *M*1135
618*b*	1929 *N* 13	714	" *L* 863	799	" *A* 492	928	" *M*1195	1042	" *R* 295
619	1928 *Notes* 59*b*	715	" *P* 593	801*a*	" *A* 673	929	" *M*1130	1043	" *L* 928
620*a*	" *Notes* 67*c*	717	" *M* 791	801*b*	" *O* 401	930	" *R* 252	1044	" *R* 243
620*b*	" *L* 740	719	" *L* 479	803	" *A* 672	932*a*	" *M*1171	1044	" *Notes* 73*b*
624	" *Notes* 36*f*	721*a*	1929 *S* 23	804	" *P* 420	932*b*	1929 *S* 5	1045	" *P* 481
625	" *M* 597	721*b*	1928 *O* 326	810	" *L* 567	934	" *L* 48	1047	1929 *L* 111
626	" *P* 139	724	" *Notes* 61*e*	815	" *L* 1	935*a*	1928 *Notes* 51*d*	1048	1928 *M*1087
631	1927 *O* 630	725	" *M* 652	819	" *C* 444	935*b*	" *A* 753	1049	" *B* 418
633	1928 *M* 224	726	" *Notes* 53*a*	822	" *L* 946	936	1929 *S* 26	1051	1929 *S* 50
635	" *M* 585	727	" *M* 485	823	" *C* 732	938	1928 *A* 765	1051	1928 *B* 347
638	" *C* 401	728	" *P* 634	827	" *Notes* 53*d*	940	" *R* 217	1052	" *L* 543
640	" *Notes* 31*e*	732	" *M* 788	828	" *PC* 254	942	" *P* 585	1053	" *Notes* 60*b*
641	" *C* 321	733	" *L* 909	833	" *Notes* 56*d*	945	" *S* 149	1056	1929 *L* 127
642	" *Notes* 50*b*	734*a*	" *M* 560	835	" *L* 880	958*a*	" *R* 240	1057	1928 *B* 388
643	" *Notes* 36*b*	734*b*	" *L* 923	842	" *Notes* 50*e*	958*b*	" *L* 88	1058	" *Notes* 73*d*
644	" *M* 598	736	" *S* 168	844*a*	" *L* 953	960	" *O* 464	1059	" *M*1198
645	" *L* 827	737	" *L* 637	844*b*	" *C* 438	961	" *L* 295	1059	" *Notes* 74*a*
646	" *R* 158	738*a*	" *Notes* 50*d*	847*a*	" *M* 651	962	1929 *S* 15	1060	" *B* 389
648	" *P* 454	738*b*	" *Notes* 55*f*	847*b*	" *C* 653	963	" *N* 36	1061	1929 *L* 125
651	" *B* 52	739	" *A* 687	849	" *Notes* 57*c*	967	1928 *Notes* 82*c*	1062	" *M* 188
652	" *L* 510	740	" *L* 647	851	" *L* 681	968	1927 *A* 649	1063	1928 *B* 390
656	" *P* 567	745	" *Notes* 19*b*	857	" *S* 193	972	1928 *B* 200	1080	1929 *L* 142
657	" *O* 292	746	" *L* 906	859	1929 *L* 59	973	" *M*1172	1081	1928 *B* 376
660	" *Notes* 16*f*	749	" *Notes* 56*b*	861	1928 *N* 325	975	" *B* 290	1082	" *M*1234
661	" *A* 627	750	" *A* 396	863	" *Notes* 52*d*	977	" *B* 221	1082	" *B* 346
663	" *A* 402	753	" *Notes* 33*b*	864	" *A* 476	979	" *O* 285	1084	" *A* 696
664	" *O* 226	755	" *L* 900	865	" *L* 858	981	" *B* 231	1085	" *M*1278
665	1927 *C* 536	756	" *P* 506	866	" *L* 694	983	" *O* 277	1087	" *Notes* 81*c*
666	1928 *O* 111	758	" *L* 925	867	" *L* 757	987	" *B* 220	1088	" *A* 745
669	" *L* 462	760	" *P* 577	869	" *R* 200	989	" *O* 417	1089	" *S* 161
671	" *A* 660	762	" *L* 898	875	1929 *S* 17	990	" *B* 241	1092	1929 *N* 42
672	" *L* 843	763	" *O* 373	877	" *L* 378	993	" *B* 336	1093	1928 *C* 466
673	1927 *PC* 215	764	" *L* 951	880	1928 *L* 357	994	" *M*1157	1096	" *Notes* 73*c*
676	1928 *Notes* 88*e*	766	" *A* 607	881	" *L* 308	996	1929 *L* 61	1096	1929 *L* 198
678	" *L* 851	767	" *L* 903	889	" *Notes* 83*c*	998	1928 *A* 439	1097	" *S* 61
679	" *L* 862	768	" *Notes* 69*e*	893	" *O* 402	999	" *Notes* 37*a*	1098	1928 *M*1028
680	*Notes* 44*d*	769	1929 *L* 382	895*a*	1929 *L* 56	1002	1929 *L* 32	1102	1929 *L* 201
681	" *M* 682	771	" *P* 64	895*b*	1928 *L* 178	1005	1928 *B* 433	1104	1928 *Notes* 87*c*
682	" *L* 855								

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I.C.)	A. I. R.	I.C.)	A. I. R.	I.C.)	A. I. R	I.C.)	A. I. R.	I.C.)	A. I. R.
1	1927 *PC* 238	27	1927 *B* 606	49	1927 *A* 601	77	1927 *R* 278	109	1927 *B* 647
5	1928 *M* 21	30	" *M* 946	53	1928 *N* 127	79	1928 *B* 8	110	" *M* 969
7	" *N* 56	31	" *B* 635	54	" *S* 71	86	1927 *O* 519	111	" *B* 369
8	" *O* 33	34	" *M* 983	57	" *N* 131	87	" *B* 456	113	" *B* 394
10	1927 *L* 693	35	" *O* 574	59	1927 *L* 687	91	1928 *C* 772	117	" *C* 956
14	1928 *N* 128	36	" *B* 633	61	" *M* 1013	92	" *C* 174	125	1928 *M* 56
17	1927 *PC* 234	38	1928 *N* 120	66*a*	1928 *C* 62	97	" *M* 18	126	" *O* 41
20	" *A* 642	40	1927 *L* 826	66*b*	1927 *B* 643	98	1927 *L* 874	127	1927 *M* 1039
24	" *B* 438	42	" *B* 638	71	1928 *C* 52	99	" *A* 708	128	1928 *C* 167
25	1928 *C* 166	45	1928 *L* 132	75	" *B* 34	100	" *B* 501	129	1927 *M* 1000
26	" *O* 46	46	1927 *B* 620	76	" *M* 14	108	1928 *L* 20		

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I C)	A. I. R.			I C)	A. I. R.			I C)	A. I. R.			I C)	A. I. R.			I C)	A. I. R.		
130	1928	*Notes*	66*b*	299	1927	*O*	504	448	1928	*Notes*	47*b*	574*a*	1928	*L*	237	794	1928	*L*	76
131	1927	*M*	1023	300	1928	*C*	180	449	"	*Notes*	26*f*	574*b*	1927	*M*	945	796	"	*L*	796
133	1928	*O*	38	303	"	*L*	160	450	"	*L*	185	575	1928	*N*	106	799	"	*M*	197
134	1927	*M*	1038	305*a*	"	*O*	17	451*a*	"	*Notes*	14*a*	577	"	*L*	66	800	"	*Notes*	34*d*
136	1928	*C*	169	305*b*	"	*N*	119	451*b*	1927	*L*	516	580	1927	*O*	627	801	"	*L*	56
138	"	*M*	398	307	1927	*A*	727	454	1928	*L*	134	581	1928	*Notes*	34*a*	803	"	*N*	89
140	1927	*M*	984	308	"	*M*	1053	455	"	*L*	97	582	"	*O*	112	804	1927	*L*	570
141	"	*L*	638	309	1928	*C*	378	456	"	*L*	180	583	"	*M*	55	808	1928	*L*	376
142	1928	*M*	1	311	1927	*O*	478	457	"	*Notes*	29*f*	584*a*	"	*Notes*	17*a*	810	"	*M*	214
143	1927	*C*	817	313	1928	*L*	43	459	"	*M*	147	584*b*	1927	*M*	1115	812	"	*L*	136
144	"	*M*	980	315	"	*M*	6	463	"	*Notes*	49*c*	585	1928	*Notes*	24*c*	813	"	*N*	84
146	"	*C*	782	324	"	*C*	46	464	"	*M*	135	587	"	*P*	213	814	"	*L*	317
147	"	*B*	640	325	"	*L*	55	465	"	*B*	1	589	1927	*M*	542	815	"	*M*	211
149	"	*O*	526	326	"	*C*	50	468	"	*R*	55	591	1928	*P*	115	816	"	*Notes*	47 *a*
150	"	*M*	1054	328	1927	*O*	469	470	"	*B*	5	593	"	*O*	49	817	"	*L*	221
156	"	*PC*	242	331	"	*M*	1010	474	1927	*L*	802	615	"	*L*	112	820	"	*O*	271
158	1928	*M*	28	332	"	*O*	561	476	1928	*R*	32	616	1927	*M*	977	821	"	*Notes*	34*f*
165	1927	*A*	684	333	1928	*N*	111	477	1927	*C*	908	619	"	*M*	1200	822	"	*O*	220
167	1928	*M*	813	334	1927	*M*	1020	481*a*	1928	*O*	218	620	"	*P*	145	823*a*	"	*Notes*	48*a*
169	"	*M*	48	335	"	*C*	775	481*b*	"	*L*	246	641	"	*M*	1091	823*b*	"	*O*	135
170	"	*N*	48	337	1928	*Notes*	9*c*	782	"	*M*	326	642	1928	*PC*	1	826	1927	*L*	905
172	1929	*M*	261	338	"	*M*	21	484	"	*Notes*	37*d*	645	"	*Notes*	39*a*	828	1928	*R*	6
176	1928	*L*	83	339	"	*Notes*	35*f*	485	"	*M*	142	646*a*	"	*M*	212	829	"	*L*	102
181	"	*R*	7	340	"	*Notes*	65*d*	486*a*	"	*L*	192	646*b*	"	*Notes*	73*a*	830	1929	*L*	374
183	"	*Notes*	48*b*	341	"	*M*	144	486*b*	"	*S*	85	648	"	*M*	143	831	1928	*O*	148
184	1927	*B*	405	342	1927	*L*	671	487	"	*M*	361	649	1927	*M*	1118	834	"	*Notes*	58*d*
189	1928	*P*	54	343	1928	*M*	136	488*a*	1927	*L*	886	651	1928	*M*	20	835	"	*P*	119
192	1927	*A*	775	347	1927	*L*	916	488*b*	"	*PC*	229	652	"	*M*	25	836	"	*C*	146
193	"	*P*	330	348	1928	*Notes*	36*c*	489	1928	*O*	13	653	"	*P*	155	838	"	*M*	2
194	1928	*P*	49	350	"	*L*	144	491*a*	"	*L*	215	654	"	*R*	51	841	"	*C*	136
195	"	*M*	799	353	1927	*C*	793	491*b*	"	*O*	99	656	"	*A*	59	842	"	*L*	116
196	1927	*M*	1039	355	1928	*R*	28	493	"	*L*	427	657	"	*M*	198	843	"	*C*	127
200	1928	*R*	23	356	"	*P*	199	494	"	*O*	19	659*a*	"	*M*	208	846	"	*L*	40
201*a*	1927	*M*	1003	358	"	*R*	47	495	"	*N*	118	659*b*	1927	*N*	410	848	"	*C*	123
201*b*	1928	*R*	3	360	1927	*O*	482	496	"	*O*	108	660	1928	*M*	215	850	1929	*M*	267
204	1927	*O*	481	362	1928	*Notes*	29*d*	498	1927	*M*	1065	661*a*	1927	*M*	1199	851	1927	*C*	965
205	1928	*M*	141	363	"	*O*	20	500	"	*M*	1197	661*b*	1928	*N*	124	853	1928	*R*	25
206	"	*B*	14	366	"	*N*	76	502	"	*M*	1196	663	"	*M*	360	854	"	*C*	143
208	1927	*M*	1030	368	"	*R*	34	503	1928	*R*	53	664	"	*M*	211	857	"	*R*	40
209	"	*B*	630	370	"	*M*	168	505	"	*M*	375	665*a*	"	*N*	143	859	"	*C*	153
212	1928	*P*	103	371	1927	*C*	916	507	"	*M*	474	665*b*	1927	*M*	1073	861*a*	1927	*R*	332
213	"	*O*	15	372	"	*A*	699	508	1927	*M*	1069	671	"	*M*	1001	861*b*	1928	*N*	112
216	1927	*B*	629	375	1928	*M*	401	509	1928	*C*	108	672	1928	*L*	237	862	"	*Notes*	31*c*
218	"	*M*	976	377*a*	1927	*A*	702	514	1927	*M*	998	673	"	*P*	120	863	"	*M*	42
219	"	*P*	351	377*b*	1928	*M*	97	516	1928	*C*	57	678	"	*N*	113	864	"	*Notes*	35d
220	1928	*L*	187	387	1927	*A*	837	519	"	*A*	29	680	1927	*A*	724	866*a*	1927	*M*	1072
221	1927	*P*	369	389*a*	1928	*P*	202	523	1927	*M*	1070	682	1928	*Notes*	15*b*	866*b*	1928	*Notes*	23*e*
222	1928	*M*	161	389*b*	"	*A*	33	524	"	*A*	838	684	"	*A*	1	867	"	*C*	286
223	1927	*P*	432	391	1927	*M*	1103	529*a*	1928	*P*	242	686	"	*O*	122	869	"	*L*	159
224	"	*L*	825	392	1928	*O*	10	529*b*	"	*M*	348	689	"	*A*	55	870	"	*M*	15
225	"	*L*	539	395	"	*M*	33	530	"	*Notes*	12*d*	691	"	*P*	124	872	"	*S*	101
226*a*	"	*M*	1052	397	"	*N*	71	531	"	*N*	114	694	"	*O*	104	874	"	*Notes*	59*d*
226*b*	1928	*L*	299	398	"	*M*	199	532	"	*P*	172	698	"	*P*	162	875*a*	"	*C*	388
229	"	*M*	27	399	"	*P*	66	534	1927	*PC*	248	703	"	*P*	161	875*b*	"	*L*	279
230	1927	*M*	1043	420	"	*N*	30	537	1928	*L*	348	705	"	*M*	160	877	"	*L*	122
239	"	*B*	601	421	"	*M*	392	538	"	*P*	191	706*a*	"	*M*	169	880	"	*C*	421
242	1928	*M*	140	422	*Too old*			539	1927	*O*	503	706*b*	"	*P*	166	882	"	*L*	53
243	"	*P*	190	423*a*	1929	*M*	265	540	1928	*P*	168	707	"	*R*	49	885	1929	*O*	42
244	"	*O*	23	423*b*	*Too old*			541	"	*O*	88	709	1927	*L*	710	890*a*	1928	*M*	232
247	"	*C*	170	426	1928	*M*	85	542	"	*C*	812	711	1928	*C*	281	890*b*	"	*Notes*	26*e*
250	"	*A*	16	429	"	*N*	39	545	"	*C*	27	715	1929	*M*	403	891	"	*M*	282
252	"	*C*	65	430	1927	*P*	382	559	"	*M*	196	716*a*	1927	*A*	791	901	"	*L*	140
255	"	*A*	3	431	1928	*A*	98	561	"	*C*	202	716*b*	1928	*M*	179	903	1927	*O*	629
261	"	*C*	198	433	"	*P*	169	568	"	*P*	248	717	1927	*L*	720	904	1928	*M*	125
265	1927	*B*	603	436	"	*L*	175	565	"	S	97	718*a*	1928	*C*	272	905	"	*L*	247
268	1928	*A*	117	437	"	*A*	22	568	1929	*N*	10	718*b*	"	*M*	164	907	"	*O*	219
270	"	*N*	115	440	"	*Notes*	26*c*	569	1927	*O*	468	721	1927	*O*	369	908	"	*L*	174
272	"	*P*	209	442	"	*A*	25	570	1928	*L*	103	790	1928	*L*	80	909	"	*Notes*	11*e*
277	"	*C*	1	446	"	*M*	166	571	1927	*PC*	250	792	"	*L*	152	910	1927	*A*	844

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1	1928 *PC* 35	191	1927 *O* 615	321	1927 *O* 618	482	1928 *Notes* 31*f*	606	1928 *L* 716
4	1927 *PC* 246	192	1928 *Notes* 13*d*	326	1928 *O* 95	485	" *L* 664	607	" *L* 700
7	1928 *PC* 10	193*a*	" *N* 91	330	" *O* 260	486	" *Notes* 28*b*	608	" *L* 258
14	" *PC* 2	193*b*	" *N* 136	333*a*	1927 *O* 632	487	" *Notes* 51*a*	609	1927 *L* 890
20	" *PC* 20	194	" *N* 89	333*b*	1928 *O* 101	488	" *L* 444	610	1928 *L* 73
25	" *PC* 27	195	" *Notes* 16*b*	335	1927 *O* 617	489	" *L* 290	612	" *L* 147
29	" *PC* 30	198	" *N* 92	337	1928 *PC* 80	490	" *Notes* 48*f*	614	" *L* 329
33	" *A* 61	199	" *N* 126	344	1927 *PC* 270	491	" *L* 143	617	" *Notes* 43*a*
34	" *A* 51	201	" *N* 182	346	" *PC* 272	492	" *L* 236	618	" *L* 640
36	" *A* 41	203	" *N* 184	347*a*	" *PC* 275	493	" *L* 442	619	" *Notes* 41*d*
40	" *A* 55	205	" *N* 133	347*b*	" *PC* 262	494	" *L* 413	620	" *L* 825
42	" *A* 46	206	" *N* 52	349*a*	" *PC* 266	495	" *L* 110	624*a*	" *Notes* 35*b*
45	1927 *A* 818	209	" *S* 95	349*b*	" *PC* 264	497	" *M* 297	624*b*	1927 *L* 848
49	1928 *B* 20	210	" *Notes* 19*d*	352	1928 *PC* 83	499	" *M* 465	625	1928 *M* 77
50	1927 *B* 599	211	" *Notes* 47*c*	353	" *C* 97	503	" *M* 89	637	" *M* 402
52	" *B* 667	213	" *S* 89	355	" *C* 116	510	" *Notes* 34*c*	639	" *M* 470
54	1928 *B* 22	214	" *S* 100	357	" *C* 94	511	" *M* 226	641	" *M* 561
56	" *B* 33	216	" *S* 93	360	" *C* 74	512	" *M* 167	643*a*	" *M* 233
57	" *B* 23	218	" *S* 86	385	" *L* 101	513	" *N* 206	643*b*	" *M* 145
60	" *B* 28	220	" *S* 91	386	" *L* 351	514	" *N* 179	646	" *M* 173
65	" *C* 462	221	1927 *S* 247	388	" *Notes* 57*b*	516	" *N* 151	648	" *M* 625
67	" *C* 338	223	1928 *S* 87	390	" *L* 244	517	" *N* 1	649	1927 *M* 1179
68	" *C* 513	225	1927 *PC* 195	391	" *L* 278	522*a*	1927 *N* 352	650	1928 *M* 637
70	" *C* 275	233	1928 *PC* 77	392	" *L* 378	522*b*	1928 *N* 87	653	" *M* 152
72	" *C* 158	237	1927 *PC* 252	393	" *L* 96	524	" *Notes* 7*c*	655	" *M* 172
79	" *C* 222	241	1928 *A* 139	394	" *L* 82	525	" *N* 173	657	" *N* 251
81	" *C* 315	242	" *A* 128	395	" *Notes* 22*a*	527	" *N* 123	658	1929 *N* 91
86	" *C* 89	243*a*	" *A* 128	396	" *L* 304	528	" *Notes* 30*c*	660	1928 *Notes* 46*f*
90	" *C* 228	243*b*	" *A* 140	397	" *L* 456	529*a*	" *P* 293	661*a*	" *N* 146
91	" *C* 115	244	" *A* 52	400	" *L* 423	529*b*	" *P* 249	661*b*	" *Notes* 16*e*
95	" *C* 104	247	" *A* 65	401	*Too old*	530	" *P* 143	662	" *N* 175
97	" *Notes* 65*b*	249	" *A* 255	412	1927 *M* 1060	532	" *P* 231	663*a*	" *N* 210
98	" *L* 165	252	" *A* 257	417*a*	1928 *M* 233	533	" *P* 221	663*b*	" *N* 217
99	" *Notes* 9*e*	254	" *A* 307	417*b*	1927 *M* 1180	536	" *P* 201	665	" *Notes* 36*a*
100	" *L* 125	257	" *B* 35	419	1928 *M* 127	537	" *P* 240	666	" *N* 80
107	" *L* 296	265	" *B* 26	420	" *M* 803	538	" *Notes* 17*c*	667	" *N* 117
108	" *L* 276	268	" *B* 166	423	" *M* 43	539	" *P* 281	668	" *N* 166
109	" *Notes* 18*d*	272	" *Notes* 55*b*	428	1927 *M* 1195	540	" *P* 270	671*a*	" *N* 146
110	" *Notes* 13*c*	273*a*	" *L* 284	429	1929 *M* 346	542	" *P* 279	671*b*	" *N* 221
113	" *PC* 39	273*b*	" *L* 320	431*a*	1928 *M* 213	545	" *O* 1	673	" *A* 58
119	" *PC* 33	274	" *L* 249	431*b*	" *M* 496	552	1927 *O* 623	674	" *A* 62
124	" *PC* 24	275	" *Notes* 58*f*	433	" *S* 90	553	1928 *O* 143	677	" *A* 13
129	" *M* 105	276*a*	" *L* 445	434	" *S* 94	555	1927 *O* 590	679	1929 *A* 121
130	" *M* 205	276*b*	1927 *L* 648	435	1929 *S* 55	556	1928 *O* 146	682	1928 *A* 67
132	1927 *M* 1165	278	" *L* 697	439	1928 *S* 105	559	1927 *O* 567	883	" *A* 81
136	1928 *M* 61	280	1928 *L* 305	440	" *S* 103	560	1928 *O* 121	687	" *A* 191
141	" *M* 176	281	" *L* 119	442	" *S* 114	561	1927 *A* 707	688	" *A* 185
145	" *P* 227	282	" *Notes* 18*a*	446	" *S* 126	562	1928 *A* 164	689	" *A* 194
149	" *Notes* 19*a*	283	" *L* 536	449	1927 *PC* 257	563	" *A* 118	690	" *A* 95
151	" *P* 220	284*a*	" *L* 341	453	1928 *PC* 135	564	" *A* 303	691	1927 *A* 610
152	" *P* 255	284*b*	" *Notes* 11*b*	455	" *PC* 128	566	" *A* 199	692	1928 *A* 50
156	" *P* 238	285*a*	" *L* 294	457	" *PC* 127	569	1929 *A* 195	693	" *A* 86
158	" *P* 259	285*b*	" *L* 660	459	" *PC* 115	570	1928 *A* 186	699	" *A* 92
160	" *Notes* 69*f*	286	" *L* 64	461	" *PC* 44	574	" *Notes* 30*b*	702	" *A* 166
161*a*	" *R* 80	288	" *Notes* 60*c*	465	" *Notes* 24*e*	576	1929 *A* 199	705*a*	" *B* 52
161*b*	" *R* 31	289	" *M* 126	467	" *C* 263	578	1928 *A* 355	705*b*	" *B* 58
163	" *R* 43	290	" *M* 499	468	" *C* 305	581*a*	" *A* 192	707	" *B* 49
165	" *R* 44	291	1927 *M* 1078	469*a*	" *C* 227	581*b*	1927 *A* 850	710	" *B* 42
167	" *R* 67	293	1928 *M* 105	469*b*	" *C* 273	584	1928 *A* 201	719	" *B* 53
168	" *R* 50	295	" *M* 684	470	" *C* 254	587	" *A* 147	721	" *C* 405
169	" *R* 96	298	" *M* 129	471	" *Notes* 38*b*	591	" *Notes* 32*d*	722	" *C* 424
172	" *R* 60	301	" *M* 124	473	1929 *C* 143	592	" *A* 266	723	" *C* 306
173	" *R* 68	302	" *M* 486	474	1928 *C* 107	593	" *Notes* 23*c*	724	" *C* 191
175	" *R* 85	303	" *M* 24	475*a*	" *C* 114	594	" *L* 240	726	" *C* 184
177	" *O* 221	305	" *P* 100	475*b*	" *Notes* 67*a*	596	1927 *L* 435	729	" *C* 179
178	" *O* 113	310	" *P* 234	476	" *C* 267	601	1928 *L* 332	730	" *C* 186
180	1927 *O* 558	313	1927 *P* 363	477	" *C* 247	603*a*	" *L* 119	733	" *C* 189
181	1928 *O* 92	319	1928 *P* 224	479	" *C* 231	603*b*	" *L* 70	735	" *C* 193
184	" *O* 114	320	" *Notes* 12*c*	481	" *Notes* 39*d*	605	" *Notes* 14*c*	738	" *C* 402

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741	1928 C 396	771	1928 L 164	805	1927 M 1071	844	1928 Notes 18c	882	1928 O 231
742	" Notes 32e	772	" L 324	806	1928 M 209	846	" P 253	884	" O 225
743	" Notes 29e	773	" L 317	809	" M 382	848	" P 272	885	" O 293
744	" C 299	774	" Notes 65a	810	" M 133	849	" R 87	887	" O 482
746	" C 305	775	" L 926	813	" M 169	856	" R 29	890	" O 138
747	" C 412	778	" L 541	814	" M 199	857	" R 98	895	" O 296
751	" C 418	779a	" L 334	815	" M 234	860	" R 36	896	" O 240
753a	" L 665	779b	" Notes 66c	817	" P 215	865	" O 300	897	" N 262
753b	1927 L 833	780	" L 329	819	" P 273	866a	" Notes 10c	899	" N 189
756	1928 L 137	781	" L 111	821	" P 318	866b	" O 203	902	" N 243
759a	" Notes 31a	782	" Notes 69d	824	" P 167	871	" O 152	903	" N 273
759b	" Notes 29a	783	" L 460	825	" Notes 6d	872	" O 153	905	" N 211
761	" Notes 21e	785	" M 852	826	" Notes 74d	875	" O 212	907	" N 255
763	" L 319	786	" M 190	827	" P 277	876	" O 207	908a	" Notes 41c
764	" L 344	789	1929 M 44	828	" Notes 32a	877	" O 214	908b	" N 222
766a	" L 332	792	1928 M 193	830	" P 338	879	" O 216	910	" N 227
766b	" L 380	793	" M 107	835	" P 146	880	" O 302	911	" N 150
769	" Notes 38c	804	" M 175	842	" P 116	881	" O 224	912	" N 242
770	" L 334								

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1	1928 P C 54	109	1928 O 246	193	1927 M 1184	319	1928 M 245	406a	1928 Notes 23b
11	" " 75	111a	" O 208	194	" M 1185	321	" P 324	406b	" M 276
14	" " 47	111b	" Notes 11d	196	1928 M 239	323	" P 348	409	" M 243
17	" B 65	112	" O 228	199	" M 268	328	" Notes 59e	411	" Notes 58a
18	" B 55	113	" A 180	202	" M 271	329	" P 347	412	" Notes 23f
19	" B 61	114	" A 251	205	" M 52	330	" P 205	413	" M 400
22	" B 67	117	" A 338	206	" M 394	333	" P 359	414	" M 495
24	" B 59	122	" A 84	212	" M 253	337	" PC 64	416	1927 M 1188
26	" B 64	123	" A 144	214	" M 275	342	" PC 38	417	1928 P 353
27	" B 184	124	" A 182	216	1929 M 146	345	" PC 8	418	" P 225
30	" B 78	129	" A 102	221	1928 M 594	348	" PC 49	419	" P 241
32	" B 77	130	" A 619	225	" A 207	350	" PC 51	421	" P 405
33	" C 349	132	" A 206	229	" A 193	354	" PC 68	424	" P 363
37	" C 504	133	" A 106	230	" A 261	361	" PC 16	427	" Notes 15d
41	" C 347	134	" A 10	234	" A 283	365	" PC 96	430	" P 145
43	" C 343	136	" A 112	238	" A 220	367	" PC 86	432	" P 144
44	" C 334	141	" A 108	241	" C 387	369	" L 533	433a	" N 226
46	" C 389	144	" A 68	242	" Notes 34e	370	" L 657	433b	" Notes 39e
49a	" Notes 28d	147	" A 380	245	" C 408	372	" Notes 69a	434	" N 275
49b	" L 176	148	" A 254	246a	" C 416	373	" L 713	435	" N 275
51	" Notes 36d	149	" A 99	246b	" C 289	374a	" L 698	437	" N 207
52	" L 289	152	" A 159	251	1929 C 20	374b	" L 704	439a	" N 195
53	" L 735	155	" A 142	253	1928 C 475	376	" L 61	439b	" N 279
55	" L 766	156	" A 158	255	" C 399	378a	" Notes 22d	440	" Notes 9b
57	" L 148	157	" Notes 29b	257	" L 448	378b	" Notes 48e	442	" N 109
58	" L 420	158	" Notes 63b	261	" L 525	379a	" L 98	445	" N 238
61	" L 427	159	" A 622	262	" L 642	379b	" Notes 16c	446	" N 196
62a	" Notes 7a	161	" Notes 49d	264	" Notes 42d	381a	" L 50	447	" N 199
62b	" L 426	162	" L 507	265	" L 546	381b	" Notes 60a	449	" A 419
63	" L 674	164	" Notes 58b	268	" Notes 30d	382	" Notes 70a	451	" Notes 8d
65	" M 194	166	" L 544	269	" Notes 45c	383	" Notes 29c	452	" A 134
66	" M 391	167	" L 257	270	" Notes 8a	384	1929 L 385	454	" A 136
67	" M 163	169	" L 496	271	" L 114	385	1928 L 539	457	" A 145
68	" M 469	170	" L 150	272	" Notes 68e	386	" Notes 55c	459	" A 71
69	" M 810	171	" Notes 49b	273a	" M 293	387	" L 676	462	" A 127
73	" M 257	173	" L 593	273b	" M 250	389	" L 598	464	" A 111
77	" M 279	175	" L 502	277	" M 234	390	" Notes 48e	465	" B 80
80	" M 369	177	" L 166	282	" M 407	391	" L 414	477	" B 119
81	" P 326	182	" Notes 41a	288	" M 404	395	" L 639	248	" B 97
89	" P 260	183	" L 530	291	" Notes 56c	396	" L 719	488	" B 104
95	" P 195	184	" L 242	294	" M 897	397	" Notes 44f	492	" B 74
97	" O 249	186	" L 170	297	1927 M 1197	398	" L 282	495	" B 69
98	" O 241	189	" L 162	298	1928 M 456	400	1929 L 376	501	" B 130
102	" O 333	191	" Notes 66d	301	" M 412	401	1928 M 246	505	" B 148
105	" O 195	192	" L 234	305	" M 327	404	" M 256	508	" B 155

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509	1928 *B* 74	585	1928 *C* 448	637	1928 *M* 613	728*a*	1928 *L* 717	804	1928 *Notes* 42*b*
510	" *B* 102	587	" *C* 428	638	" *M* 391	728*b*	" *A* 77	805	" *N* 102
512	" *B* 141	589	" *Notes* 54*b*	639	" *M* 945	732	" *Notes* 48*d*	809	" *R* 73
513	" *L* 733	590	" *C* 446	644	" *M* 873	733	" *A* 264	814	1929 *P* 49
514	" *L* 320	591	" *C* 490	649	" *M* 955	734	" *R* 61	817	1928 *O* 155
517	" *L* 243	593*a*	" *L* 641	654	" *Notes* 64*c*	735	" *A* 97	873	" *S* 133
518	" *L* 482	593*b*	" *L* 678	656	" *M* 370	737	" *Notes* 24*a*	878	" *Notes* 11*f*
521	" *L* 690	596	" *L* 239	657	" *S* 118	738	" *Notes* 22*c*	879	" *N* 165
524	" *L* 219	597	1929 *L* 83	660	" *S* 111	739	" *L* 538	881	" *N* 149
526	" *Notes* 69*b*	598	1928 *Notes* 62*d*	663	" *S* 106	740*a*	" *M* 683	882	" *Notes* 61*d*
528	" *L* 528	600	" *L* 459	668	" *S* 129	740*b*	" *N* 171	883	" *C* 854
529	" *M* 226	602	" *L* 556	672	" *S* 15	741	1929 *L* 45	887	" *P* 232
539	" *M* 416	603*a*	" *L* 534	673	" *PC* 87	745	1928 *Notes* 24*d*	889	" *M* 655
542	" *M* 384	603*b*	" *L* 453	678	" *PC* 99	746	" *L* 370	891	" *P* 428
544	" *Notes* 20*a*	604	" *Notes* 21*b*	681	" *PC* 92	748	" *L* 121	892	" *Notes* 47*d*
545	1929 *P* 51	605	1929 *L* 68	687	" *PC* 98	750	" *Notes* 33*a*	894*a*	" *M* 909
552	1928 *P* 250	606	1928 *L* 666	689*a*	" *Notes* 66*a*	751	" *Notes* 57*d*	894*b*	" *L* 773
556	" *P* 370	607	" *L* 186	689*b*	" *A* 211	753	" *Notes* 7*e*	895	" *Notes* 12*f*
558	" *P* 362	608	" *Notes* 11*a*	690	" *A* 213	754	1927 *M* 1190	897	" *Notes* 21*c*
559	" *P* 268	609	" *L* 515	691	" *A* 103	758	1928 *Notes* 31*b*	898	" *Notes* 16*d*
561	" *A* 131	610	" *L* 709	694	" *A* 236	760	" *M* 299	899	" *A* 354
564	" *A* 679	612	" *L* 641	699	" *A* 120	782	" *M* 344	900	1929 *O* 86
565	" *A* 300	613	" *L* 238	703	" *A* 214	784	" *M* 922	901*a*	1928 *M* 479
566	" *A* 286	614*a*	" *L* 702	704	" *A* 96	785	" *N* 178	901*b*	" *Notes* 63*c*
567	" *A* 287	614*b*	" *L* 672	705	" *B* 108	786	" *M* 952	902	" *Notes* 33*c*
568	" *A* 215	617	" *L* 638	709	" *B* 55	790	" *N* 229	904	" *M* 859
569	" *A* 268	618	" *Notes* 46*a*	712	" *M* 216	791	" *S* 144	905	" *Notes* 59*f*
570	" *A* 311	619	" *L* 643	720	" *L* 693	793	" *M* 905	906	" *M* 899
572	" *A* 124	622	" *L* 636	721	" *A* 39	794	" *B* 123	907	" *Notes* 84*f*
575	" *A* 168	623	" *Notes* 41*e*	723	" *O* 490	801*a*	" *Notes* 13*e*	909	" *M* 364
576	" *A* 301	624	" *L* 571	724	" *S* 146	801*b*	" *N* 181	912*a*	" *L* 687
577	" *C* 83	625	" *M* 419	727*a*	" *L* 157	803	" *Notes* 26*b*	912*b*	" *A* 297
584	" *C* 474	636	" *M* 473	727*b*	" *PC* 122				

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1	1928 *PC* 103	85	1928 *Notes* 6*c*	141	1928 *B* 17	209	1928 *L* 272	262	1929 *S* 58
5	" *M* 118	86	" *L* 374	145	" *R* 81	211*a*	" *Notes* 12*e*	264	1928 *P* 335
11	" *R* 65	87	" *M* 437	148	" *M* 454	211*b*	" *C* 237	266	" *L* 98
13	" *S* 137	90	" *L* 554	149*a*	" *Notes* 51*c*	213	" *Notes* 60*f*	268	" *Notes* 19*e*
18	" *M* 459	92	" *Notes* 32*b*	149*b*	" *B* 250	214	" *N* 172	272*a*	" *Notes* 44*e*
21	" *Notes* 64*d*	93	" *Notes* 43*d*	151	" *R* 67	215*a*	1927 *L* 880	272*b*	" *A* 476
22	" *A* 165	94	" *M* 476	152	" *B* 177	215*b*	1928 *R* 64	277	" *C* 709
24	" *L* 922	95	" *N* 144	153	" *M* 180	217	" *B* 156	281*a*	" *N* 91
25	" *C* 512	96	" *Notes* 67*b*	164	" *C* 234	219	" *L* 318	281*b*	" *M* 491
26	" *L* 726	99	" *B* 191	165	" *L* 90	220	" *B* 142	282	" *C* 215
28	" *L* 297	101	" *M* 317	167	" *M* 448	221	" *L* 820	283	1927 *R* 238
31	" *PC* 108	104	" *B* 95	168	" *M* 1191	224	" *L* 751	284	1928 *C* 584
35	" *Notes* 32*c*	106	" *M* 450	169	1927 *L* 887	225	" *C* 500	287*a*	1927 *M* 1111
38	" *A* 241	110	" *Notes* 14*e*	170	1928 *M* 919	228	" *L* 65	287*b*	1928 *P* 603
46*a*	" *Notes* 46*d*	112	" *A* 309	173	" *M* 385	229	" *Notes* 54*e*	293	" *N* 203
46*b*	" *P* 451	113*a*	" *P* 480	175*a*	" *C* 183	230	" *B* 134	296	" *C* 563
47	" *M* 817	113*b*	" *O* 241	175*b*	" *M* 370	231	" *C* 344	297	" *M* 399
50	" *L* 832	114	" *P* 203	176	" *Notes* 10*a*	234	" *N* 188	298	1929 *C* 50
52	" *PC* 106	117	" *Notes* 62*b*	177	" *N* 69	236	" *L* 92	304	1928 *O* 223
54*a*	" *A* 267	118	" *S* 142	178	" *M* 900	237	" *C* 207	305	" *C* 570
54*b*	" *L* 695	120*a*	" *L* 759	180*a*	" *M* 475	239	" *L* 72	306	" *P* 491
56	" *A* 251	120*b*	" *A* 280	180*b*	" *R* 70	240	" *C* 230	310	" *O* 233
58	" *Notes* 20*c*	122	" *Notes* 61*f*	183	1927 *S* 219	241	" *C* 298	315	" *C* 761
59	" *Notes* 8*e*	123	" *N* 162	187	1928 *O* 486	243*a*	" *Notes* 28*a*	317	" *M* 372
61	" *A* 330	126	" *Notes* 45*d*	189	" *R* 79	243*b*	" *Notes* 23*d*	320	" *L* 32
63	" *M* 604	127*a*	1929 *L* 41	191	" *B* 91	245	" *M* 962	322	" *M* 371
65	" *Notes* 42*c*	127*b*	1928 *Notes* 61*f*	195	" *N* 223	247	" *C* 593	323	" *P* 187
67	" *C* 539	129	" *N* 202	199	" *M* 445	251	" *N* 145	326	" *Notes* 8*b*
70	" *M* 69	130	" *M* 430	203	" *Notes* 28*c*	253	" *N* 277	327	" *L* 105
79	" *N* 199	133	" *B* 145	205	" *N* 287	255	" *L* 291	329	" *M* 601
82	" *Notes* 19*c*	136	" *P* 429	206	" *M* 472	258	" *M* 66	331	" *L* 763
83	" *M* 903	139	" *B* 159	207	" *A* 143	261	" *P* 495	332	" *M* 906

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335	1928 *Notes 68d*	419	1928 *A* 269	557	1928 *M* 362	647	1929 *N* 41	765	1928 *PC* 174
336	" *L* 854	421*a*	" *A* 306	559	" *N* 194	648	1928 *L* 848	769	" *R* 109
337	" *B* 117	421*b*	" *N* 216	561	" *L* 910	649	" *M* 476	770	" *N* 301
342	1927 *L* 853	422	" *O* 307	562	" *Notes 78b*	650	" *L* 151	771	" *M* 377
344	1928 *B* 136	443	" *N* 281	563	" *M* 478	651	" *M* 463	774	" *L* 824
345	" *L* 34	444	" *R* 83	564	" *Notes 77b*	653	1929 *L* 77	775	" *N* 211
346	" *B* 177	446	" *M* 517	566	" *N* 198	654	1928 *Notes 77d*	776	" *Notes 80c*
349	" *O* 215	448	" *L* 437	568	1929 *L* 73	755	" *P* 156	777	" *N* 246
351	" *C* 416	449	" *N* 136	569	1928 *Notes 35c*	657	1929 *L* 71	779	" *L* 224
353	" *B* 135	456	" *R* 125	571	" *L* 887	658	" *L* 195	785	" *N* 319
354	" *L* 95	457	" *N* 134	572	" *M* 1055	661	1928 *M* 497	787	" *L* 983
355	" *C* 260	458	" *Notes 40d*	574	" *PC* 165	662	1929 *L* 70	789	" *M* 607
356	1927 *L* 852	459	" *N* 303	576	" *N* 244	663	1928 *PC* 146	791	" *O* 338
357	1928 *B* 140	461	" *P* 316	578*a*	" *M* 477	671	" *N* 291	793	" *A* 352
358	" *Notes 68b*	464	" *L* 954	578*b*	1929 *L* 72	672	" *A* 119	794	" *Notes 18f*
359	" *B* 140	465	" *M* 380	579	1928 *N* 264	673	" *L* 277	795	1929 *M* 16
360	" *L* 850	467	" *PC* 137	581	" *M* 265	674	" *Notes 46e*	799	1927 *L* 880
361	" *M* 846	469	" *R* 101	585	" *Notes 7b*	675	" *R* 115	800	" *PC* 263
362	" *L* 844	470	" *B* 170	586	" *N* 248	677	" *Notes 57e*	801	1928 *N* 213
363	" *M* 494	476	" *L* 800	588	" *C* 302	679	" *R* 117	804	" *P* 551
364	" *Notes 52b*	477	" *P* 198	589	" *Notes 27c*	681	" *L* 840	805	" *P* 574
365	" *M* 624	479	" *L* 440	590	" *L* 280	682	" *L* 445	809	" *A* 60
367	" *O* 306	481	" *B* 143	591	" *Notes 12b*	683	" *R* 113	810*a*	" *R* 112
368	" *B* 145	482	" *C* 430	592	" *L* 901	685	" *L* 259	810*b*	1929 *N* 13
369	" *M* 487	487	" *B* 162	593	" *L* 193	689	" *R* 102	811	1928 *Notes 59b*
370	1029 *L* 79	491	" *R* 118	597	" *N* 186	694	1929 *L* 92	812*a*	" *Notes 67c*
372	" *M* 152	497	" *N* 257	599	" *L* 78	695	1928 *R* 111	812*b*	" *L* 740
373	1928 *L* 738	502	" *B* 152	600	" *M* 928	696	" *M* 484	816	" *Notes 36f*
375	" *M* 971	503	" *P* 562	601	" *L* 232	697	" *R* 187	817	1927 *L* 348
376	" *Notes 10e*	506	" *A* 671	603	" *M* 969	698	" *M* 503	818	1928 *PC* 165
377	" *M* 434	508	" *Notes 47e*	604	" *Notes 14f*	702	" *B* 417	819	" *L* 813
380*a*	" *C* 177	509	" *B* 138	605*a*	" *N* 217	703	" *PC* 156	820	1927 *L* 782
380*b*	1929 *L* 90	510	" *Notes 63a*	605*b*	" *M* 493	711	" *B* 187	821	1928 *P* 7
381	1928 *N* 297	511	" *N* 219	606	" *M* 591	713	" *Notes 78d*	827	1927 *O* 545
382	" *L* 705	513	1927 *L* 491	607	" *Notes 44c*	714	" *Notes 85a*	829	1928 *Notes 49a*
383	" *N* 209	514	1928 *R* 129	609	" *P* 343	716	" *B* 270	830	1927 *L* 888
385	" *N* 299	516*a*	1927 *M* 1186	613	" *L* 269	722	" *M* 1107	832	1928 *M* 360
386	" *L* 816	516*b*	1928 *M* 531	615	" *N* 249	723*a*	" *Notes 84b*	833	" *P* 153
387*a*	" *N* 220	519	" *P* 218	617	" *M* 458	723*b*	" *PC* 172	835	" *O* 67
387*b*	" *PC* 152	521	" *Notes 81d*	618	" *C* 450	727*a*	" *Notes 80a*	858	" *PC* 112
391	" *Notes 25d*	522	" *N* 252	624	" *N* 254	727*b*	" *N* 149	862	1927 *M* 886
392	" *PC* 130	524	" *Notes 76d*	626	" *PC* 139	728	" *L* 428	863	1928 *L* 537
397	1927 *L* 451	525	1927 *M* 438	633*a*	1929 *L* 68	730	" *PC* 177	864	" *Notes 34b*
398	1928 *A* 310	526	1928 *P* 267	633*b*	1928 *O* 263	733	" *Notes 83d*	866	" *M* 209
399	" *L* 46	528	" *M* 522	635	" *Notes 89b*	734	" *B* 286	867	1929 *L* 94
401	" *N* 280	532	" *B* 150	636*a*	" *M* 609	736	1927 *A* 716	869	1928 *M* 170
402	" *Notes 57a*	533	" *Notes 40b*	636*b*	" *N* 294	737	1928 *B* 225	872	" *M* 713
403	" *N* 281	538	" *C* 177	638	1929 *L* 88	739	" *C* 209	892	" *O* 303
404	" *M* 496	539	" *M* 708	639	1928 *O* 297	742	" *B* 194	894	" *M* 545
405	" *A* 302	543	" *Notes 37f*	640	" *Notes 68c*	747	" *C* 216	895	" *P* 535
406	" *M* 593	545	" *B* 180	641*a*	" *P* 278	750	1927 *P* 411	897	" *M* 597
408	" *Notes 6e*	546	" *L* 696	641*b*	1927 *L* 872	752	1928 *C* 204	898	" *P* 139
409	" *A* 313	548	" *M* 537	642	1928 *PC* 248	755	" *C* 199	903	1927 *O* 630
412	" *A* 293	552	1929 *L* 87	643	" *N* 288	758	" *M* 468	905	1928 *M* 224
414	" *M* 679	558	1928 *M* 652	644	1929 *L* 85	759	" *C* 256	907	" *M* 585
416	" *L* 811	556	" *Notes 16a*	645	1928 *P* 118	764	" *C* 295	910	" *C* 401
417	" *PC* 162							912	" *Notes 31e*

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1	1928 *PC* 190	28	1928 *Notes 18b*	46	1928 *N* 297	60	1928 *C* 459	79	1929 *O* 89
4	" *O* 409	25	" *Notes 15a*	47	" *M* 556	63	" *M* 528	81	1928 *L* 355
5	" *M* 346	26	" *O* 414	48	" *N* 202	67	" *O* 266	83	" *O* 199
8	" *PC* 193	29	" *R* 108	49	" *C* 296	70*a*	" *O* 405	89	" *M* 569
12	" *P* 582	30	" *PC* 187	50	" *O* 230	70*b*	" *O* 251	91	" *O* 330
16	" *M* 516	33	" *B* 252	52	" *C* 303	76	" *N* 192	93	" *P* 282
18	" *L* 499	41	" *R* 168	54	" *M* 500	77	" *O* 286	96	" *O* 289
21	" *M* 489	45	" *Notes 63e*	56	1929 *O* 80	78	" *Notes 37c*	97	" *C* 921

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98	1928 *Notes* 50*b*	244	1928 *Notes* 22*e*	376	1928 *A* 650	498	1928 *N* 239	638	1928 *C* 830
99	" *Notes* 36*b*	245	" *Notes* 79*a*	377	" *M* 831	500	" *O* 424	639	1929 *S* 85
100	" *M* 598	246	" *Notes* 81*b*	383	" *A* 665	506	" *L* 470	642	1928 *P* 354
101	" *L* 827	247*a*	" *L* 860	384	" *L* 375	510*a*	" *Notes* 64*e*	644	" *C* 826
102	" *R* 158	247*b*	" *M* 681	386*a*	" *Notes* 72*d*	510*b*	" *L* 908	646	" *R* 220
104	" *P* 454	248	" *L* 831	386*b*	" *B* 132	511	" *Notes* 40*e*	649	1929 *B* 38
107	" *B* 52	250	" *Notes* 80*e*	389	" *M* 1192	514	" *P* 627	657	1928 *A* 710
108	" *L* 510	251	" *PC* 267	390	" *A* 640	517	" *L* 792	662*a*	" *M* 772
112	" *P* 567	258	1929 *L* 55	391	1929 *L* 72	518	" *M* 627	662*b*	" *A* 376
113*a*	" *Notes* 62*c*	260	1928 *PC* 303	392	1928 *Notes* 61*c*	521	" *C* 893	665	" *A* 459
113*b*	" *O* 404	261	" *Notes* 38*e*	394	" *L* 493	524	" *N* 332	672	" *M* 820
114	" *M* 499	263	" *B* 183	395	" *C* 684	526	" *P* 587	673	" *L* 637
115	" *O* 229	264	" *L* 113	397	" *L* 504	528	" *Notes* 45*b*	674*a*	" *Notes* 50*d*
116	" *B* 153	266	" *B* 279	398	" *M* 687	529	" *Notes* 68*a*	674*b*	" *Notes* 55*f*
118	" *L* 235	269*a*	" *Notes* 67*d*	401	" *L* 915	531	" *O* 353	675	" *A* 687
119	" *O* 237	269*b*	" *B* 232	403	" *Notes* 6*b*	533	" *Notes* 38*a*	676	" *L* 647
120	" *Notes* 53*e*	273	" *Notes* 7*d*	404	" *C* 686	535	" *M* 610	681	" *Notes* 19*b*
122	" *L* 271	276*a*	1929 *B* 13	407	" *A* 667	536	" *P* 555	682	" *L* 906
123	" *R* 62	276*b*	1928 *M* 760	408	" *Notes* 76*c*	538	" *L* 895	685	" *Notes* 56*b*
124	" *C* 837	281	" *L* 359	409	" *Notes* 42*a*	539	" *M* 519	686	" *A* 396
127	" *PC* 116	283	" *C* 307	410	" *O* 295	542	" *C* 580	689	" *Notes* 25*e*
130	1927 *C* 513	285	" *L* 393	411	" *M* 1139	544	" *M* 592	691	" *L* 443
131	1928 *B* 285	287	" *P* 372	412	" *Notes* 75*a*	546	" *A* 656	692	" *M* 1200
133	" *R* 145	289	" *O* 353	413	" *A* 337	548	" *M* 635	693	" *Notes* 51*f*
136	" *M* 1074	290	" *Notes* 53*c*	415	" *Notes* 21*f*	550	" *L* 489	695	" *A* 553
140	" *O* 48	293	" *L* 484	416	" *C* 368	554	" *M* 840	697	" *B* 181
141	" *M* 657	296	" *C* 99	418	" *Notes* 43*b*	560	" *Notes* 59*c*	698	" *R* 128
163	" *N* 243	298	" *L* 849	419	" *Notes* 11*c*	561*a*	" *O* 463	699	" *P* 640
164	" *L* 325	299	" *PC* 261	420	" *N* 328	561*b*	" *A* 387	700	" *L* 934
167	" *M* 480	302	1929 *L* 367	421	" *Notes* 73*f*	564	" *O* 475	701	" *R* 127
172	" *L* 527	303	1928 *B* 287	422	1929 *C* 286	567	" *M* 525	702*a*	" *O* 405
173	" *L* 475	305	1929 *L* 89	424	1928 *L* 873	569	" *O* 470	702*b*	" *M* 854
175	" *O* 329	306	1928 *PC* 197	425	" *L* 357	571	" *C* 810	704	" *O* 337
177	" *L* 841	309	" *O* 438	427	" *C* 749	573	" *A* 494	706	" *L* 557
179	" *L* 560	310	" *M* 590	428*a*	" *L* 667	575	1928 *L* 833	710*a*	" *Notes* 69*c*
180	" *O* 348	311	" *L* 657	428*b*	" *P* 539	577*a*	1929 *S* 23	710*b*	" *B* 189
185	1929 *L* 86	312	" *B* 227	432*a*	" *Notes* 84*d*	577*b*	1928 *O* 326	712	" *A* 612
186	1928 *M* 356	316	" *L* 535	432*b*	" *Notes* 46*c*	580	" *Notes* 61*e*	715	" *C* 436
190	" *Notes* 77*f*	318	" *M* 278	433	" *M* 367	581	" *M* 652	718	" *L* 438
191	" *P* 274	319	" *L* 852	435	" *Notes* 22*f*	582	" *Notes* 53*a*	719	" *A* 708
193	" *Notes* 33*d*	320	" *O* 336	436	" *Notes* 76*f*	583	" *M* 485	720	" *C* 365
195	" *PC* 180	321*a*	" *L* 851	438	" *Notes* 26*d*	584	" *P* 634	722	" *P* 321
203	" *Notes* 85*c*	321*b*	" *PC* 264	439	" *M* 797	588	" *M* 783	725	" *L* 371
205	" *M* 563	325	" *L* 861	441	" *N* 230	589	" *L* 909	727	" *B* 175
206	" *Notes* 64*b*	326	" *C* 410	444*a*	" *Notes* 68*f*	590*a*	" *M* 560	729	" *R* 130
207	" *M* 543	329	" *L* 724	444*b*	1929 *L* 69	590*b*	" *L* 923	730*a*	" *Notes* 36*e*
209	" *O* 292	330	" *L* 856	445	1928 *C* 751	592	" *S* 168	730*b*	" *S* 121
212	" *Notes* 16*f*	332	" *P* 337	447	1929 *L* 91	593	" *M* 826	735	" *R* 124
213	" *A* 627	333*a*	" *L* 844	448	1928 *C* 748	594	" *P* 398	737	" *M* 393
215	" *A* 402	333*b*	" *R* 150	449*a*	" *L* 863	595	" *R* 143	738*a*	" *L* 874
216	" *O* 226	336	" *L* 469	449*b*	" *C* 309	596	" *M* 630	738*b*	" *M* 534
217	1927 *C* 536	337	" *Notes* 70*d*	454	" *M* 847	601	" *R* 152	742*a*	" *L* 750
218	1928 *O* 111	338	" *C* 408	458	" *L* 863	606	" *M* 856	742*b*	" *M* 889
221	" *L* 462	339	" *L* 918	459	" *P* 593	610	" *R* 182	744	" *R* 157
223	" *A* 660	340	" *C* 406	461	" *M* 791	611	" *M* 608	745	" *Notes* 63*f*
224	" *L* 843	342	" *M* 1129	463	" *L* 479	612	" *R* 144	747	" *Notes* 40*a*
225	1927 *PC* 215	343	" *B* 248	465	" *A* 659	613	" *M* 820	748	" *L* 753
228	1928 *Notes* 88*e*	346	" *Notes* 15*c*	466	" *O* 125	616	" *R* 321	750	" *A* 698
230	" *L* 851	347	" *C* 325	469	" *P* 410	618	" *O* 342	752	" *M* 929
231	" *L* 862	349	" *R* 160	479	" *L* 892	620	" *R* 176	756	" *P* 356
232	" *Notes* 44*d*	351	" *N* 232	480	" *M* 870	621	" *Notes* 18*e*	759	" *M* 1094
233	" *M* 682	357	" *O* 344	483	" *P* 581	622	" *R* 175	762	" *L* 930
234	" *L* 855	361	" *R* 148	484	" *M* 588	623	" *P* 653	763	" *M* 759
235	" *B* 139	363	" *P* 409	487	1929 *N* 23	626	" *R* 172	765	" *M* 641
236	" *L* 865	365	" *A* 668	490	1928 *M* 815	628	" *L* 178	772	" *A* 718
239	" *L* 853	366	1928 *M* 564	491	" *L* 534	629	" *M* 902	773	" *Notes* 44*a*
241	" *L* 834	368	" *C* 392	492	" *M* 830	631	" *L* 157	775	" *M* 828
243	" *Notes* 74*c*	373	" *A* 626	493	" *A* 609	633	" *B* 291	776	" *L* 495
		274	" *L* 488	494	1929 *P* 18	636	" *R* 188	778	" *Notes* 21*a*

110 Indian Cases=All India Reporter—(*Concld.*).

I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.
779	1928 *M* 823	801	1929 *L* 382	821	1928 *P* 537	853	1928 *L* 473	873	1928 *R* 194
782	" *M* 851	803	" *P* 64	823	" *N* 329	855	1929 *N* 85	875	" *O* 479
785	" *Notes*33*b*	804	1928*Notes*54*d*	824	" *L* 744	857	1928 *L* 306	876	" *A* 704
787	" *L* 900	805	" *P* 649	826	" *O* 362	859	" *L* 936	878	" *M* 261
788	" *P* 506	807	" *L* 818	829	" *M* 493	860	" *O* 491	881	" *A* 740
790	" *L* 925	810	" *L* 921	830	" *M* 894	861	" *L* 464	886	" *O* 365
792	" *P* 577	811	" *L* 109	832	" *L* 142	866	" *Notes*51*e*	889	" *M* 923
794	" *L* 893	812	" *L* 551	833	" *L* 550	868	" *Notes*56*a*	893	" *N* 336
795	" *O* 373	815	" *M* 918	834	" *N* 86	869	" *A* 697	894	" *M* 614
796	" *L* 951	816	" *A* 548	835	" *Notes* 5*d*	870	" *R* 197	905	" *R* 210
798	" *A* 607	817	" *C* 863	837	" *M* 630	871	" *C* 824	910	" *L* 596
799	" *L* 903	818*a*	" *A* 688	850	" *L* 154	872	" *A* 716	912	" *L* 912
800	" *Notes*69*e*	818*b*	" *L* 710						

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I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.
1	1928 *C* 852	143	1928 *A* 491	300	1928 *PC* 227	435	1928 *L* 681	575*a*	1929 *L* 56
2	" *R* 179	145	1929 *L* 369	304	" *M* 980	441	" *S* 193	575*b*	1928 *L* 178
6	" *A* 437	147	1928 *M*1270	305*a*	" *A* 673	443	1929 *L* 59	576	" *N* 135
8	" *L* 361	148	" *N* 283	305*b*	" *O* 401	445	1928 *N* 325	577	" *Notes*43*c*
15	" *R* 184	149	" *L* 944	307	" *A* 672	447	" *Notes*52*d*	583	" *A* 516
16	" *L* 514	150	" *A* 760	308	" *P* 420	448	" *A* 476	592	" *L* 181
17	" *R* 236	152	1929 *M* 38	314	" *L* 567	449	" *L* 858	595	" *Notes*70*c*
19	" *C* 574	156	1928 *A* 534	319	" *L* 1	450	" *L* 694	596	" *L* 397
21	" *R* 173	159	" *N* 241	323	" *C* 444	451	" *L* 757	617	" *Notes*37*e*
22	" *M* 349	160	" *L* 954	326	" *L* 946	453	" *R* 200	619	1929 *S* 12
29	" *L* 662	161	" *O* 355	327	" *C* 732	459	1929 *S* 17	620	1928 *B* 282
31	" *O* 498	165	1929 *A* 25	331	" *Notes*53*d*	461	" *L* 378	622	" *A* 505
33	" *A* 422	168	1928 *M* 786	332	" *PC* 254	464	1928 *L* 357	626	" *B* 238
51	" *P* 557	169	" *PC* 277	337	" *PC* 291	465	" *O* 369	627	" *A* 677
56	" *L* 943	174	" *Notes*40*c*	340	" *C* 441	469	" *R* 199	629	" *B* 243
57	" *P* 304	175	" *L* 609	344	" *Notes* 6*a*	471	" *Notes*21*d*	631	" *O* 384
70	" *C* 544	193	" *PC* 276	345	" *PC* 234	472	" *R* 196	633	" *B* 308
72	" *L* 635	194	" *O* 500	349	" *C* 537	473	" *O* 262	635	" *L* 688
74	" *C* 535	196	" *Notes*10*d*	351	" *PC* 273	474	" *R* 209	638	" *P* 468
76*a*	" *N* 96	197	" *PC* 221	354	" *L* 954	475	" *Notes*14*b*	641	" *B* 275
76*b*	" *L* 720	203	" *L* 932	356	" *PC* 238	477	1929 *L* 10	645	" *L* 722
79	" *C* 496	204	" *M*1245	357	1929 *L* 93	478	1928 *R* 186	647	" *P* 477
80	" *R* 177	208	" *L* 941	358	1928 *N* 338	479*a*	" *P* 353	650	" *N* 316
82	" *Notes*52*a*	210	" *M* 509	360	" *O* 305	479*b*	" *R* 282	654	" *A* 675
84	" *P* 641	216	" *PC* 282	361	1929 *L* 78	480	" *PC* 200	655	" *A* 499
93	" *A* 660	218	" *M* 648	362	1928 *O* 391	482	" *P* 426	656	" *Notes*23*a*
99	" *L* 605	221	1929 *A* 15	364	" *M*1279	485	" *PC* 251	657	" *B* 208
105	" *R* 186	222	1928 *C* 533	370	1929 *O* 15	488	" *N* 153	659	" *L* 245
106	" *O* 493	225	" *M* 571	371	1928 *R* 185	498	" *L* 20	661	" *B* 244
107	" *C* 553	238	" *A* 532	372	" *C* 211	505	" *M* 479	662	" *N* 284
110	" *L* 369	240	" *PC* 219	376	" *Notes*64*a*	506	" *L* 418	664	" *B* 240
111	" *C* 548	242	" *A* 480	377	" *L* 940	508	" *L* 562	665	" *L* 230
113	" *N* 337	243	" *P* 552	378	" *M* 387	513	" *M* 320	668	" *B* 224
114*a*	" *C* 531	245	" *A* 458	381	1929 *L* 82	519	" *L* 668	669	" *Notes* 82*e*
114*b*	" *M* 506	247	" *L* 6	383	1928*Notes*39*c*	521	1929 *O* 11	670	" *A* 680
118	" *P* 491	248	" *Notes*45*a*	384	" *Notes*70*b*	528	1928 *L* 837	672	" *R* 296
122	" *A* 706	251	" *L* 9	385	" *Notes*50*d*	527	" *Notes*25*a*	673	" *P* 466
123	" *C* 339	258	" *S* 192	387	" *L* 880	528	" *L* 713	675	" *P* 451
126*a*	" *Notes*44*b*	259	" *L* 7	394	" *Notes*50*e*	530	1929 *S* 13	677	" *M* 546
126*b*	" *C* 569	261	" *PC* 287	396*a*	" *L* 953	533	" *L* 34	686	" *A* 549
127	" *A* 492	264	" *O* 9	396*b*	" *C* 438	535	1928 *N* 340	688	" *M* 555
129*a*	" *A* 758	266	" *M* 703	399*a*	" *M* 651	539	" *M* 778	690	" *M* 541
129*b*	" *L* 670	268	" *B* 215	399*b*	" *C* 653	543	" *C* 600	692	" *L* 947
131	" *A* 681	274	" *L* 904	401	" *M* 612	549	" *L* 346	694	1929 *A* 59
132	" *R* 189	276	" *C* 822	402	" *N* 289	551	" *M* 806	698	1928 *Notes*62*e*
134	1929 *C* 27	278	" *B* 201	404	" *PC* 258	554	" *L* 316	700	" *S* 195
135	1928 *N* 295	282	" *Notes*18*a*	407	" *M* 773	555	" *M* 371	701	" *A* 34
136*a*	" *A* 676	283	" *PC* 284	413	" *PC* 208	556	" *B* 316	704	" *B* 310
136*b*	" *R* 256	287	" *B* 267	425	1929 *S* 1	559	" *A* 674	706	1929 *L* 149
139	" *L* 545	288	" *PC* 248	430	1928 *C* 341	561	" *L* 308	707	" *L* 141
141	" *Notes*54*c*	294	" *N* 333	432	" *L* 675	569	" *Notes*83*c*	708	1928 *C* 468
142	1929 *C* 31	297	" *M* 566	433	" *Notes*57*c*	573	" *O* 402	712	" *Notes*74*f*

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I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.
713	1929 *A* 65	743	1928 *M* 340	796	1928*Notes*75*e*	839	1928 *R* 206	865	1928 *S* 149
715	1928 *O* 375	746	1929 *C* 77	797	" *P* 600	842	" *Notes*72*b*	878*a*	" *R* 240
716	" *Notes*13*b*	748	1928*Notes*81*e*	804	" *Notes* 5*c*	843	1929 *O* 41	878*b*	" *L* 88
718	" *Notes*80*d*	749	" *L* 349	805	1929 *O* 65	846	1928 *L* 703	880	" *O* 464
719	" *A* 607	751	" *A* 746	808	1928 *L* 653	848	" *L* 454	881	" *B* 264
721	" *P* 473	759	" *N* 305	809	" *A* 467	849	" *M*1130	882	1929 *S* 52
725	" *C* 381	760	1929 *O* 55	814	1929 *L* 137	850	" *R* 252	886	1928 *B* 247
730	" *B* 205	761	" *A* 85	816	" *A* 31	852*a*	" *M*1171	887	" *M* 940
732	1929 *S* 9	762	1928 *P* 375	817	" *O* 44	852*b*	1929 *S* 5	892	" *B* 245
735	1928 *C* 645	787	" *Notes*39*b*	828	1928 *C* 836	854	" *L* 48	893	1929 *L* 143
736	" *M*1195	789	" *Notes*84*a*	829	" *O* 386	855*a*	1928*Notes*51*d*	895	1928 *N* 265
737	" *M* 559	790	1929 *A* 52	832	" *R* 244	855*b*	" *A* 753	903	" *O* 376
738	" *Notes*83*a*	791	1928*Notes*71*d*	834	" *O* 406	856	1929 *S* 26	904	" *B* 260
739	1929 *L* 147	792	" *C* 498	836	" *R* 246	858	1928 *A* 765	908	" *R* 241
740	1928 *M* 981	795*a*	" *Notes*79*c*	837	1929 *O* 21	860	" *R* 217	909	" *M* 557
742	1929 *A* 78	795*b*	" *M* 785	838	1928*Notes*71*b*	862	" *P* 585	911	" *B* 265

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I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.
1	1928 *M* 991	130	1928 *O* 289	248	1929 *N* 27	361	1928 *S* 166	466	1928 *R* 295
5	" *L* 746	132	1929 *L* 136	251*a*	1928*Notes*84*e*	363	" *P* 497	467	" *L* 928
6	" *M* 950	134	" *S* 24	251*b*	" *M*1101	369*a*	" *L* 595	468*a*	" *R* 243
8	" *L* 762	136	1928 *O* 340	254	" *R* 242	369*b*	" *C* 727	468*b*	" *Notes*73*b*
10	" *O* 265	139	" *M*1088	255	" *M* 926	371	" *P* 434	469	" *P* 481
11	1929 *S* 43	142	" *O* 301	256	" *Notes*71*f*	375*a*	1929 *L* 154	471	1929 *L* 111
13	1928 *O* 258	143	" *A* 472	257	" *Notes*71*c*	375*b*	" *PC* 15	472	1928 *M*1087
15	" *L* 732	147	" *Notes*46*b*	261	1929 *R* 5	379	" *L* 148	473	" *B* 418
17	" *L* 301	149	" *M* 732	262	1928 *L* 730	380	" *A* 123	475*a*	1929 *S* 50
19	" *M* 963	151	" *Notes*79*d*	265	" *P* 471	381	1928 *L* 794	475*b*	1928 *B* 347
20	" *Notes*85*b*	153	" *L* 342	266	" *O* 411	382	" *Notes*75*d*	476	" *L* 543
22	" *M* 837	156	1929 *O* 93	270	" *M* 705	384	1929 *L* 146	477	" *Notes*60*b*
24	" *B* 319	159	1928 *A* 440	273	" *O* 439	385	" *L* 145	480	1929 *L* 127
29	" *L* 196	166	" *Notes*78*c*	276	" *P* 465	387	1928 *O* 509	481	1928 *O* 273
35	" *L* 267	168	" *Notes*75*c*	277	" *Notes*71*a*	391	" *A* 538	485	1929 *L* 126
36	" *M* 440	169	" *O* 359	278	" *M* 909	400*a*	" *O* 227	486	1928 *M* 890
41	" *L* 285	172	1929 *C* 22	284	1929 *B* 50	400*b*	" *M* 960	490	1929 *L* 125
46	" *L* 755	176	1928 *M*1103	285*a*	1928*Notes*76*a*	402	" *Notes*30*a*	491	1928 *M* 972
48	" *Notes*10*b*	180	" *C* 597	285*b*	" *R* 248	404	" *M*1092	495	1929 *L* 135
49	" *L* 295	183	" *L* 395	286	" *S* 175	405	" *Notes*86*e*	496	1928 *C* 670
50	1929 *S* 15	184	" *M*1064	288	" *O* 378	406	" *M*1122	501	" *M* 933
51	" *N* 36	197	" *C* 697	295	" *L* 772	408	" *O* 501	508	" *C* 794
55	1928*Notes*82*c*	201	1929 *O* 125	296	1929 *O* 178	410	" *M* 800	518	" *L* 608
56	1927 *A* 649	202	1928 *C* 560	303	1928 *C* 491	413	" *R* 225	520	" *L* 429
60	1928 *B* 200	205	1929 *O* 117	307	1929 *M* 91	425	" *L* 599	522	" *O* 449
61	" *M*1172	209	1928 *B* 336	309	1928 *P* 515	427	" *R* 249	534	" *A* 527
63	" *B* 290	210	" *M*1157	310	" *Notes*77*c*	430	" *N* 292	539	1929 *S* 40
65	1929 *M* 118	212	1929 *L* 61	312	" *M*1085	431	" *R* 268	540	1928 *L* 919
68	1928 *O* 269	214	1928 *A* 439	314	" *Notes*8*c*	434	1929 *O* 124	541	" *M* 735
71	1929 *C* 130	215	" *Notes*37*a*	315	" *O* 460	436*a*	1928 *R* 272	553	" *M* 986
73	1928 *A* 629	218	1929 *L* 32	318	" *S* 169	436*b*	1929 *O* 116	558	" *L* 526
89	" *L* 432	221	1928 *B* 433	320	1929 *M* 93	438*a*	1928 *R* 261	559	" *M*1050
96	" *M* 816	222	" *Notes*55*a*	323	1928 *Notes*9*d*	438*b*	" *P* 543	561	" *B* 388
97	" *B* 221	223	" *P* 466	324	" *L* 751	447	" *L* 966	562	" *Notes*73*d*
99	" *O* 285	224	1929 *L* 67	326	" *C* 705	449	" *R* 245	563*a*	" *M*1198
101	" *B* 231	225	1928 *C* 654	327	" *L* 455	450	1929 *L* 127	563*b*	" *Notes*74*a*
103	" *O* 277	227	" *Notes*74*b*	328	" *P* 508	451	1928 *R* 137	564	" *B* 389
107	" *B* 220	228	" *M* 793	335	" *P* 652	452*a*	1929 *L* 140	565	1929 *L* 125
109	" *O* 417	229	1929 *O* 96	337	" *O* 430	452*b*	" *S* 41	566	" *M* 188
110	" *B* 241	230	1928 *R* 237	344	" *B* 348	455	1928 *L* 737	567	1928 *B* 390
113	1929 *C* 166	231	" *M* 794	345*a*	" *P* 193	456	" *Notes*57*f*	584	1929 *L* 142
116	1928 *M* 914	233	" *R* 258	345*b*	" *L* 531	457	" *L* 481	585	1928 *B* 376
120	" *N* 313	235	" *M* 784	347	" *L* 476	458	" *C* 666	586*a*	" *M*1234
123	" *O* 257	236	" *P* 457	350	" *C* 675	459	" *B* 305	586*b*	" *B* 346
124	1929 *C* 140	238	" *Notes*50*a*	356	" *L* 759	461	" *Notes*76*b*	588	" *A* 696
126*a*	1928 *N* 256	243	" *Notes*79*b*	359*a*	" *Notes*54*a*	462	1929 *B* 114	589	" *M*1278
126*b*	1929 *S* 28	246	1929 *A* 101	359*b*	" *Notes*55*d*	464	" *L* 128	591	" *Notes*81*c*
128	1928 *C* 360	247	1928 *O* 408	360	" *L* 540	465	1928 *M*1135	592	" *A* 745

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I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.	I C)	A. I. R.
593	1928 *L* 706	654	1928 *A* 670	699*b*	1928 *L* 505	771	1928 *S* 191	845	1928 *O* 374
596	1929 *O* 126	655	" *P* 582	702	1929 *A* 126	772	" *Notes*87*a*	847	" *Notes*88*d*
602	1928 *L* 601	657	1929 *N* 5	704	1928 *L* 784	773	" *B* 532	848	1929 *L* 200
605	" *Notes*78*e*	659	1928 *P* 482	706	" *C* 522	774	" *A* 270	849	1928 *B* 527
606	" *L* 523	668	1929 *L* 150	710	" *M* 984	777	" *B* 550	850	" *L* 382
608	" *M* 983	669	1928 *M* 983	712	" *C* 464	780	" *C* 357	861	" *B* 528
609	" *Notes*77*a*	670	" *L* 655	715	" *Notes*86*e*	783	1929 *L* 29	863	" *M*1049
610	" *B* 487	673	" *S* 161	718	" *C* 729	784	1928 *C* 359	865*a*	1929 *L* 23
616	" *Notes*71*e*	676	1929 *N* 42	719	" *L* 424	785	" *C* 355	865*b*	" *C* 101
617	" *A* 763	677	1928 *C* 466	721	" *C* 565	786	" *B* 526	872	1928*Notes*86*d*
618	" *C* 586	680*a*	" *Notes*73*c*	722	" *S* 179	787	" *C* 353	873	" *A* 709
619	" *M* 878	680*b*	1929 *L* 198	732	" *C* 577	789	" *B* 534	875	" *N* 296
620	1929 *A* 85	681	" *S* 61	734	" *B* 548	790	1929 *L* 195	876	" *A* 293
621	" *M* 242	682	1928 *M*1028	736	" *L* 774	791	" *A* 134	881	" *A* 403
623*a*	1928 *M* 981	686	1929 *L* 201	740	" *B* 539	797	1928 *L* 263	887	" *B* 510
623*b*	1929 *A* 180	688	1928*Notes*87*c*	748	" *A* 582	801	" *A* 561	893	" *N* 322
642*a*	1928 *N* 324	689	1929 *L* 161	758	" *B* 553	823	" *C* 576	895	1929 *R* 92
642*b*	" *L* 747	691	1928 *M* 969	762	" *M*1097	824	" *B* 436	897	1928 *O* 393
646	" *S* 177	693	" *L* 806	765	1929 *A* 12	833	" *L* 701	901	" *C* 324
648	1929 *N* 17	695	" *L* 792	768	1928*Notes*88*a*	834	1929 *O* 129	902	1929 *N* 43
649	1928 *C* 514	697	" *M*1229	769*a*	" *R* 299	840	1928 *L* 870	909	1928 *P* 374
651	" *Notes*87*b*	698	" *Notes*85*f*	769*b*	1929 *L* 194	843	1929 *L* 203	910	" *Notes*88*b*
653	1929 *N* 58	699*a*	" *Notes*85*e*	770	1928 *A* 333	844	" *L* 186	911	" *A* 759

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A. I. Cr. R.	A. I. R.	A. I. Cr. R.	A. I. R.	A. I. Cr. R.	A. I. R.	A. I. Cr. R.	A. I. R.	A. I. Cr.R.	A. I. R.

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1928 Allahabad.**

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1928 LAHORE SECTION with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1928 LAHORE. Column No. 2 denotes corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

A. I. R. 1928 Lahore=Other Journals.

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Othet Journals
1	9 *Lah* 537	20 (2)	111 *I C* 498	35	9 *Lah* 260	50	10 *L L J* 250
	29 *Cr L J* 815	27	8 *Lah* 613	39	28 *P L R* 580		29 *Cr L J* 382
	111 *I C* 319		28 *P L R* 697		104 *I C* 561	51 (1)	28 *P L R* 604
6	111 *I C* 247		105 *I C* 826	40	106 *I C* 846		104 *I C* 585
7	111 *I C* 259		28 *Cr L J* 1002		9 *Lah* 333	51 (2)	100 *I C* 874
9	111 *I C* 251		9 *A I CrR* 178		29 *P L R* 481	53	106 *I C* 882
16	28 *P L R* 605	28	8 *Lah* 593	42	28 *P L R* 593		29 *P L R* 177
	104 *I C* 586		28 *P L R* 694		28 *Cr L J* 860		9 *Lah* 340
17	8 *Lah* 605		102 *I C* 37		104 *I C* 636	55	28 *P L R* 601
	28 *P L R* 649	30	8 *A I CrR* 230		9 *A I Cr R* 42		106 *I C* 325
	105 *I C* 807		28 *Cr L J* 564	43	106 *I C* 313	56	106 *I C* 801
	28 *Cr L J* 989		102 *I C* 500	45	28 *P L R* 597	58	103 *I C* 353
20 (1)	9 *A I CrR* 132	32	9 *L L J* 384		105 *I C* 593	60	9 *L L J* 393
	9 *L L J* 411		109 *I C* 320	46	9 *L L J* 502		105 *I C* 653
	28 *Cr L J* 1020	33	100 *I C* 859		109 *I C* 399		29 *P L R* 224
	106 *I C* 108	34	9 *L L J* 329	49	28 *Cr L J* 813	61	108 *I C* 876
	9 *A I CrR* 213		29 *Cr L J* 521		104 *I C* 259	63	103 *I C* 348
	29 *P L R* 231		109 *I C* 345		9 *Lah* 193	64	107 *I C* 286
20 (2)	9 *Lah* 148	35	28 *P L R* 595		29 *P L R* 368		29 *Cr L J* 236
	29 *P L R* 554		104 *I C* 661	50	108 *I C* 381		9 *A I CrR* 490

A. I. R. 1928 Lahore=Other Journals—(*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
65	8	*Lah*	671	105 (1)	9	*L L J*	481	134 (2)	28	*P L R*	400	186	108	*I C*	607
	29	*P L R*	126		106	*I C*	570		105	*I C*	603		29	*Cr L J*	425
	29	*Cr L J*	500		29	*P L R*	129	136	106	*I C*	812		9	*Lah*	491
	109	*I C*	228	105 (2)	9	*L L J*	518	137	107	*I C*	756		29	*P L R*	610
66	29	*Cr L J*	65		29	*P L R*	276		9	*Lah*	380	187	9	*A I CrR*	202
	106	*I C*	577		109	*I C*	327	140	10	*L L J*	51		28	*Cr L J*	1036
	9	*A I CrR*	317	107	26	*P L R*	843		29	*P L R*	42		106	*I C*	220
69	26	*P L R*	343		28	*Cr L J*	961		106	*I C*	901	189	28	*Cr L J*	657
	28	*Cr L J*	969		105	*I C*	673		9	*Lah*	303		103	*I C*	193
	105	*I C*	681	108	26	*P L R*	164	142	9	*Lah*	4	191	28	*Cr L J*	661
70	107	*I C*	603		105	*I C*	616		29	*P L R*	331		103	*I C*	197
72	8	*Lah*	647	109	9	*L L J*	541		110	*I C*	832	192	29	*P L R*	67
	29	*P L R*	69		29	*P L R*	252	143	107	*I C*	491		106	*I C*	486
	29	*Cr L J*	511		9	*A I CrR*	405	144	9	*A I CrR*	346	193	29	*Cr L J*	577
	109	*I C*	239		29	*Cr L J*	779		29	*Cr L J*	14		109	*I C*	593
73	107	*I C*	610		110	*I C*	811		106	*I C*	350		10	*A I CrR*	293
75	28	*Cr L J*	988	110	9	*L L J*	533	147	107	*I C*	612		9	*Lah*	550
	105	*I C*	812		107	*I C*	495	148	103	*I C*	57	196	9	*Lah*	7
	9	*A I CrR*	129		29	*Cr L J*	256	150	10	*L L J*	45		29	*P L R*	333
76	106	*I C*	794		9	*Lah*	302		103	*I C*	170		112	*I C*	29
	29	*Cr L J*	202		29	*P L R*	329	151	9	*Lah*	397	202	9	*L L J*	550
	9	*Lah*	347		9	*A I CrR*	454		109	*I C*	650		28	*P L R*	468
78	8	*Lah*	666	111	8	*Lah*	678	152	29	*Cr L J*	200		105	*I C*	569
	29	*P L R*	234		29	*P L R*	72		106	*I C*	792	209	103	*I C*	449
	29	*Cr L J*	583		107	*I C*	781		9	*A I CrR*	423	212	9	*Lah*	110
	109	*I C*	593	112	9	*L L J*	577	154	9	*Lah*	67		103	*I C*	170
80	106	*I C*	790		106	*I C*	615		29	*P L R*	310	214	103	*I C*	182
	29	*Cr L J*	198		29	*P L R*	280		110	*I C*	850		29	*P L R*	675
81	9	*L L J*	186	113	8	*Lah*	730	157 (1)	108	*I C*	727	215	10	*L L J*	68
	28	*P L R*	277		29	*P L R*	97		29	*P L R*	438		106	*I C*	491
	102	*I C*	295		110	*I C*	264	157 (2)	9	*Lah*	23	216	9	*Lah*	76
82	29	*P L R*	122	114	9	*L L J*	588		29	*P L R*	320		104	*I C*	281
	107	*I C*	394		29	*P L R*	282		110	*I C*	631	219	108	*I C*	524
	10	*L L J*	156		108	*I C*	271	159	106	*I C*	869	221	106	*I C*	817
83	8	*Lah*	632		29	*Cr L J*	371	160	106	*I C*	303	224	10	*L L J*	27
	106	*I C*	176	115	9	*Lah*	33	162	10	*L L J*	202		109	*I C*	779
	29	*P L R*	132		103	*I C*	365		108	*I C*	189		9	*Lah*	470
88	29	*Cr L J*	958		29	*P L R*	305		29	*P L R*	371		29	*P L R*	635
	111	*I C*	878	116	9	*L L J*	543	164	29	*P L R*	30	230	29	*Cr L J*	905
90	9	*L L J*	488		106	*I C*	842		29	*Cr L J*	285		111	*I C*	665
	29	*P L R*	46		29	*P L R*	300		107	*I C*	771	232	9	*Lah*	400
	109	*I C*	165	117	9	*Lah*	27	165	107	*I C*	98		29	*Cr L J*	585
92	8	*Lah*	662		28	*P L R*	396		29	*Cr L J*	210		109	*I C*	601
	29	*P L R*	151		9	*L L J*	342		9	*A I CrR*	413		29	*P L R*	510
	29	*Cr L J*	508		103	*I C*	616	166	10	*L L J*	1		10	*A I CrR*	302
	109	*I C*	236	119 (1)	107	*I C*	281		108	*I C*	177	234	108	*I C*	192
93	26	*P L R*	363		9	*Lah*	306		29	*P L R*	344	235	29	*P L R*	50
	28	*Cr L J*	966		29	*P L R*	399	170	108	*I C*	186		110	*I C*	118
	105	*I C*	678	119 (2)	9	*L L J*	548	174	106	*I C*	908	236	107	*I C*	492
94		...			29	*Cr L J*	267	175	29	*Cr L J*	20	237 (1)	106	*I C*	574
95	9	*L L J*	522		107	*I C*	603		106	*I C*	436	237 (2)	106	*I C*	672
	29	*Cr L J*	530		29	*P L R*	271		9	*A I CrR*	295	238	108	*I C*	613
	109	*I C*	354		9	*A I CrR*	453	176	108	*I C*	49		9	*Lah*	451
96	107	*I C*	393	120	103	*I C*	223		9	*Lah*	360		29	*P L R*	548
97	9	*L L J*	508	121	108	*I C*	748	178 (1)	9	*A I CrR*	428	239	108	*I C*	596
	29	*Cr L J*	39	**FB**	29	*P L R*	396		29	*Cr L J*	895		29	*Cr L J*	425
	106	*I C*	455		9	*Lah*	504		111	*I C*	575		10	*A I Cr R*	81
	9	*A I CrR*	328	122	106	*I C*	877	178 (2)	9	*Lah*	35	240	29	*P L R*	119
	9	*A I CrR*	399		9	*Lah*	324		29	*P L R*	316		107	*I C*	594
98 (1)	103	*I C*	379		29	*P L R*	697		110	*I C*	628	242	108	*I C*	184
98 (2)	8	*Lah*	655	125	29	*P L R*	14	180	29	*Cr L J*	40	243	10	*L L J*	72
	29	*P L R*	77		107	*I C*	100		106	*I C*	456		108	*I C*	517
	109	*I C*	266		29	*Cr L J*	212		9	*A I CrR*	426		29	*Cr L J*	417
101	107	*I C*	385		9	*A I CrR*	505	181	111	*I C*	592		29	*P L R*	434
102	106	*I C*	829	132	106	*I C*	45	183		...			10	*A I CrR*	141
103	8	*Lah*	673	134 (1)	29	*Cr L J*	38	185	29	*Cr L J*	34	244	107	*I C*	390
	9	*L L J*	362		106	*I C*	454		106	*I C*	450	245 **SB**	29	*P L R*	385
	28	*P L R*	561		9	*A I CrR*	327		9	*A I CrR*	321		9	*Lah*	663
	105	*I C*	785	134 (2)	10	*L L J*	13	186	9	*A I CrR*	406		29	*Cr L J*	899

A. I. R. 1928 Lahore=Other Journals—(*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
245SB	111	*I C*	659	295	112	*I C*	49	348	106	*I C*	537	445 (2)	29	*P L R*	90
246	29	*P L R*	68	296	29	*Cr L J*	219	349	9	*Lah*	519		29	*Cr L J*	602
	106	*I C*	481		107	*I C*	107		111	*I C*	749		109	*I C*	682
247	106	*I C*	905		9	*A I CrR*	496	351	107	*I C*	386		10	*A I Cr R*	274
	9	*Lah*	356	297	10	*L L J*	87	352	9	*Lah*	176	448	29	*Cr L J*	362
	30	*P L R*	138		29	*P L R*	406		30	*P L R*	135		108	*I C*	257
249	107	*I C*	274		9	*Lah*	455	354	10	*L L J*	207		10	*A I Cr R*	42
250	10	*L L J*	183		109	*I C*	28		109	*I C*	464	452		...	
	113	*I C*	53	299	106	*I C*	226	355	10	*L L J*	198	453	10	*L L J*	180
257	108	*I C*	167		29	*P L R*	633		110	*I C*	81		108	*I C*	602
	29	*Cr L J*	348	301	9	*Lah*	88	357 (1)	29	*P L R*	653	454	10	*L L J*	70
	9	*A I CrR*	559		112	*I C*	17		29	*Cr L J*	880		111	*I C*	848
	9	*Lah*	389	304	107	*I C*	396		111	*I C*	464	455	112	*I C*	327
259	107	*I C*	608	305	107	*I C*	280	357 (2)	9	*Lah*	659	456	107	*I C*	397
259	10	*L L J*	218		9	*Lah*	352		30	*P L R*	32	459	29	*P L R*	219
	9	*Lah*	408		29	*P L R*	475		110	*I C*	425		108	*I C*	600
	109	*I C*	685	306	10	*L L J*	63	359	9	*Lah*	526	460	29	*Cr L J*	295
	29	*Cr L J*	605		29	*P L R*	331		29	*P L R*	626		107	*I C*	789
	10	*A I CrR*	313		110	*I C*	857		110	*I C*	281	462	10	*Lah*	1
	29	*P L R*	515	308	9	*Lah*	626	361FB	29	*P L R*	446		10	*A I Cr R*	494
263	112	*I C*	797		29	*P L R*	679		111	*I C*	8		29	*Cr L R*	669
267	9	*Lah*	106		29	*Cr L J*	881	369	10	*L L J*	215		110	*I C*	221
	112	*I C*	35		111	*I C*	561		9	*Lah*	448	464	110	*I C*	861
269	109	*I C*	613	316	111	*I C*	554		29	*P L R*	546	469	10	*A I Cr R*	423
271	10	*L L J*	159	317 (1)	106	*I C*	814		111	*I C*	110		29	*Cr L J*	704
	29	*P L R*	229	317 (2)	107	*I C*	773	370	108	*I C*	746		110	*I C*	336
	110	*I C*	122		29	*Cr L J*	289	371	110	*I C*	725	470	110	*I C*	506
272	10	*A I CrR*	235		10	*A I CrR*	8	374	109	*I C*	86	473	110	*I C*	853
	29	*Cr L J*	481	318	29	*Cr L J*	491	375	9	*Lah*	588	475	110	*I C*	173
	109	*I C*	209		109	*I C*	219		30	*P L R*	41	476	9	*Lah*	671
	9	*Lah*	531		10	*A I CrR*	247		110	*I C*	384		29	*Cr L J*	1019
	10	*L L J*	408	319	29	*Cr L J*	279	376	106	*I C*	808		112	*I C*	347
	29	*P L R*	629		107	*I C*	763	378	107	*I C*	392	479	10	*A I Cr R*	435
274		...		320 (1)	107	*I C*	273	380	29	*Cr L J*	282		29	*Cr L J*	719
276	29	*Cr L J*	220	320 (2)	29	*P L R*	165		107	*I C*	766		110	*I C*	463
	107	*I C*	108		108	*I C*	514		10	*L L J*	389	481	10	*L L J*	290
	9	*A I CrR*	514		29	*Cr L J*	413	382	112	*I C*	850		112	*I C*	457
277	29	*Cr L J*	593		10	*A I Cr R*	76		30	*Cr L J*	18	482	108	*I C*	518
	109	*I C*	673		9	*Lah*	608	393	110	*I C*	285		10	*L L J*	292
	10	*A I CrR*	337	324	29	*Cr L J*	286	395	9	*Lah*	592		29	*P L R*	721
	10	*L L J*	298		107	*I C*	772		30	*P L R*	43	484	110	*I C*	293
	29	*P L R*	727		9	*A I CrR*	499		112	*I C*	183	488	110	*I C*	374
278	29	*Cr L J*	250	325	9	*Lah*	649	397	10	*L L J*	93	489	29	*P L R*	254
	107	*I C*	391		29	*P L R*	733		111	*I C*	596		110	*I C*	550
	9	*A I CrR*	501		110	*I C*	164	413	107	*I C*	494	493	10	*L L J*	289
	9	*Lah*	394	329 (1)	107	*I C*	780	414	10	*L L J*	161		110	*I C*	394
279	106	*I C*	875	329 (2)	29	*Cr L J*	267		108	*I C*	391	495	110	*I C*	776
280	109	*I C*	590		107	*I C*	614	418	111	*I C*	506	496	29	*Cr L J*	950
	9	*Lah*	496		9	*A I CrR*	527	420	108	*I C*	58		108	*I C*	169
	29	*P L R*	620	332(1)	29	*Cr L J*	282	423	107	*I C*	400		10	*A I Cr R*	16
282	10	*L L J*	174		107	*I C*	766	424	112	*I C*	719	497		...	
	108	*I C*	898	332(2)	29	*Cr L J*	265	426	108	*I C*	62	499	110	*I C*	18
	29	*Cr L J*	386		107	*I C*	601	427 (1)	29	*P L R*	125	502	108	*I C*	175
	10	*A I CrR*	115		9	*A I Cr R*	488		106	*I C*	493	504	110	*I C*	397
284	107	*I C*	273		9	*Lah*	424	427 (2)	108	*I C*	61	505	112	*I C*	699
285	9	*Lah*	95	334 (1)	107	*I C*	779	428	109	*I C*	728	507	9	*A I Cr R*	567
	112	*I C*	41		29	*Cr L J*	294		10	*L L J*	370		29	*Cr L J*	343
289	10	*L L J*	40		10	*A I Cr R*	22	429	112	*I C*	520		108	*I C*	162
	108	*I C*	52	334 (2)	107	*I C*	770	432	9	*Lah*	224	510	9	*Lah*	678
290	107	*I C*	489	335	10	*L L J*	58		30	*P L R*	154		10	*C I Cr R*	474
291	9	*Lah*	180	337	9	*Lah*	689		112	*I C*	89		29	*Cr L J*	652
	29	*P L R*	8		113	*I C*	769	437	29	*P L R*	222		110	*I C*	108
	109	*I C*	255	341	107	*I C*	284		109	*I C*	448	514	111	*I C*	16
294	29	*Cr L J*	295	342	9	*Lah*	140	438	110	*I C*	718	515	108	*I C*	609
	107	*I C*	285		29	*P L R*	359	440	109	*I C*	479	516	9	*Lah*	428
295	9	*Lah*	137		112	*I C*	153	442	107	*I C*	493	523	112	*I C*	606
	29	*P L R*	306	344	29	*Cr L J*	280	443	110	*I C*	691	525	108	*I C*	261
	10	*L L J*	538		107	*I C*	764	444	107	*I C*	488	526	112	*I C*	558
	29	*Cr L J*	961	346	111	*I C*	549	445 (1)	107	*I C*	276	527	110	*I C*	172

A. I. R. 1928 Lahore=Other Journals—(*Contd.*)

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
528	108 *I C* 528	635	111 *I C* 72	705	109 *I C* 382	784	112 *I C* 704
530	29 *P L R* 292	636	108 *I C* 622	706	29 *P L R* 423	787	...
	108 *I C* 183	637	29 *P L R* 541		10 *L L J* 348	792(1)	29 *P L R* 308
531	29 *Cr L J* 1017		11 *A I Cr R* 9		112 *I C* 593		110 *I C* 517
	112 *I C* 345		29 *Cr L J* 737	709	108 *I C* 610	792(2)	112 *I C* 695
533	9 *A I Cr R* 561		110 *I C* 673	710	110 *I C* 818	794	112 *I C* 381
	10 *L L J* 235	638	29 *Cr L J* 430	713(1)	108 *I C* 373	796	9 *Lah* 371
	29 *Cr L J* 377		108 *I C* 617	713(2)	111 *I C* 528		29 *Cr L J* 204
	108 *I C* 369		10 *A I Cr R* 131	716	107 *I C* 606		106 *I C* 796
534(1)	11 *L L J* 64		9 *Lah* 462	717(1)	29 *P L R* 440	799	...
	110 *I C* 491		29 *P L R* 550		108 *I C* 728	800	109 *I C* 476
534(2)	108 *I C* 603	639	108 *I C* 395	717(2)	...		10 *L L J* 401
535	110 *I C* 316	640	107 *I C* 618	719	108 *I C* 396	802	...
536	107 *I C* 283	641(1)	108 *I C* 593	720	10 *L L J* 251	804	...
537	109 *I C* 863	641(2)	108 *I C* 612		111 *I C* 76	806	112 *I C* 693
538	108 *I C* 739	642	108 *I C* 262	722	111 *I C* 645	808	...
539	108 *I C* 385	643	108 *I C* 619	724	29 *P L R* 388	811(1)	109 *I C* 416
540	29 *Cr L J* 1032	647	10 *L L J* 262		10 *L L J* 311	811(2)	...
	112 *I C* 360		29 *P L R* 703		10 *A I Cr R* 508	813(1)	...
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550	110 *I C* 833	665	107 *I C* 753		109 *I C* 812		110 *I C* 101
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	110 *I C* 812	668	111 *I C* 519	746	112 *I C* 5	831	9 *Lah* 467
554	109 *I C* 90	670	10 *L L J* 277	747	112 *I C* 642		29 *P L R* 544
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557	10 *Lah* 64	675	111 *I C* 432		109 *I C* 224	834	110 *I C* 241
	110 *I C* 706	676	29 *Cr L J* 385	751(2)	112 *I C* 324	837	111 *I C* 523
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1928

LAHORE HIGH COURT

** A. I. R. 1923 Lahore 1

TEK CHAND, J.

Chiranji Lal—Accused—Petitioner.

v.

The Crown—Opposite Party.

Misc. Criminal Case No. 158 of 1927, Decided on 22nd, October 1927, for transfer of a case.

** (a) *Judicial Officer — Officer called upon to decide a matter, must decide it himself and should not consult other officers.*

It is one of the elementary principles of administration of justice that a judicial officer, who is called upon to decide a matter in controversy, must exercise his *own* independent judgment, after hearing the parties concerned. It is the privilege as well as the duty of the presiding officer of a Court of justice to form his own opinion on the point before him and to act accordingly. He ought not, as if it were, to mortgage his mind to another officer and to seek instructions from the latter, whenever he is called upon to decide a difficult or important matter. A Magistrate who does so, abdicates his proper functions and discloses a lamentable lack of sense of responsibility. [P 3 C 1, 2]

* (b) *Criminal P. C., S. 526 — Magistrate consulting his superior in disposing of a bail application—Act forms a ground for transfer.*

Where a Magistrate before disposing of a bail application consulted the District Magistrate and refused the application as advised by the latter :

Held : that though both, the Subordinate Magistrate in consulting the District Magistrate and the latter in advising him in connexion with the orders to be passed on the bail application, may have acted with the best of intentions, it cannot be denied that such action on their part was wholly unjustified and was certainly calculated to raise a reasonable apprehension in the mind of the petitioner that he will not have a fair trial : *Sarjeant* v. *Dale* (1877) 2 Q. B. D. 558, *Ref.* [P 3 C 2]

* (c) *Criminal P. C., S. 526 — Circumstances causing apprehension in accused's mind that he will not have fair trial described.*

A case was started against the accused under S. 377, on an incomplete chalan. The accused applied, as soon as the case was called, under S. 344, Criminal P. C., for adjournment on the ground that he had been served only three hours before, that he wanted time to get copies of the statements made by witnesses to the police or before Magistrates under S. 164, and that his leading counsel was out of station on account of the Muharram holidays. This application was rejected by the Court on the ground that another advocate was present in Court on behalf of the petitioner. The accused then presented another application under S. 526 (8) stating that he intended to apply for the transfer of the case from the Magistrate's Court and praying that the case be adjourned to enable him to do so. The Magistrate rejected the application assuming that the accused wanted to apply under S. 528. In the course of the trial which then commenced, the first and important witness in respect of whom the offence was alleged to be committed stated that he made the allegations against the accused at the instance of a person, who was alleged to be a bitter enemy of the accused, that his previous statement before a Magistrate was made under pressure. A complaint was made against this witness by the Magistrate under S. 476, Criminal P. C. The next witness was then called, but he did not give any direct evidence against the accused. Though at least one other witness for the prosecution was present in Court, the Magistrate did not examine him but passed an order adjourning the case on the ground that he had "lot of treasury work to do." The accused then moved the High Court for transfer of the case and an ad interim order was passed staying further proceedings. [P 5 C 1]

Held : that the manner in which the applications under S. 344 and 526 were rejected, the anxiety to commence the trial on an incomplete challan within three hours of the service of the summonses on the petitioner, the haste with which proceedings under S. 476 against the first witness were started the moment he retracted his former statements implicating the petitioner and the adjournment of the case without examination of the remaining witnesses

as soon as it was discovered that the second witness did not give any direct evidence as to the guilt of the petitioner, were incidents which would necessitate the transfer of the case to another Court : *A. I. R.* 1925 *Lah.* 361 ; *In re McCarthy* (1924) 1 *K. B.* 256 and *A. I. R.* 1923 *Lah.* 264, *Rel. on.* [P 5 C 1]

* (*d*) *Criminal P. C., S.* 526 (8)—*Accused notifying his intention to apply for transfer to Court—Court must adjourn the case.*

Under the amended S. 526 (8) as soon as the Public Prosecutor, complainant or the accused person notifies to the Court his intention to make an application to the High Court for transfer, the Magistrate is bound to adjourn the case and it is not competent to him, after such an application has been made, to record any evidence at all : *A. I. R.* 1924 *All.* 533, *Ref.* [P 4 C 2]

Ram Lal Anand—for Petitioner.

C. N. Carden Noad—for the Crown.

Order. — This is a petition under S. 526, Criminal P. C., for transfer to another district of a criminal case pending against the petitioner Charanji Lal in the Court of Mr. Taj-ud-Din, Magistrate, 1st Class, Ambala. The petitioner, who is the ex-Principal of the Benarsi Das High School and Vice-President of the Cantonment Board at Ambala, has been challaned under S. 377, I. P. C., for having committed unnatural offence with one of his pupils, Raj Kumar Sharma (P. W. 1), a youth 15 or 16 years old.

The petition is an unnecessarily lengthy document and contains a large number of allegations, several of which are either irrelevant to the point before me or have not been proved. I do not, therefore, think it necessary to deal at length with all the contentions raised, but propose to confine myself only to incidents which occurred before the Magistrates in their judicial capacity, and to base my decision on matters, which are either admitted by both parties or with regard to which there was no controversy at the Bar. There is however, one matter on which the affidavit filed by the petitioner and the explanation furnished by the District Magistrate do not agree and to which reference seems to be necessary at the very outset. It is alleged by the petitioner that he, in his capacity as a member of the Cantonment Board and as an office-holder of various political and other associations, had on several occasions advocated and pressed views on public matters which were opposed to those of the Deputy Commissioner (Mr. Fyson), that by so doing he had incurred the displeasure of the latter, and that for this reason Mr. Fyson was using his position and powers as District Magistrate to harm him. After considering the arguments of the learned counsel for the petitioner and reading the explanation of the District Magistrate, I have no hesitation in rejecting the petitioner's contentions in this behalf and hold that there is no foundation for the suggestion that because of his activities as a member of the Cantonment Board and other public bodies the petitioner will not have a fair and impartial trial in the Ambala District.

The facts leading to the institution of criminal proceedings against the petitioner, so far as they can be gathered from the record and the affidavits placed before me, are as follows :

On the 8th June 1927, an application (Ex. A) purporting to be written by Raj Kumar Sharma and containing serious allegations of misconduct against the petitioner, was received by the Inspector of Schools, Ambala Division. On the 13th June Raj Kumar is said to have made a lengthy statement (Ex. P. B) to the Inspector of Schools, in which he stated that the petitioner had committed unnatural offences with him on certain specified occasions.

The Inspector of Schools discussed the matter with Rai Bahadur Benarsi Das, the proprietor of the school, as well as with Mr. Fyson, District Magistrate, Ambala, who was then at Kasauli. Shortly afterwards the petitioner was dismissed from the school, and on the 27th June he was arrested by the Superintendent of Police. On the same day an application for his release on bail was presented before Mr. Said Zaman Khan, Cantonment Magistrate. The Magistrate heard arguments in support of the application, but instead of making up his mind as to whether he should grant or refuse the application, he put himself in communication on the telephone with the District Magistrate, who was then at Kasauli. The petitioner in his affidavit alleges that the Magistrate did so with a view to take instructions from the District Magistrate as to what order he should pass on the bail application. Another affidavit has been filed by one Captain G. D. Ram, Medical Practitioner, Ambala, in which the deponent states that

on the 27th of June 1927, he had gone to the Court of Sardar Said Zaman Khan, Cantonment Magistrate, along with many other leading residents of Ambala, to watch the proceedings

of the bail application that had been presented on behalf of Charanji Lal,
but the Cantonment Magistrate stated in open Court
that he was personally inclined to grant the bail,
but for certain reasons,
he would like to consult the District Magistrate on the 'phone at Kasauli, where he was on that day
and that on the 28th the bail application was refused by the Magistrate,
who stated that he had done so in compliance with the instructions received on the 'phone from the District Magistrate'.

In the explanation that he has sent up to this Court, the District Magistrate states that
the Cantonment Magistrate consulted me by telephone and was advised of the reasons of refusing bail, namely, to protect the schoolboys, to prevent an escape and tutoring of witnesses.

From the above it would appear that the Cantonment Magistrate, Mr. Said Zaman Khan, did not dispose of the application according to his own view of the matter, but acted in accordance with the instructions received by him from the District Magistrate. Now it is quite clear—and indeed it has not been denied on behalf of the Crown—that in dealing with the bail application Mr. Said Zaman Khan was acting judicially, and in deciding what orders he should pass on the application he ought not to have taken instructions from the District Magistrate or any other superior authority. If the learned Magistrate felt that all the necessary facts had not been placed before him, the proper course to follow was to ask the Public Prosecutor to take further and fuller instructions from the police or the Inspector of Schools and to present in open Court the case for the Crown against the petition for bail, and then, after hearing the petitioner's counsel to pass such orders as he deemed fit. The learned Government Advocate has frankly admitted that he is unable to support the action of the Magistrate on legal grounds and says that all that he can urge in justification is that Subordinate Magistrates sometimes consult District Magistrates in such matters. Now this is a position which I can under no circumstances accept. It is one of the elementary principles of administration of justice that a judicial officer, who is called upon to decide a matter in controversy, must exercise his *own* independent judgment, after hearing the parties concerned. It is the privilege as well as the duty of the presiding officer of a Court of justice to form his own opinion on the point before him and to act accordingly. He ought not, as if it were, to mortgage his mind to another officer and to seek instructions from the latter, whenever he is called upon to decide a difficult or important matter. A Magistrate who does so, abdicates his proper functions and discloses a lamentable lack of sense of responsibility.

I have no doubt whatever that in this particular case both the Cantonment Magistrate in consulting the District Magistrate, and the latter in advising him in connexion with the orders to be passed on the bail application, acted with the best of intentions, but it cannot be denied that such action on their part was wholly unjustified and was certainly calculated to raise a reasonable apprehension in the mind of the petitioner, such as to bring the case within the rule laid down by Lush, J., in the well-known case of *Serjeant* v *Dale* (1), which is regarded by the Courts in England and India as the leading authority on the subject of transfer of cases.

Turning back to the proceedings in the case we find that, on the rejection of the bail application by Mr. Said Zaman Khan, the petitioner moved the Sessions Judge, who accepted his petition and ordered his release on bail.

In the meantime the boy, Raj Kumar, was produced by the police before Mr. Said Zaman Khan, Cantonment Magistrate, to make a statement on oath in the absence of the petitioner. That statement is not among the papers that are before me, but it is admitted by both parties that before Mr. Said Zaman Khan, the deponent retracted the allegations, which he had made before the Inspector of Schools imputing misconduct to the petitioner.

On the the 30th June 1927, which was a public holiday, the police took Raj Kumar to the Savoy Hotel and once again produced him before another Magistrate, Mr. Keelan, who recorded his statement under S. 164, Criminal P. C., (Ex. P. C.). In this statement Raj Kumar practically reiterated what he had stated before the Inspector of Schools on the 13th June and specifically stated that

(1) [1877] 2 Q. B. D. 558=46 L. J. Q. B. 781=37 L. T. 153.

on several occasions the petitioner had committed unnatural offence with him.

On the 5th July 1927 the police sent up an incomplete challan against the petitioner under S. 377, I. P. C., and this was made over by the District Magistrate to Mr. Taj-ud-Din, Treasury Officer, and Magistrate, 1st Class, for trial. In the challan eight witnesses were named. On the 5th the Magistrate, Mr. Taj-ud-Din, issued summons to the petitioner to appear in his Court to take his trial on the next day (6th July). The petitioner was served on the morning of the 6th and appeared in Court at 10 a. m. As soon as the case was called an application under S. 344, Criminal P. C., for adjournment was presented on his behalf, it being urged that he had been served only three hours before, that he wanted time to get copies of the statements made by witnesses to the police or before Magistrates under S. 164, and that his leading counsel, Sardar Jhanda Singh, was out of station on account of the Muharram holidays. This application was rejected by the Court on the ground that another advocate Lala Sri Ram, was present in Court on behalf of the petitioner.

The petitioner then presented another application under S. 526 (8), stating that he intended to apply for the transfer of the case from the Magistrate's Court and praying that the case be adjourned to enable him to do so. In this application it was not stated in so many words that the applicant wanted to move the High Court for transfer, but the application was made under S. 526 (8), and if the learned Magistrate had taken the trouble of reading that section he would have discovered that it applies only when a party asks for an adjournment on the ground that he intends to move the High Court. The Magistrate, however, passed the following order:

> . . . . . The applicant does not disclose whereto an application for transfer is to be made. S. 528 relates to such applications to be made to the District Magistrate and further on it is not imperative to stop the proceedings when the witnesses were present in Court. I will record the evidence in Court and allow the accused time to make application as desired and I remember such is the practice in cases like this where unnecessary adjournments are sought. Under the circumstances I disallow the application and proceed with the case.

As already pointed out the application purported to be under S. 526 and it is surprising how the learned Magistrate assumed that the petitioner intended to move the District Magistrate under S. 528, Criminal P. C., for transfer. It is hardly necessary to point out that under the amended S. 526 (8), as soon as the Public Prosecutor, complainant or the accused person notifies to the Court his intention to make an application to the High Court for transfer, the Magistrate is bound to adjourn the case and it is not competent to him after such an application has been made to record any evidence at all: see inter alia *Satraj Singh* v. *Emperor* (2).

The application having been rejected, the trial of the petitioner commenced and the first witness examined was the boy, Raj Kumar. In his examination-in-chief, Raj Kumar, went back on the statements which he made before the Inspector of Schools as well as before Mr. Keelan. On this the Public Prosecutor applied and was granted permission to cross-examine him as a hostile witness. In cross-examination he stuck to what he had stated before and alleged that he had written the petition to the Inspector of Schools at the dictation of one Shugan Chand (who, in the affidavit is described, as a bitter enemy of the petitioner); he alleged that what he had stated before Mr. Said Zaman Khan was true, and that on the 30th June, as soon as he returned from Muradabad, he was arrested by the police and brought in handcuffs before Mr. Keelan at the Savoy Hotel and that his statement before that officer had been made under pressure. As soon as the examination of Raj Kumar was over, the Public Prosecutor presented an application to the Court, stating that the evidence given by Raj Kumar in Court was false and that he having gone back on the statement which he made on solemn affirmation before Mr. Keelan on the 30th June, proceedings under S. 476, I. P. C., should be taken against him with a view to prosecute him for perjury. The learned Magistrate stopped further proceedings in the case, and there and then called upon Raj Kumar to show cause why he should not be prosecuted under S. 193, I. P. C. In reply Raj Kumar said that what he had stated in Court was true and that his statement before Mr. Keelan was not voluntary but had been made under pressure. On this the Magistrate passed an order making a complaint against Raj

(2) A. I. R. 1924 All. 533.

Kumar for having committed an offence under S. 193, I. P. C., and sent it to the District Magistrate for trial either in his own Court or in that of any other Magistrate; Raj Kumar being directed to furnish security for Rs. 1,000 or in default to be kept in the judicial lock-up. This complaint was in due course made over by the District Magistrate to Sardar Budh Singh, Magistrate, for trial.

The learned Magistrate then resumed the trial and examined the second witness, Anant Ram, Head Master, H. M. High School, Ambala, but this witness did not give any direct evidence against the petitioner. Though at least one other witness for the prosecution was present in Court, the Magistrate did not examine him, but passed an order adjourning the case to the 16th July on the ground that he had "lot of treasury work to do."

On the 13th July the petitioner moved this Court for transfer of the case and an ad interim order was passed staying further proceedings.

It is quite clear from what has been stated above that the proceedings before the learned Magistrate on the 6th July were conducted in such a way as to give rise to a reasonable apprehension in the mind of the petitioner that he will not have a fair and impartial trial in his Court. The manner in which the applications under Ss. 344 and 526 were rejected; the anxiety to commence the trial on an incomplete challan within three hours of the service of the summonses on the petitioner, the haste with which proceedings under S. 476 against Raj Kumar (P. W. 1) were started the moment he retracted his former statements implicating the petitioner; and the adjournment of the case without examination of the remaining witnesses as soon as it was discovered that the second witness did not give any direct evidence as to the guilt of the petitioner, are incidents which necessitate the transfer of the case to another Court. These incidents do not necessarily prove the existence of any real bias in the mind of the Magistrate against the petitioner but, as pointed out by the learned Chief Justice in *Amar Singh* v. *Sadhu Singh* (3) :

> In dealing with an application for transfer the Court has to consider not merely whether there has been any real bias in the mind of the presiding Judge against the applicant, but whether incidents may not have happened which, though they may be susceptible of explanation, are nevertheless such as are calculated to create in the mind of the accused person a justifiable apprehension that he will not have an impartial trial:

See also the observations of Lord Hewart, C. J., in the recent English case *in re McCarthy* (4) and of Broadway, J., in *Sardari Lal* v. *Crown* (5), where the case-law on the subject is discussed at length. For the foregoing reasons I am constrained to allow the application for transfer and to withdraw the case from the Court of Mr. Taj-ud-Din.

Both counsel were agreed that in the event of this Court deciding to transfer the case from the Court of Mr. Taj-ud-Din there was no other Magistrate at the headquarters of the Ambala District competent to try it as the District Magistrate and the other Magistrates have in some form or another taken part in the investigation and the case cannot be sent to any of them for trial. A transfer to another district is, therefore, necessary. The learned counsel for the petitioner suggested that the case should be tried in the neighbouring district of Ludhiana or Karnal, but the learned Government Advocate pointed out that, having regard to the fact that the case has roused considerable local feeling at Ambala and in the neighbourhood, and that the petitioner appears to have influential friends and enemies there, it would be proper to send it to a convenient place outside the Ambala Division, where there is no likelihood of the witnesses being harassed by either side. After fully considering the matter, and more especially having regard to all that has already happened, I find myself in agreement with the suggestions of the learned Government Advocate and direct that this case be tried at Hoshiarpur.

Accordingly I allow the petition, withdraw the case from the Court of Mr. Taj-ud-Din, Magistrate, 1st Class, Ambala, and refer it for trial to Mr. E. M. Jenkins, District Magistrate, Hoshiarpur, who will proceed to hear it with all convenient speed fixing dates on which it may be possible for him to examine all the witnesses who come from Ambala, or as many of them as may be possible.

Before concluding, I wish to point out that nothing contained in this order should, in any way, be construed as giv-

(3) A. I. R. 1925 Lah. 361=6 Lah. 396.

(4) [1924] 1 K. B. 256.

(5) A. I. R. 1928 Lah. 264=3 Lah. 443.

ing the slightest indication of the views of this Court on the merits of the allegations against the petitioner or as to the truth or otherwise of the assertions made in his affidavit that he is a victim of intrigue. These are matters for enquiry and determination by the trial Magistrate hereafter.

D.D. *Transfer ordered.*

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* A. I. R. 1928 Lahore 6

HARRISON AND TEK CHAND, JJ.

Khangah Hazrat Sultan Bahu Sahib—Defendant—Appellant.

v.

Pira and *others*—Plaintiffs and Defendants—Respondents.

S. A. No. 144 of 1923, Decided on 23rd September 1927, from the decree of the Dist. Judge, Shahpur, D/- 13th October 1922.

* (a) *Custom (Punjab)—Alienation by widow—Next reversioner minor—Remote reversioner can sue.*

A minor is treated as being ordinarily incapable of defending his rights in the same way as a person who has attained majority. Therefore a more remote reversioner may sue to set aside an alienation by widow where the next reversioner happens to be a minor. It is not a question of collusion but rather of inability to act. Where property is not ancestral the reversioners may take action in the presence of the daughters and their position is equally good where in addition to the daughters there are minor grandsons of the last male owner in existence. [P 6 C 2]

(b) *Evidence Act, S. 115—Reversioners challenging alienation by widow—Widow living—Reversioners cultivating land under alienee and paying rent to him, taking contribution from him for improvements and keeping silent when he paid a mortgagee of last male-holder—Facts do not amount to admission of alienee's title.*

Where the alienating widow is living, the fact that reversioners exacted more contribution from the alienee from widow, for building a well for the common benefit of their portion of land and that of the deceased male holder, though coupled with payment of rent to donee, delay in bringing suit and their silence when donee paid off some mortgages on property of the deceased male holder, is insufficient to establish admission of donee's title. [P 7 C 1]

Niaz Muhammad—for Appellant.

Nanak Chand—for Respondents.

Harrison, J.—The plaintiffs in this case are the collaterals of one Murad, who died in 1908, and they sue for a declaration that an alienation by gift made by his widow Mt. Begam in favour of Khanqah Hazrat Sultan Bahu will not affect their reversionary rights when succession opens out.

The suit has been decreed by both the lower Courts and on second appeal the two points urged by counsel are that the suit is speculative and should not have been allowed to proceed, inasmuch as there were not only the widow and the two daughters of Murad but also their two sons, and in the presence of these four persons the suit is not likely to have any practical result. The second point is that even if the suit can proceed, the conduct of the plaintiffs puts them out of Court, inasmuch as they have admitted in various ways the title of the donee.

As regards the first point the counsel has relied, more especially, on *Barkat Ram* v. *Jagat Ram* (1), a Full Bench ruling, which is not reported in the Punjab Record. The all important point of whether the daughter's son in that case was a minor or a major is not to be found in the ruling. In this case the sons are minors and this appears to us to make all the difference. A minor, as stated in Rattigan's Digest in Art. 67 is treated as being ordinarily incapable of defending his rights in the same way as a person who has attained majority. It is therefore laid down in that article that a more remote reversioner may sue where the next reversioner happens to be a minor. It is not a question of collusion but rather of inability to act. In this case the property is not ancestral and it is well established that in the presence of the daughters the reversioners may take action, and their position appears to us to be equally good where in addition to the daughters there are minor grandsons of the last male owner in existence.

On the second point the counsel has relied on four facts; (1) the delay of nearly six years; (2) the fact that several of the plaintiffs cultivated various portions of the property and paid the donee rent; (3) the fact that the donee paid off some mortgages created by the last male owner without any sort of protest on the part of the plaintiffs and (4) and this is the strongest point, that when the plaintiffs built a well for irrigation purpurposes of the land of which they owned $\frac{3}{4}$ and the late Murad owned the remaining 1/4 they demanded and succeeded in exacting a full quarter share, i. e., a full

(1) [1912] 249 P.W.R. 1912=17 I.C. 379 (F.B)

owner's share from the donee. This last point is of some importance in our opinion, but all that is shown is that the plaintiffs, who are doubtless entitled to some contribution, as the donee will enjoy the benefits of the well during the widow's lifetime, exacted more than they should. It is in itself insufficient to establish an admission of the donee's title and the other circumstances, namely, the cultivation, the delay and the silence when the mortgages were paid do not appear to us to strengthen the position appreciably. It is to be remembered that before this gift the collaterals were cultivating under the widow and it was only natural that they who owned the remainder of the joint holding should have continued to do so even after the gift had been made.

We are of opinion, therefore, that both the lower Courts have decided rightly that the plaintiffs' suit lies and in spite of their conduct they are entitled to the decree which they seek. We, therefore, dismiss the appeal with costs.

D.D. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 7

JAI LAL, J.

Ghanaya Lal and *others*—Judgment-debtors—Appellants.

v.

Punjab National Bank, Ltd., Lahore—Decree-holder—Respondent.

Misc. Appeal No. 2455 of 1926, Decided on 27th September 1927, from the order of the Senior Sub-Judge, Kangra, D/- 4th June 1926.

*(a) *Civil P. C., O.* 21, *R.* 11 (2) (*j*) (*v*)—*Scope.*

Any method suggested by the decree-holder for the satisfaction of his decree which method is not actually prohibited by law falls within the purview of R. 11 (2) (j) (v): *A. I. R.* 1926 *Oudh* 616, *Rel. on.*; 41 *Mad.* 265 and 5 *P.R.* 1919, *Dist.* [P 9 C 1]

*(b) *Limitation Act, Art.* 182 (5)—*Step-in-aid—Application to take step need not be made during pendency of application by same decree-holder.*

It is not necessary that an application to take some step-in-aid of execution must be made during the pendency of an application by that particular decree-holder in accordance with law to the proper Court for execution of the decree; such an application can be made when no execution proceeding at the instance of the decree-holder who makes it is pending in Court. The words "where the application next hereinafter mentioned has been made" in Cl. 5, Art. 182 apply both to an application for execution and an application to take some step-in-aid of execution, and both the applications are mentioned independently of each other in the clause, with the result that each is sufficient to save limitation and the second kind of application is not dependent on the first. Any action taken by a decree-holder to realize the money decreed in his favour whether such an action is taken in a pending application for execution or otherwise is a step-in-aid of execution: *A. I. R.* 1922 *Mad.* 217, *Foll.* [P 9 C 2]

Jagan Nath Aggarwal—for Appellants.
Hargopal—for Respondent.

Judgment.—On the 11th December 1919 the Punjab National Bank, Limited, obtained a decree against Rai Sahib Kanhaiya Lal for the recovery of Rs. 34,084-7-9 and costs recoverable out of the property mortgaged and other property and person of the judgment-debtor. The decree was not in the form prescribed by O. 34, but was in the terms already mentioned. It appears that another creditor of Rai Sahib Kanhaya Lal had obtained a decree against him and had applied to the same Judge who passed the decree in favour of the bank for the execution of his decree by sale of the property which was subsequently declared subject to the lien of the bank and in the course of the execution of that decree an order had been passed by the learned Senior Subordinate Judge that the property be sold and out of the sale proceeds Rs. 25,000 be paid to the bank and the rest to the executing decree-holder. On the 12th June 1920 the bank presented an application to the Senior Subordinate Judge which application is in the form prescribed for the execution of the decrees in O. 21, R. 11, Civil P. C., the only exception that could possibly be taken to it relates to the description of the mode in which the assistance of the Court was required. This matter I will discuss presently. On the 14th April 1923 the bank presented an application to the Court praying that the lands already attached be auctioned. It appears that previously a wrong description had been given by the bank of the property which they desired to be sold and that a correct description was supplied on the date on which this application was made. It is not necessary for the purposes of this case to consider the effect of the next application mentioned in the judgment of the Senior Subordinate Judge, i. e., the application dated the 11th February 1924 made

by the bank for permission to bid at the auction. Whether that application isor is not a step-in-aid of execution has been the subject of controversy before me, but as the decision of this point is not necessary for the purposes of this appeal I have refrained from expressing any opinion on the subject. The next application is dated the 4th June 1924 which was made by the bank praying for the appointment of an ad interim receiver in respect of the judgment-debtor's property. The later application of the 12th December 1924, might be ignored for the same reason as the application made on the 11th February 1924. It appears that the judgment-debtor compromised the case with the other attaching decree-holder with the result that on the 20th October 1925 all execution proceedings in that case were filed by the Court and with those proceedings the application made by the bank on the 12th June 1920 was also consigned to the record room. Then the bank presented another application on the 16th January 1926, asking for the execution of the decree. This application was objected to by the judgment-debtor on the 27th April 1926, on the ground that it was barred by time. The learned Senior Subordinate Judge has disallowed this objection and has allowed the execution to proceed. This is an appeal by the judgment-debtor.

The only question that is agitated before me is whether the application of the 16th January 1926 is or is not barred by time. The counsel for the respondent has relied upon Cl. (5) of the third column of Art. 182, Indian Limitation Act, which provides that an application for execution can be made when the application next hereinafter mentioned has been made within three years from the date of applying in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree. The argument of the counsel for the appellant is that the application of the 12th June 1920 is not an application in accordance with law and therefore must be ignored and that though the applications of the 14th April 1923 and 4th June 1924 are applications made to take some steps-in-aid of execution of the decree, the condition precedent, as contained in the opening words of this clause has not been complied with because according to him, as I have already stated, there was no application for execution in accordance with law. The counsel for the respondent says that the application of the 12th June 1920 was an application in accordance with law and that in any case it is not necessary that an application to take some step-in-aid of execution of the decree should be made in the course of proceedings taken during the pendency of an application by the same decree-holder for execution of decree in accordance with law.

Now, I have already stated that the application of the 12th June 1920 conforms with the provisions of O. 21, R. 11, Civil P. C., with the possible exception of the prayer as to the mode in which the assistance of the Court is required. The application itself is headed as follows :

Application for execution of a decree according to O. 21, R. 11.

Then follow the various columns in which all the details required by R. 11 are given, but in the last column it is stated that

according to the order of the Senior Subordinate Judge dated the 9th April 1919, Rs. 25,000 are to be paid to the bank first and the rest with interest and costs may be paid pro rata along with the other decree-holder,

and the same prayer is repeated in an amplified form in the body of the petition. This petition was initially dealt with by the learned Senior Subordinate Judge as other applications for execution are dealt with ; but later he apparently kept it pending with the record relating to the execution of the decree of the other decree-holder. Now, Cl. (j) O. 21, R. 11 (2) provides that the application for execution of the decree shall state the mode in which the assistance of the Court is required and the following clauses are added as an indication of the various modes in which the assistance may be given ; (a) by delivery of property decreed, (b) by attachment and sale or by the sale without attachment, (c) by the arrest of the judgment-debtor, (d) by the appointment of a receiver and (e) otherwise, as the nature of the relief granted may require. Now, this last clause in my opinion is comprehensive enough to include the prayer for grant of a rateable share in respect of the balance after 25,000 had been first paid to the decree-holder out of the sale-proceeds as already decided by the Court. This view is supported by a judgment of a Division Bench of the Chief Court of Oudh which is reported as *A. I. R.* 1926 *Oudh* 616. In my

opinion any method suggested by the decree-holder for the satisfaction of his decree which method is not actually prohibited by law, falls within the purview of Cl.(e) mentioned above. The learned counsel for the appellant relied upon *Annamalai Chettiyar* v. *Palamalai Pillai* (1) and *Rangi Ram* v. *Gangu* (2) which I hold are distinguishable. In both these cases it has been laid down that where a decree-holder has attached the property of his judgment-debtor in execution of his decree and another decree-holder applies merely for a rateable share of the sale proceeds and the original decree-holder compromises with the judgment-debtor and withdraws the attachment, the second decree-holder is not entitled to ask that the attachment be maintained in execution of his decree, because he has not initially made a prayer for the attachment of the property. The question of limitation did not arise in those cases and in my opinion is to be decided by quite different considerations.

Holding as I do that the application of the 12th June 1920 was an application for execution in accordance with law it is obvious, and in fact it is conceded by the counsel for the appellant, that on that finding the application for execution is admittedly within time. I think it advisable, however, to record a finding on the second point that was agitated before me and that is whether an application to take some step-in-aid of execution must be made during the pendency of an application made by the same decree-holder in accordance with law to the proper Court for execution of the decree, or whether such an application can be made when no execution proceeding at the instance of the decree-holder who makes it is pending in Court. The question appears to be a difficult one, but after a careful consideration of all that has been said by the learned counsel on both sides I have arrived at the conclusion that an application to take some step-in-aid of execution of the decree can be made when no application for execution at the instance of the particular decree-holder is pending in Court. This view is supported by *Shankara Nainar Pillai* v. *P. V. Thangamma* (3) and follows from the wording of Cl. (5), Art 182. In my opinion the words

where the application next hereinafter mentioned has been made

apply both to an application for execution and an application to take some step-in-aid of execution and both the applications are mentioned independently of each other in the clause with the result that each is sufficient to save limitation and the second kind of application is not dependent on the first. I am of opinion that any action taken by a decree-holder to realize the money decreed in his favour whether such an action is taken in a pending application for execution or otherwise is a step-in-aid of execution. The result is that in my judgment the learned Senior Subordinate Judge has correctly disallowed the objection of the judgment-debtor and I dismiss this appeal with costs.

D.D. *Appeal dismissed.*

(1) [1917] 41 Mad. 265=33 M. L. J. 707=7 M. L. W. 298=43 I. C. 539=(1917) M. W. N. 882 (F. B.).
(2) [1919] 5 P. R. 1919=49 I. C. 131.
(3) A. I. R. 1922 Mad. 247=45 Mad. 202.

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* A. I. R. 1928 Lahore 9

FFORDE AND JAI LAL, JJ.

Dhanna Mal—Defendant—Appellant.

v.

Parmeshari Das and *another*—Plaintiff and Defendant—Respondents.

F. A. No. 1620 of 1922, Decided on 1st June 1927, from the decree of the 1st Cl. Sub-Judge, Amritsar, D/- 27th March 1922.

(a) *Transfer of Property Act, S. 123—Husband gifting house to wife—Both living in the house before and after gift—Gift-deed executed and registered—Gift is complete.*

There is no authority in support of the proposition that where the donee is the wife of the donor, a gift is invalid unless the donor vacates the donated property and puts the donee in its exclusive possession. All that is required in such a case to validate the gift is an unequivocal intention to make a gift and an effective transfer of control of and power to dispose of the gifted property to the donee, and this may be done by the execution and registration of the deed of gift, though the husband and wife who resided in the house may continue to do so after the gift. [P 11 C 2]

(b) *Hindu Law—Stridhan passing to daughter as heir—Daughter takes limited estate.*

A daughter taking as heir to her mother, property which was stridhan in the hands of the mother, does not take it as her own stridhan, but takes it with a limited estate, with reverter after her death to the heirs of her predecessor: 25 *All.* 476 (*P.C.*) and *A. I. R.* 1924 *All.* 15, *Foll.* [P 12 C 1]

(c) *Hindu law—Stridhan property reverting after extinction of a limited estate does not become limited estate itself.*

There is no authority in support of the proposition that when property reverts to the heirs of the last female full owner after the extinction of a limited estate under the Mitakshara law, it loses its original character and assumes the character of a limited estate. Such a proposition is self-contradictory and is antagonistic to the very notion of the rule of reverter which when translated into practice means that when determining the heir who is to succeed to the property, it must be assumed as if the intermediate limited heir who has died did not exist, and the original inheritance opened out to the next heir to the estate of the last full owner. [P 12 C 2 ; P 13 C 1]

(d) *Hindu Law—Stridhan—Succession,*

Daughter's son is a preferential heirs to stridhan as compared to a son : 25 *All.* 468 (*P.C.*), *Expl.* ; 23 *Mad.* 1 (*F.B.*). ; *A. I. R.* 1924 *All.* 15 and *A. I. R.* 1926 *All.* 557, *Ref.* [P 13 C 2]

(e) *Hindu Law—Adoption—Adopted son loses all rights in natural family including right to inherit natural relations.*

It is a well established principle of the Mitakshara law that an adoption in the dattaka form has the effect of transferring the adopted boy from his natural into the adoptive family and consequently of losing all his rights of a son in his natural family including the right of claiming any share in the estate of his natural relations. The only tie or affinity that such a boy retains with his natural family is that he cannot marry in it within the prohibited degree nor can he adopt from that family a boy whom he could not have adopted if he had remained in that family. [P 14 C 1]

* (f) *Hindu Law—Alienation by limited owner—Person in possession having no right to challenge cannot defend his possession against alienee.*

A sale by a limited owner is not ab initio void or invalid. It is perfectly valid and binding until it is set aside at the instance of the next reversioner. Such a transaction is like a voidable contract which is valid and enforceable unless it is repudiated by the person at whose option it is voidable. Therefore, if a person who has no right to challenge such an alienation be in possession of the alienated property, he cannot defend his possession against the alienee : *A. I. R.* 1922 *Lah.* 217, *Expl.* and *Dist.* ; *A. I. R.* 1924 *All.* 109, *Appr.* [P 14 C 2 ; P 15 C 1]

(g) *Transfer of Property Act, S. 53—Sale can be set aside by creditors only.*

A fictitious sale in fraud of creditors can be set aside only at the instance of the creditors. [P 16 C 1]

Badri Das, J. N. Bhandari and *Hem Raj* for *Tek Chand*—for Appellant.

Moti Sagar and *Mehr Chand Mahajan*—for Respondents.

Order.—For reasons which we have stated briefly and which we shall record in detail separately we accept both appeals 1620 and 1621 of 1922 and direct that the suit of Dhanna Mal against Parmeshr Das etc. be decreed with costs throughout and that the suit of Parmeshri Das against Dhanna Mal etc. be dismissed with costs throughout.

Judgment.—The following facts may briefly be stated : The house in dispute originally belonged to Bishan Das who had two wives, Mt. Lorindi Bai and Mt. Ved Kaur, the latter died without issue, but by Mt. Lorindi Bai he had a daughter, Mt. Durgi, who had two sons, Moti Ram and Parmeshri Das. Parmeshri Das was adopted by Bishen Das. On the 30th June 1890, Bishan Das made an absolute gift of this house to Mt Lorindi Bai by means of a registered deed. Thereafter on the 23rd September 1890, he made a will bequeathing the whole of his property to Mt. Lorindi Bai and after her death to Mt. Durgi and then to Parmeshri Das. Bishan Das died on the 5th October 1902, and Mt. Lorindi Bai died the next day, that is, on the 6th October 1902. On the 26th August 1913 Mt. Durgi sold the house in dispute to one Hari Ram by means of a registered sale-deed, and the latter sold it to Dhanna Mal, appellant, on the 23rd November 1917. It appears that after the sale Mt. Durgi continued to live in the house as a tenant, till her death in September 1917. Parmeshri Das also resided in the house with Mt. Durgi. It further seems that after the death of Bishan Das, Parmeshri Das and Mt Durgi continued to carry on his business which, however, failed with the result that a composition had to be made with the creditors.

Apparently after the death of Mt. Durgi Parmeshri Das claimed to be the owner of the house ; this led to civil and criminal proceedings between him and Dhanna Mal which culminated in two suits being instituted in the Court of the Senior Subordinate Judge of Amritsar, one by Dhanna Mal against Parmeshri Das for possession of the house, with the exception of a small portion which the plaintiff alleged was already in his possession, and the second by Parmeshri Das against Dhanna Mal for a declaration that he was the absolute owner of the house. Both the suits were tried together and have been disposed of by the learned Senior Subordinate Judge by the same judgment. The suit of Parmeshri Das has been decreed and the other suit has been dis-

missed. Dhanna Mal has consequently appealed to this Court.

After counsel for both parties had argued their respective cases we arrived at the conclusion that the appeals must be accepted and, stating our reasons in brief orally, we pronounced judgment accordingly and intimated to the parties that we would record our reasons for our conclusion in detail later. This we proceed to do now. The first important question, which needs determination in this case, is as to the origin and nature of the title of Mt. Lorindi Bai in the house in dispute. Counsel for the appellant contends that she derived her title by virtue of the gift made in her favour on the 30th June 1890 which conferred an absolute interest on her and, therefore, that it become her stridhan descending on her death to her stridhan heir under the Mitakshara law, and also that, even if it be held that she derived her title by virtue of the will made by Bishan Das, on a proper construction of the will the bequest gave her an absolute title to the house and, therefore, the subsequent bequests in favour of Mt. Durgi and Parmeshri Das being repugnant to the antecedent absolute bequest in favour of Mt. Lorindi Bai were invalid and should be ignored, and that consequently the house descended to the heir who would be entitled to inherit her stridhan estate. The respondents' case, on the other hand, is that the gift was never acted upon as it has not been established that possession of the property donated was given to the donee at the time of the gift and that, therefore, Mt. Lorindi Bai took the house under the will, and further that the intention of the testator was to give a limited interest to Mt. Lorindi Bai subject to the gift over to Mt. Durgi and Parmeshri Das. In support of this contention reliance was placed on a judgment of the House of Lords reported in (1905) *Appeal Cases* 85, and it was strenuously urged that Mt. Dúrgi and after her death Paremshri Das became the owners of the house under the will.

The learned Senior Subordinate Judge has given no definite finding whether or not the gift was acted upon or whether it was invalid. He has held, following *Mohanlal* v. *Niranjan Das* (1) that even under the will Mt. Lorindi Bai took an absolute interest and consequently that the bequest in favour of Mt. Durgi and Parmeshri Das was invalid and inoperative.

In my opinion there is absolutely no reason to hold that the gift was not acted upon. In the deed it is expressly provided that possession of the house had been given to Mt. Lorindi Bai, the donee. There is no evidence on the record from which it may be inferred that possession was not actually given to her. After the lapse of so many years from the date of the deed the burden of proving the invalidity of the gift lay heavily on Parmeshri Das and, in my opinion, he has not discharged it. Moreover no authority is cited in support of the proposition that, in a case like the present where the donee is the wife of the donor a gift is invalid unless the donor vacates the donated property and puts the donee in its exclusive possession. Indeed the learned counsel admitted that all that is required in such a case is an unequivocal intention to make a gift and an effective transfer of control of and power to dispose of the gifted property to the donee. This provision of law was, in my opinion, complied with in this case by the execution and registration of the deed of gift, it being borne in mind that the husband and wife who resided in the house continued to do so after the gift.

Holding, therefore, as I do that Mt. Lorindi Bai took the property under the gift it is obvious that she took an absolute interest in the house which the deed purported to grant her and, therefore, the house was her stridhan property and devolved after her on Mt. Durgi as an heir to the stridhan estate of her mother Mt. Lorindi Bai.

In view of the above finding it is not necessary for me to discuss the next question whether, if Mt. Lorindi Bai had taken the house under the will, she had an absolute interest in it or a limited interest subject to the bequests in favour of Mt. Durgi and Parmeshri Das. Counsel for the latter urged that the house was not taken by Mt. Lorindi Bai under the gift because otherwise Bishan Das would not have made a will, but the will makes no mention of the house and it is admitted that he had considerable property other than the house which could have been the subject of the bequest. There is further no substance in the argument of the counsel that in his pleadings Dhanna

(1) A. I. R. 1921 Lah. 11=2 Lah. 175.

Mal admitted that Mt. Lorindi Bai had taken the house under the will. His written statement properly construed amounts to this : that Mt. Lorindi Bai derived her title to the house under the deed of gift, but if she be deemed to have taken it under the will, still she inherited an absolute title. Such a plea does not in any way militate against his primary case which is that the title of Mt. Lorindi Bai was by virtue of the gift.

The next question agitated before us, and which comes after the first in its natural sequence, is whether Mr. Durgi as an heir to the stridhan estate of her mother Mt. Lorindi Bai had herself a life interest in the house or whether she took an absolute title thereto. Counsel for Parmeshri Das contends that she took an absolute interest, but the learned Senior Subordinate Judge has held that she had only a life-interest and nothing more. In my opinion the view of the learned Judge is correct. It is supported by a judgment of their Lordships of the Privy Council, i. e. *Sheo Partab Bahadur Singh* v. *Allahabad Bank* (2), in which it was held that under the Hindu law of Benares school there is no distinction as to the nature of the estate taken between property inherited by a woman from a male and property inherited by her from a female and that in both cases she takes it not absolutely as her stridhan but as a qualified estate with reverter after her death to the heirs of her predecessor-in-title. The same view is taken in *Sham Behari Lal* v. *Kam Kali* (3) where it was held that :

> a daughter taking as heir to her mother property which was stridhan in the hands of the mother does not take it as her own stridhan, but takes it with a limited estate, with reverter after her death to the heirs of her predecessor.

Following these judicial authorities, I hold that after the death of Mt. Durgi the house would have reverted to the heirs of Mt. Lorindi Bai but for the sale by her in favour of Hari Ram, and also that Mt. Durgi having merely a limited estate in the house was not competent to sell it except for valid necessity as that term is defined in the Hindu law.

No argument, however, was advanced before us by counsel for the appellant in support of his plea that there was valid necessity for the sale. Indeed it was conceded that such necessity had not been established. The main contention of the learned counsel was that, assuming that the sale was without necessity, Parmeshri Das, not being the next heir of Mt. Lorindi Bai with regard to the house in dispute in the presence of Moti Ram, her daughter's son, was not competent to challenge the sale which must be held to be valid and subsisting unless set aside at the instance of the next reversionary heir, that is Moti Ram.

This takes us to the consideration of the next question that arises in this case, which is whether Parmeshri Das is the next heir of Mt. Lorindi Bai in respect of the house in dispute or whether he is now competent to challenge the sale by Mt. Durgi in favour of Hari Ram. I will first clear the ground by stating that, according to the recitals in the sale-deed Mt. Durgi did not purport to transfer her life-estate only, but she sold the house absolutely, that is to say, she expressly intended to grant an absolute heritable title to the vendee Hari Ram, which was not intended to terminate with the death of Mt. Durgi, but continues to subsist unless the sale is set aside as having been made without valid necessity.

The argument of the respondent's counsel was that, even assuming that originally the house was the stridhan property of Mt. Lorindi Bai in her hands, it ceased to be so in the hands of Mt. Durgi, and when it reverted to Mt. Lorindi Bai's heirs after Mt. Durgi's death, it had lost its character as the stridhan property of Mt. Lorindi Bai and had assumed the character of the usual woman's estate in the property inherited by her from her husband, and, therefore, devolved on the heir who was entitled to succeed to the rest of her husband's estate in her hands. No authority was cited, and I know of none, in support of the proposition that when property reverts to the heirs of the last female full owner after the extinction of a limited estate under the Mitakshara Law, it loses its original character and assumes the character of a limited estate. Such a proposition, in my opinion, is self-contradictory and is antagonistic to the very notion of the rule of reverter which, when translated into practice, means that when determining the heir who is to succeed to the property, it must be assumed as if the intermediate limited heir who has died did not exist, and the original

(2) [1903] 25 All. 476=30 I. A. 209=8 Sar. 535 (P. C.).
(3) A. I. R. 1924 All. 15=45 All. 715.

inheritance opened out to the next heir to the estate of the last full owner. I hold that the house would have reverted to the heirs of Mt. Lorindi Bai who would have inherited it as her stridhan property if her death had taken place after that of Mt. Durgi. The learned Senior Subordinate Judge has held that, on the death of Mt. Durgi, Parmeshari Das was equally entitled to inherit the house in dispute with Moti Ram as stridhan heir of Mt. Lorindi Bai, and has relied in support of this view on *Sheoshankar Lal* v. *Devi Sahai* (4), which is a judgment of the Judicial Committee of the Privy Council. In that case the property in dispute was gifted absolutely to Mt. Jadu Nath by the last male owners thereof. On Mt. Jadu Nath's death her daughter, Mt. Jagar Nath, succeeded to her rights. Jagar Nath died leaving sons and a married daughter. In a suit by the sons of Mt. Jagar Nath to establish their title to the property against certain defendants, who professed to hold it adversly to Mt. Jadu Nath and Mt. Jagar Nath, the plea of the defendants, inter alia was that as a sister of the plaintiffs was in existence, she, not they, was the heir to their mother's property. The plaintiffs contended that the existence of the sister did not prejudice their claim and an issue was framed :

whether the plaintiffs are entitled to maintain the present suit while the daughter of Mt. Jagar Nath Kunwari exists.

It may be mentioned that the daughter was not a party to this litigation at all. In the course of their judgment their Lordships of the Privy Council remarked:

The precise question, therefore, for decision is whether, under the Hindu law of the Benares school, property which a woman has taken by inheritance from a female is her stridhan in such a sense that on her death it passes to her stridhan heirs in the female line to the exclusion of males.

Their Lordships eventually answered the question in the negative and decreed the plaintiff's suit concluding the judgment as follows :

Their Lordships are, therefore, unable to agree with the High Court in thinking that the property now in dispute was the stridhan of Mt. Jagar Nath devolving as such upon the plaintiff's married sister in preference to them and this is sufficient to dispose of the case.

It is thus to be observed that the precise question that is involved in the present case was not raised and discussed before the Judicial Committee. It appears to have been assumed that if Mt. Jagar Nath did not become a full owner of the property and it reverted to the heirs of Mt. Jadu Nath the plaintiffs were entitled to succeed. The question whether the plaintiffs were the heirs of Mt. Jadu Nath after the death of Mt. Jagar Nath or whether their sister was the heir was not apparently discussed before their Lordships. This judgment, therefore, is no authority in support of the view of the learned Senior Subordinate Judge, but its ultimate effect does lend some support to it. This, however, is not the first time that the question of interpretation of this case has come up for consideration before the High Courts in India. It was considered, inter alia, by a Full Bench of the Madras High Court in *Subramanian Chetty* v. *Arunachalam Chetty* (5), and also by a Division Bench of the Allahabad High Court in *Sham Behari Lal* v. *Ram Kali* (3), and again in *Ram Kali* v. *Gopal Dei* (6). In the Madras case it was held that a daughter's daughter is entitled to take in preference to a daughter's son, the stridhan of grandmother and that the judgment of the Judicial Committee already referred to should not be taken to lay down a rule to the contrary as the question was not directly put in issue before their Lordships, but was merely assumed. The same view of the effect of the Privy Council judgment was taken in the Allahabad cases cited above.

Another circumstance that may pertinently be mentioned is that in the case before us Moti Ram has been impleaded as a party and is actually prosecuting the case on behalf of Dhanna Mal who is his father-in-law and there is a statement on the record from which it appears that Dhanna Mal intends to transfer this property to Moti Ram. This, however, does not materially affect the question before us.

The heirs to the stridhan property of the kind with which we are concerned in this case are mentioned in para. 125 (2) of Mulla's Principles of Hindu. Law, where the daughter's son is mentioned to be the preferential heir as compared to a son. The learned counsel for Parmeshri Das did not contend that this order of succession was not correct. His argu-

(4) [1903] 25 All. 468=30 I. A. 202=8 Sar. 465 (P. C.).

(5) [1905] 28 Mad. 1 (F. B.).

(6) A. I. R. 1926 All. 557=48 All. 648.

ment, however, was that his client was entitled to succeed for two reasons; (1) as the property when it reverted to Mt. Lorindi Bai's heirs after the death of Mt. Durgi ceased to be her stridhan property, it descended to her son with the rest of the property which she had inherited from her husband, and (2) that in any case Parmeshri Das was also a daughter's son of Mt. Lorindi Bai and did not lose his rights as such in spite of his adoption by Bishan Das.

I have already recorded my opinion that the property, when it reverted to Mt. Lorindi Bai's heirs after the death of Mt. Durgi, did not lose its character as her stridhan property. It, therefore, follows that her daughter's son is entitled to take it before her son, and consequently Parmeshri Das could not inherit the house in suit as the son of Mt. Lorindi Bai. I am also of opinion that on his adoption by Bishan Das he lost his rights as his daughter's son and consequently also as the daughter's son of Mt. Lorindi Bai. The learned Senior Subordinate Judge appears to have been under some misapprehension, when he holds that the adoption of Parmeshri Das by Bishan Das did not take away his former status as his daughter's son. It is a well-established principle of the Mitakshara Law that an adoption in the dattaka form has the effect of transferring the adopted boy from his natural into the adoptive family and consequently of losing all his rights of a son in his natural family including the right of claiming any share in the estate of his natural relations. The only tie or affinity that such a boy retains with his natural family is that he cannot marry in it within the prohibited degree nor can he adopt from that family a boy whom he could not have adopted if he had remained in that family: see para. 409 of Mulla's Principles of Hindu Law. The proposition, in my opinion, is so well recognized that no further authority is necessary to support it. In fact counsel for the respondent did not seek to support the judgment of the Senior Subordinate Judge on this ground but he asserted that the adoption in this case was not in the Dattaka but in the kritima form, the sole ground advanced in support of this contention, being that under the Mitakshara law, a daughter's son could not be adopted in the dattaka form.

We declined to entertain this assertion of the learned counsel, as it appeared to us that it was assumed throughout the trial in the lower Court that this was a valid adoption under the dattaka form and that an attempt was being made to raise a new plea for the first time before us. I further hold that there is absolutely no material on the record in support of the contention of the learned counsel and it must, therefore, be assumed that this was a valid adoption under the dattaka form. It, therefore, follows that Parmeshri Das is not entitled to inherit the house along with or in preference to Moti Ram.

Counsel for the respondent then propounded another proposition which is that the sale in favour of Hari Ram being by the holder of a limited estate under the Hindu law was invalid, and, therefore, that Parmeshri Das who was in possession of the house could defend his possession against the invalid title of Dhanna Mal who derived it from Hari Ram. It was further contended that as part of the same proposition that, in any case, Parmeshri Das being a reversioner after Moti Ram, was entitled to defend his possession on the ground that the sale in favour of Hari Ram being without consideration and necessity was invalid.

In support of the first proposition the learned counsel relied upon *Ismail Ariff* v. *Mahomed Ghous* (7) and *Abdul* v. *Sarbuland* (8) in which it has been held that mere possession is a sufficient defence against persons who have no title to the property in suit and that a person in possession of land without title has an interest in the property which is good against all the world except the true owner. But there is an initial fallacy underlying the contention of the learned counsel. A sale by a limited owner is not ab initio void or invalid. It is perfectly valid and binding until it is set aside at the instance of the next reversioner. Such a transaction is, if I may use the analogy, like a voidable contract which is valid and enforceable unless it is repudiated by the person at whose option it is voidable. The learned counsel placed reliance on certain remarks quoted at the bottom of p. 452 by a Divi-

(7) [1893] 20 Cal. 834=20 I. A. 99=6 Sar. 305 (P. C.).
(8) [1902] 78 P. R. 1902.

sion Bench of this Court in *Gobinda* v. *Nanda* (9) which are to the effect that

> the restrictions on a Hindu widow's power of alienation are inseparable from her estate, and their existence does not depend on that of heirs capable of taking on her death. It follows that if, for want of heirs, the right to the property, so far as it has not been lawfully disposed of by her, passes to the Crown, the Crown must have the same power which an heir would have of protecting its interests by impeaching any unauthorized alienation by the widow.

This remark, in my opinion, does not help the respondent. The true meaning of the remark is that if at the time when the inheritance opens out on the death of the widow there are heirs who are entitled to inherit they have a right to institute a suit to impeach an unauthorized alienation made by her, and that if there are no such heirs and the property passes to the Crown, the Crown has such a right. The remark assumes that the person who attacks the alienation is entitled to inherit the property. Assuming that Parmeshri Das is a stranger to the family in the sense that he has no right to inherit the stridhan property of Mt. Lorindi Bai and, therefore, that he is attempting to establish his title to the property merely on the ground of his adverse possession as against an alienee from a limited owner, the alienation being without necessity, I am clearly of opinion that he cannot succeed.

In *Jhari Koeri* v. *Bijai Singh* (10) persons in possession of the property then in dispute, who were the defendants, defended the suit inter alia on the ground of their possession and contended that unless the plaintiffs who for practical purposes were the purchasers of the property from a limited owner proved an indefeasible title to the property they, the defendants, were entitled to remain in possession. The learned Judges held that the purchasers having purchased what purported to be an absolute interest in the property they obtained a title voidable at the instance of the reversioners on the widow's death and that until challenged by them it was a good title and could not be treated as a nullity by any trespasser who had succeeded in getting possession of the property. With all respect I agree with this view and hold that there is no substance in the first contention of the learned counsel.

(9) A. I. R. 1922 Lah. 217=5 Lah. 450.
(10) A. I. R. 1924 All. 109=45 All. 618.

With regard to the second contention that, though Moti Ram was the immediate heir still Parmeshri Das being the heir next after him could contest the validity of the sale in favour of Hari Ram. It is not necessary for me to decide whether Parmeshri Das was competent to sue to set aside the sale during the lifetime of Mt. Durgi, but I will confine my remarks to the circumstances as they existed at the time of institution of these suits. On the death of Mt. Durgi, Moti Ram remained no longer an expectant reversioner. His expectation to inherit the estate of Mt. Lorindi Bai having materialized on the succession having opened out Parmeshri Das lost all rights in it as the next heir. There is no doubt that if Moti Ram had actually inherited the house, he would, as the daughter's son of Mt. Lorindi Bai, have become a full owner thereof, and as such would have become a new stock of heirs with regard to the house so inherited by him, and therefore on his death it is his heirs, under the Hindu law, and not those of Mt. Lorindi Bai, that would be entitled to succeed to him. Parmeshri Das, therefore, under the circumstances, has lost all reversionary interest in the house on the death of Mt. Durgi and is consequently not competent to challenge the sale by her, and especially so when we know that Moti Ram is actually supporting the alienee. Parmeshri Das's interest, if any, that now remains in the house is as an expectant heir to Moti Ram and as such he is not entitled to challenge the alienation and specially so considering that it has not been challenged by the latter.

The last question taken up by the counsel for the respondent was that in any case the sale in favour of Hari Ram was fictitious having been effected to defraud the creditors of Mt. Durgi and that it was absolutely void and, therefore, did not confer any title on the vendee. It is hardly necessary to seriously consider this plea. In the first instance it has not been established that the sale was fictitious and effected with intent to defraud the creditors. On the other hand it appears from the statement of the respondent's own witness, Harjas Rai, that the house in dispute was left to Mt. Durgi by the creditors. It appears that on the failure of the business of Mt. Durgi and Parmeshri Das they made a

composition with their creditors and handed over the bulk of their property to certain trustees, including Harjas Rai, for distribution to the creditors, but it is clear that the house in dispute was not so handed over, but was expressly left unaffected by the trust. There was, therefore, no danger of its being attached by the creditors and consequently there was no motive and no occassion to transfer it fictitiously with intent to defraud the creditors.

It is not, therefore, necessary for me to consider the next point whether Parmeshri Das is entitled to defend his possession, merely on the plea that the sale in question was fictitious, though I may remark in passing that, as at present advised, I consider that such a sale can be set aside only at the instance of the creditors and consequently the plea that it was void is not open to Parmeshri Das under the circumstances.

It is for these reasons that the appeals have been accepted by us and the decrees of the learned Senior Subordinate Judge reversed.

D.D. *Appeal accepted.*

A. I. R. 1928 Lahore 16

DALIP SINGH, J.

Haji Abdul Rahim and *Sons*—Defendants—Appellants.

v.

Chet Ram-Amar Nath — Plaintiffs — Respondents.

S. A. No. 722 of 1927, Decided on 29th June 1927, from a decree of the Senior Sub-Judge, Gurdaspur, D/- 25th November 1926.

Limitation Act, S. 12—*Copying agent is not an agent of the Court—Time spent by the copying agent is not allowed to the appellant—Chief Court's Rules and Orders Vol. III, Ch. I, Rr.* 4 (*ii*) *and* 4 (*iv*).

The Copying Agency cannot be regarded as other than an agent of the applicant and is not an agent of the Court. Time spent by the Copying Agency in getting the estimate and putting in the application should not be allowed to the applicant : 61 *P. L. R.* 1911 *Foll.*

[P 16, C 2]

Mohsin Shah—for Appellants.

Mehr Chand Mahajan—for Respondents.

Judgment.—A preliminary objection is taken that this appeal is barred by limitation. The facts are as follows :

The order of the learned Senior Subordinate Judge from which this appeal is taken is dated the 25th November, 1926. On the 31st January 1927 the appellant applied to the Agent, Copying Agency, Gurdaspur for copies of : (1) the judgment of the Sub-Judge, Pathankot, dated the 11th December 1925 : and (2) the judgment and decree-sheet of the Senior Sub-Judge, Gurdaspur, dated the 25th November 1926.

He sent this application by post under registered cover with a copying-fee of Rs. 3. The copying agent asked the Court for an estimate of the money needed, and on the 2nd February he was informed that Rs. 4 more were payable in advance and that this should be put in by the 10th February. Thereupon, on the 10th February the sum was put in and a proper application made to the Court. The copies required were supplied on the 11th February 1927. The appeal was originally presented here as a revision on the 28th February 1927, but the office pointed out that an appeal lay and accordingly the heading was altered on the 5th March 1927.

It is, however, contended on behalf of the respondent that, even taking the date for the presentation of the appeal as the 28th February, 1927 the appeal is barred by limitation by three days. This would be so, unless the time spent by the copying agent in getting the estimate, etc., and putting in the application with the proper fee be allowed to this appellant. *Ashiq Hussain* v. *Ali Bakhsh* (1) is a case almost entirely in point. It is true that in that case no money at all was sent, whereas in this case Rs. 3 were sent and it was pointed out that any deficiency would be made up on the copies being supplied per V. P. P. But the point decided by that ruling was that the copying agency could not be regarded as other than an agent of the applicant and was not an agent of the Court under R. 4 (ii), Ch. 1, of the Rules and Orders of the Chief Court, Vol. III. Whether R. 4 (ii) or R. 4 (iv) applies, this principle must still hold good.

I, therefore, accept the preliminary objection and hold that the appeal is barred by limitation and must be dismissed with costs.

N.D. *Appeal dismissed.*

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(1) [1911] 61 P. L. R. 1911 = 9 I. C. 381 = 189 P. W. R. 1911.

A. I. R. 1928 Lahore 17

ADDISON AND SKEMP, JJ.

Emperor—Appellant.

v.

Ibrahim and *others*—Accused — Respondents.

Cri. A. No. 1203 of 1926, Decided on 23rd March 1927, from the order of the Sessions Judge Ferozepur, D/- 1st September 1926.

(a) *Criminal P. C., S. 154—All details need not be given in report to police.*

Every detail need not be given in the first report to the police, which is not substantive evidence. [P 19, C 1]

(b) *Criminal trial—Evidence.*

Where the prosecution evidence is reliable, stands unrebutted and is overwhelming, convictions cannot be set aside. [P 19, C 2]

(c) *Criminal P. C., S. 162—Statements to police can be used only for contradicting a witness under S. 145, Evidence Act.*

The only way a witness can be contradicted by statements made to the police under the provisions of S. 162, Criminal P. C., is to prove his written statement and put it to the witness under S. 145, Indian Evidence Act, to permit him to explain the contradictions, if any. Statements made to the police cannot be used at a trial in any other way. [P 19, C 1]

Carden Noad—for the Crown.

Zafrulla Khan—for Respondents.

Addison, J.—The nine respondents, Ibrahim, Dillu, Mustaqim, Nizam, Imam Din, Bidar Din, Sultan, Khushi Mahommad and Jan Mohammad, who are Tarkhans of village Dabra and closely related to each other, were charged under S. 302, read with S. 149, I. P. C., with the murder of Bhagat Singh, Honorary Magistrate, on the afternoon of the 3rd May 1926, at Dabra and were acquitted by the Sessions Judge of Ferozepore. An appeal has been presented by the Crown against this order of acquittal.

Bhagat Singh lived at Muktsar but some members of his family live at Dabra. Bhagat Singh and his sons along with his nephew, Balwant Singh and others own Patti Ganda Singh of village Dabra, while Fazal, lambardar and others own Patti Ram Singh. Fazl and the other owners of the second named patti, though Musalmans, are related to the Khatri owners of the other patti. They changed their religion some time ago as is clear from the fact that Fazl's father was also a Musalman, by name Mohkam Din. The respondents are occupancy tenants, as well as ordinary tenants, of the proprietors of village Dabra. Litigation was pending at the time of the murder between Bhagat Singh and Ibrahim respondent, namely, a revenue suit for produce and a criminal case of mischief caused by cattle, instituted by Bhagat Singh. There also had been other cases against Ibrahim and other members of his family by the relatives of Bhagat Singh.

The story, as told by the prosecution, is that Bhagat Singh came to Dabra on the afternoon of the 3rd May. He did so in order to arrange for the summoning of the witnesses in the pending cases mentioned above. His nephew Balwant Singh P. W. 4, complained to him that the ears of some of their wheat sheaves had been stolen, that the lambardar Fazl Din, P. W. 8 had promised to make inquiries and that Murid, sweeper, was suspected. Murid was called to Fazl Din's house where he denied the theft and offered to show the ears which he had. Thereupon, Bhagat Singh, accompanied by his nephew Balwant Singh P. W. 4, his son Jaswant Singh, P. W. 10, Jagat Singh his cousin once removed, P. W. 11, Fazl Din, lambardar, P. W. 8. and his brother Waheb, P. W. 7, both of whom are Musalman collaterals of the deceased, and by Murid, sweeper P. W. 5, who works for Waheb, went to Murid's house, being joined by Shibbu, a Chamar by caste, P. W. 9, on the way. The respondent Dillu, brother of Ibrahim respondent, was standing there. When they arrived, Jaswant Singh remarked that Murid and the Tarkhans had looted them. The ears were inspected and the deceased sent Balwant Singh for a cart which he brought. By this time Dillu, respondent, had disappeared. Rana, P. W. 6, uncle of Murid sweeper, came with the cart and swore that Murid had not stolen the ears. Waheb also defended Murid. On this the deceased agreed that the ears had not been stolen. At that very instant, Shibbu Chamar, called out that the Tarkhans were coming. The nine respondents, armed with sticks, gandhalis and other weapons, arrived and fell upon the Khatri proprietors, inflicting injuries not only upon the deceased, but upon his son and nephew, Jaswant Singh and Balwant Singh. The son and nephew fled but Bhagat Singh fell down and his assailants continued to beat him when he was on the ground. The attack only

ceased when the bystanders called out that he had been killed. This took place in the late afternoon. Bhagat Singh was carried to his son's house and it is in evidence that he was able to speak, though the doctor, who performed the post-mortem examination, said that he thought that he must have become unconscious at once. Bhagat Singh was then placed in a cart and taken to the Muktsar hospital which he reached about 11-30 p. m. The sub-assistant surgeon there attended to the three injured men, prepared certificates of their injuries and wrote two notes to the sub-inspector of police about 4 a. m. and 5 a. m. asking him to come at once as Bhagat Singh was in a precarious condition. The sub-inspector came to the hospital at 6 a. m. and recorded the statement of Balwant Singh, his nephew, as the first information report. Bhagat Singh died at 5-40 a. m. before the sub-inspector arrived. The above story is told by each of the eight eyewitnesses.

The respondents refused to answer any questions in the Court of the committing Magistrate but put in next day a combined written statement, to the effect that they were not there, and that Bhagat Singh was killed by Murid and other sweepers against whom Bhagat Singh wished to complain. His relatives, however, did not care to have his death attributed to sweepers and thus accused the respondents

between whom and Bhagat Singh, deceased there was no love lost.

They did not add to this statement before the Sessions Judge and produced no evidence in their defence.

After a very careful consideration of the entire record, through which we have been taken, I can see no reason whatsoever for disbelieving the story told by the eight eyewitnesses regarding whose demeanour the Sessions Judge has said nothing. The deceased had eight injuries on his person, two being caused by sharp weapons and the rest by blunt weapons. Of these four injuries, one being an incised wound, were on the head which was extensively fractured, this being the cause of death. The head injuries were so severe that survival was impossible. The injuries themselves leave no doubt that it was intended to kill him or to inflict such injuries as were likely to cause death. His son and nephew had each four injuries.

Counsel for the respondents urged nothing except the points mentioned in the judgment of the Sessions Judge, none of which, in my opinion, are of any significance. The first was that he thought it inexplicable that the matter was not reported earlier to the police except on the defence theory that the relatives waited till Bhagat Singh was dead. In the first place the medical evidence shows that Bhagat Singh must have become unconscious almost at once. It was known at the hospital that he was dying. It is admitted in the written statement of the respondents that there was no love lost between Bhagat Singh and them. What advantage, therefore, was there in the so called delay ? In the second place, there was no reason to implicate the respondents instead of the real culprits. In the third place there was no delay which has not been explained in the most satisfactory way. Bhagat Singh was put in an ordinary cart very soon after the crime and it did not reach the hospital till 11-30 p. m. He was taken first to the hospital and not to the police station as he was in a dangerous condition. It took a considerable time to attend to the wounds of the three injured persons and prepare certificates of their injuries. It was intended to take these certificates to the police station, but this was not done as the sub-assistant surgeon had already written to the Sub-Inspector of police who came at 6 a. m. The evidence establishes these facts beyond any question while the theory relied upon is mere conjecture without any basis.

The second point taken by the Sessions Judge was that a conspiracy to give a false version of the affair was not improbable, as the witnesses were either relatives or dependants of relatives of the deceased. I fail completely to understand this argument which is purely hypothetical and unwarranted. The eyewitnesses except three are relatives, though two of those relatives are Musalmans of a different religion from the deceased. Two are sweepers and dependants of relatives, but Shibbu Chamar, has not been proved to be a dependant. It is inconceivable that eight eye witnesses deliberately implicated the respon-

dents instead of the real culprits, a finding without any justification.

The third point taken by him was that the story in Court had been improved upon in certain respects as compared with the first information report made by Balwant Singh at 6 a. m., on the 4th May. What was stated by Balwant Singh on the 4th May, is not substantive evidence and can only be used to corroborate or contradict what he had stated as a witness. Besides the story now told by Balwant Singh is nearly the same as that first told by him to the police. There are two omissions only in the statement made by him to the police. The first is that in the first information report it was stated that Jaswant Singh said that there were ears of grain in other houses as well as in Murid's (see p. 11, line 16 of the paper-book). According to the evidence given in Court Jaswant Singb said that "Murid and these Tarkhans have looted us." Surely that is no real difference. The second is that in the first information report there was no mention of the fact that Dillu, respondent, was standing at Murid's house when the party went there and that he had disappeared before the cart came. An argument such as this means that if every detail is not given in the first report to the police, which is not substantive evidence, the case must be held to be false. The witnesses other than Balwant Singh were asked if they told the police about Dillu's presence and replied that they did while the sub-inspector said that they did not tell him. The written statements made by these witnesses to the police have not been proved and the only way a witness can be contradicted by statements made to the police under the provisions of S. 162, Criminal P. C., is to prove his written statement and put it to the witness under S. 145, Indian Evidence Act, to permit him to explain the contradictions, if any. This was not done. Statements made to the police cannot be used at a trial in any other way. In any case, the respondents must have known that the proprietors, including their enemy, Bhagat Singh, had gone to Murid's house and it is unimportant whether Dillu actually saw them arrive or not. It is frivolous to say that this throws discredit on the prosecution story. On the evidence, however, I have no hesitation in holding that Dillu was there.

The fourth reason given by the Sessions Judge was that the story was improbable as there was then no provocation to the respondents, though there was to the sweepers. But the respondents bore Bhagat Singh a grudge, and there is no reason to disbelieve the evidence that they seized the opportunity to be revenged. The Sessions Judge, when dealing with this point, has clearly erred in saying that the prosecution witnesses, in order to exclude the possibility of the sweepers having any motive for making such an attack, introduced at a late stage into their story an improvement to the effect that just before the attack, Bhagat Singh, impressed by the protestations of Rana Wahab regarding Murid's innocence, said "very well, let the matter drop." All this is in the first information report (see p. 11, lines 10-16, of the paper-book) the only difference being that he is there reported as saying "I agree," words which have the same meaning.

Lastly, the Sessions Judge relied on the fact that Murid absconded for two days as proving that Murid and his friends committed the assault. But there is little in this. Murid has explained that Mustaqim took him away with himself by frightening him. This is a possible explanation, and, at the same time, Murid might have been afraid that he too would be implicated as the affair took place at his house. Mustaqim did abscond and was not arrested till the 7th May, though all the others were arrested at once.

Two of the assessors considered that all the respondents were guilty, while two held that the sweepers were responsible for the crime. The evidence is reliable, stands unrebutted, and is overwhelming. In my judgment, there is no possible escape from the conclusion that all the respondents are guilty under S. 302, read with S. 149, I. P. C., of the murder of Bhagat Singh. I would, therefore, accept the appeal, convict them of the offence stated and sentence them to transportation for life.

Skemp, J.—I concur.

N.D. *Appeal accepted.*

A. I. R. 1928 Lahore 20 (1)

TEK CHAND, J.

Samman Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Cri. Rev. No. 181 of 1927, Decided on 14th August 1927, reported by the Dist. Mag., Amritsar, D/- 12th February 1927.

Criminal P. C., S. 514 — Magistrate's not holding Court on the date fixed—Order forfeiting amount of security is illegal.

When the Magistrate himself does not hold his Court on the date fixed for producing the accused, the accused are under no obligation to appear, nor are the sureties under any obligation to produce them, and therefore the amount of security cannot be forfeited for their non-production. [P 20 C 2]

Faqir Chand and *Har Pershad*—for Petitioner.

Raj Krishna—for the Crown.

Order.—On the 16th May 1925, one Pal Singh lodged a complaint under Ss. 497/498, I. P. C., against Saudagar Singh and Mt. Guro. Bailable warrants for Rs. 1,000 were issued against both Saudagar Singh and Mt. Guro for appearance in Court on the 2nd June 1925. These warrants were served on the 23rd May 1925 on which date Samman Singh and Kesar Singh, petitioners, executed bonds undertaking to produce the accused persons before the Court on the 2nd June 1925.

It appears that on the 2nd June 1925 the Magistrate Sir Arur Singh did not hold his Court but had gone to Gurdaspur. The reader made a note on the record that Pal Singh complainant was present but that the accused persons were absent; that the warrants had not been received back after service and that the case should come up on the 6th June 1925. The complaint was ultimately withdrawn by Pal Singh on receipt of Rs. 1,800 from Saudagar Singh.

The Magistrate Sir Arur Singh took proceedings under S. 514, Criminal P. C., against the two petitioners who had, as already mentioned, undertaken to produce them in Court on the 2nd June 1925 and ordered that the amount of the security be forfeited. On revision, the learned District Magistrate, Amritsar, had forwarded proceedings to this Court with a recommendation that the order of forfeiture be set aside. After hearing Mr. Fakir Chand for the petitioners and Mr. Raj Krishna for the Crown I am of opinion that the recommendation of the District Magistrate must be accepted and Sir Arur Singh's order of forfeiture set aside. The Magistrate did not hold his Court on the 2nd June 1925 the only date on which the petitioners had undertaken to produce the accused persons. When the Magistrate himself was not holding his Court the accused were under no obligation to appear nor the sureties under any obligation to produce them. I, therefore, accept the petition and set aside the order of the Magistrate forfeiting the amount of the security of Rs. 1,000 each furnished by each of the petitioners.

N.D. *Petition accepted.*

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* A. I. R. 1928 Lahore 20 (2)

BROADWAY AND AGHA HAIDAR, JJ.

Firm Ganesh Das Ishar Das—Defendants—Appellants.

v.

Ram Nath and *others*—Plaintiffs—Respondents.

F. A. No. 244 of 1923, Decided on 26th May 1927, from the decree of the 1st Cl. Sub-Judge, Delhi, D/- 18th December 1922.

* (*a*) *Contract — Construction — Contract of sale of goods—Goods to be supplied by different shipments in lots—Contract is indivisible one and limitation for suit for damages for non-delivery commences from the day of arrival of last shipment—Contract is not contingent one and sinking of goods on high seas is no defence.*

A contract for sale of goods provided: "We hereby sell to you goods detailed below at Karachi Godown according to the Karachi usage . . . As soon as the railway receipt and the invoice of these goods reach Delhi, you shall have to receive the same on payment of the price, failing which you shall be liable for interest and damage. *Details of Goods.* 1. thirty bales of Mulls, December shipment three lots . . . 25th February shipment two lots . . . 5/30, 60 days grace; 2. three cases of Mulls of December shipment, three lots, grace two months."

Buyers sued sellers for damages for non-delivery within three years of arrival of the last shipment but beyond three years of arrival of all previous shipments.

Held: that the contract was not an instalment contract, that the sellers could have delivered goods under it up to the last day of arrival of the last shipment and that the plaintiffs could not sue for damages for breach of contract until that date had expired and, therefore, the suit was not barred in respect of any

shipment: 26 *Bom.* 744 and 36 *Cal.* 617, *Dist*; *A. I. R.* 1925, *Lah.* 513; *A. I. R.* 1927, *Lah.* 92 and *A. I. R.* 1926 *Lah.* 404, *Foll.*

[P 23, C 2]

Held further: that the sellers had clearly and in unequivocal terms undertaken to deliver the goods to the buyers against payment as soon as the railway receipt and the invoice of those goods reached Delhi, and therefore the fact that the goods were sunk on the high seas or that the suppliers did not supply goods was no defence to a suit for damages for non-delivery: *A. I. R.* 1923 *P. C.* 54, *Foll.* [P 24, C 1]

(*b*) *Contract Act, S.* 51—*Suit for damages for non-delivery—Plaintiff must prove that he was ready and willing to pay for the price.*

In a suit for damages for non-delivery of the goods it is the duty of the plaintiffs to satisfy the Court that they were ready and willing with the money, that they had capacity to pay, or, at any rate, they had made proper and reasonable preparations and arrangements for securing the purchase money and that having thus complied with the requirements of law they demanded the goods on the due date from the defendants. It would then be incumbent upon the defendants to deliver the goods to the plaintiffs: *A. I. R.* 1925 *Mad.* 971; *A. I. R.* 1926 *Mad.* 1109 and *A. I. R.* 1926 *Lah.* 318, *Rel. on.* [P 26, C 2]

(*c*) *Contract Act, S.* 93—*Buyers to receive railway receipt and invoices on payment as soon as they arrive—Buyers must apply for delivery even when seller sends notice of arrival.*

Even where the contract provides that as soon as the railway receipts and the invoice of the goods contracted to be sold arrive, the buyers would receive the same on payment of the price, the buyers must apply for delivery although the seller gives notice of arrival. *First Appeal No.* 572 *of* 1923, *Foll.* [P 27, C 1]

Sardha Ram and *Mehr Chand Mahajan* —for Appellants.

Kishan Dial and *Jagan Nath Bhandari* —for Respondents.

Agha Haidar, J.—This is a defendants appeal arising out of a suit for damages for breach of contract. The plaintiff firm is the buyer and the defendant firm is the seller. The plaintiffs came into Court on the allegation that on the 24th November 1916, the defendants agreed to sell to them thirty bales of Mulls No. 35255 and three cases of Mulls No. 36556; that the goods were not ascertained at the time of the contract between the parties, nor were they ascertained afterwards; that the defendants delivered two bales of Mulls No. 35255 only to the plaintiffs and that in spite of the repeated demands the defendants did not deliver to the plaintiffs 28 bales of Mulls No. 35255 and three bales of Mulls No. 36556, with the result that the plaintiffs suffered a loss of Rs. 6,975. The cause of action according to the plaintiff, arose at Delhi on the defendants committing breach of contract and failing to give delivery of the above-mentioned 31 bales in the month of September, October and November 1917.

It would be convenient to quote here the relevant portions of the original contract dated 24th November 1916:

Compliments of Ganesh Das Ishar Das (seller) to Bhai Ram Nath Ram Sarup (buyer). We hereby sell to you goods detailed below at Karachi Godown according to the Karachi usage * * * * * As soon as the railway receipt and the invoice of these goods reach Delhi, you shall have to receive the same on payment of the price, failing which you shall be liable for interest and damage.

Details of Goods.

I. 30 (thirty) bales of Mulls No. 35255 at the rate of Rs. 5-7-6 (rupees five, annas seven and pies six only, December shipment three lots . . . . . 25 February shipment two lots . . . . 5/30 60 days grace.

II. 3 (three) cases of Mulls .No. 36556 at the rate of Rs. 5-4-0 (rupees five and annas four only) of December shipment, three lots, grace two months 3/33.

The defendants after reciting the terms of the contract dated the 24th November 1916, pleaded that it was agreed between the parties that on the arrival of the railway receipt and the invoice of the goods at Delhi, the defendants on receipt of payment of price would give delivery of the goods to the plaintiffs. They also pleaded that the goods were subsequently ascertained. They admitted that on the arrival of the railway receipt and the invoice the plaintiffs took delivery of two bales of Mulls No. 35255 on payment of their price. They give details of the sinking of 24 bales of the two numbers of Mulls in suit and point out that one bale was not received by them from their sellers and, therefore, claim to be exonerated from all liability as regards 25 bales. They further urge that they gave arrival notices of eight bales on various dates to the plaintiffs out of which two only were taken delivery of by the plaintiffs and they state that one bale had been lying at the Allahabad Bank since the 22nd December 1917, without the plaintiffs taking delivery of the same. In their additional pleas the defendants raised the plea of limitation and urged that if there was breach of contract on the part of the defendants at all, it was committed in the months of May and June 1917, and, as the suit was brought more than three years after the breach, it was barred by time. They also stated that the plaintiffs suffered no

damages and that as the railway receipt and the invoices of the goods were not delivered to the defendants by their sellers the plaintiffs were, therefore, not entitled to get the goods. The learned Senior Subordinate Judge held that the suit was within time. And, although the plea was not clearly taken on the pleadings, the learned Senior Subordinate Judge with the consent of the counsel for the parties, raised the issue:

whether the plaintiffs were ready and willling to perform their part of the contract.

He gave a finding on this issue in favour of the plaintiffs. He also found that 177 bales had been sunk on the high seas; but he held that it could not be said that goods relating to the contract between the parties had been sunk as the goods were never ascertained or appropriated. He also found that the contract was not contingent one and, therefore, the defendants were bound to deliver the goods on due date whether they received them from their sellers or not. Lastly, he held that the defendants were not absolved from liability if they did not receive railway receipts and invoices from their sellers; in other words, he held that they were bound to supply the goods in any event. The rest of the judgment is not material for the purposes of this appeal. In the end he gave a decree to the plaintiffs for Rs. 3,482-13-0 and dismissed the plaintiffs' claim as to the balance.

The defendants came up in appeal to this Court challenging the findings of the Courts below as regards damages awarded against them, and the plaintiffs-respondents filed cross-objections under O. 41, R. 22, Civil P. C., complaining against their suit not being decreed in full.

The case was argued at considerable length by the learned counsel for the parties. A number of pleas were taken in the memorandum of appeal, but it is not necessary to discuss them at any length. On behalf of the appellants it was urged that barring two bales only, the rest of the claim was time barred. The argument is based upon the various due dates as worked out by Mr. Sardha Ram, the learned counsel for the defendants-appellants, in the light of a certain memorandum described as statement A which is printed at p. 8 of the supplementary paper book. He says that the December shipment reached Karachi on the 8th April 1917, and that allowing four days for the journey between Karachi and Delhi the date of arrival in Delhi was the 12th April 1917. In the same way, about the January shipment the date of arrival at Delhi according to him would be the 21st May 1917, and as to the February shipment the date of arrival in Delhi would be the 1st May 1917. It is only as regards the March shipment consisting of two bales only which reached Delhi on the 12th September 1917, that, according to Mr. Sardha Ram, the claim was within time, since the present suit was brought on the 19th July 1920. It may be mentioned that the statement A deals with Mulls Nos. 35255 only, because Messrs. Ralli Brothers, whose agent prepared the said statement A, are the sole importers of Mulls No. 35255 and not of Mulls No. 36556.

Mr. Sardha Ram's argument on this part of the case is that every date of the arrival of a particular instalment of goods at Delhi constituted the "due date" and default on the part of the defendants on such due date gave a separate cause of action to the plaintiffs and as the plaintiffs brought the present suit more than three years after the dates, worked out as above, the suit was time barred in respect of all the instalments with the exception of the two bales of the March shipment. The point in controversy is not free from difficulty, because the appellants' contention finds some support from the reasoning contained in two cases at least. *Jagmohandas Vurjiwan Das* v. *Nusserwanji Jehangir* (1) was quoted on behalf of the appellants. In this case the defendants sold to the plaintiffs 1,000 tons of coal, shipment January to May, at the rate of 200 tons monthly. There was a breach, and the buyers sued the sellers for damages. It was held that the contract was for delivery in monthly shipments and as the coal took about four weeks to arrive at Bombay after shipment, the dates for delivery under the contract would be February to June, and damages should be assessed in respect of each default and on the basis of the stipulated instalments. *Cooverjee Bhoja* v. *Rajendra Nath Mukerjee* (2) was also cited on behalf of the appellants. Here the contract was to deliver 5,000 tons of manganese ore, 500

(1) [1902] 26 Bom. 744=4 Bom. L. R. 504.
(2) [1909] 36 Cal. 617=2 I. C. 831.

tons before the 31st October 1906, 1,000 tons before the 30th November 1906, 1,500 tons before the 31st December 1906, and the remaining 2,000 tons to be completed and delivered before the 15th February 1907. It was held that the contract was in fact a set of distinct contracts and on each period, when no delivery was made, there was a cause of action for damages for each breach.

It may be mentioned that in none of these two cases there was any question of limitation involved and the Courts treated each default as a distinct breach of contract for the purpose of assessing damages.

On behalf of the respondents at least three cases of the Lahore High Court have been quoted which seem to support their contention.

In *Phul Chand Fateh Chand* v. *Chhote Lal Amba Parshad* (3) a suit for damages was brought by the buyer for the breach of contract by non-delivery of goods against the defendant, seller. The defendant pleaded that qua certain bales the suit was time barred. It was held that the contract was an indivisible one and as the arrival of the last shipment under the contract did not take place till within three years of filing the suit, the claim was within time as to all the bales.

This case was followed in *Firm Amba Parshad Gopi Nath* v. *Firm Jawala Dat Ram Kanwar* (4). In this case also the buyer brought a suit against the seller for damages for breach of contract by non-delivery. The contract was for eleven bales of Mulls, November (1916) shipment, four lots, sixty days grace, delivery of goods to be taken against payment on arrival of the railway receipt. November shipment, four lots, meant that the goods were to be shipped in four monthly lots commencing from November 1916, allowing two months grace and four months for transit from England to Karachi and one month for their conveyance from Karachi to Lahore. The due date for the first lot was calculated to be somewhere at the end of June 1917. The suit was brought on the 15th July 1920. The lower appellate Court held that the suit was time barred as regards the first lot of goods. It was held on the authority of *Phul Chand Fateh Chand* v. *Chhote Lal Amba Parshad* (3) that the contract was an indivisible one and that the due date did not arrive until the last shipment under the contract reached Karachi.

Firm Chhota Lal-Amba Parshad v. *Firm Basdeo Mal Hira Lal* (5) was decided by a learned Judge of this Court sitting singly. This was also a suit by a buyer against a seller for damages for non-delivery of goods. The contract was for five bales of white mulls, December shipment, three lots, 60 days grace, payment against railway receipt and invoices. The lower appellate Court held that the suit as regards the first shipment was time barred as the due date of December shipment expired on the 30th June 1917, and the suit was instituted on the 20th July 1920. It was held that a contract such as the present was not an instalment contract, that the defendants could have delivered goods under it up to the last day of arrival of the last shipment and that the plaintiffs could not sue for damages for breach of contract until that date had expired. It may be noted that in this case also, March shipments were arriving until September, so that the defendants could have shipped the goods up to March 1917 at the latest. To me the Lahore cases seem to be more in point because they all deal with the question of limitation and the terms of the contract in the last two cases seem to bear a family resemblance to the terms of the contract Ex. P-1 (a) which forms the basis of the present suit. Following these cases I hold that the suit was within time and that no portion of the claim is barred by limitation.

On behalf of the appellants it was further argued that the contract may be deemed to have been cancelled in respect of the 24 bales which were sunk and also as to one bale which was not delivered to the plaintiffs by their sellers.

This argument does not appeal to me. There was no condition in the contract Ex. P-1 (a) against a contingency such as the sinking of the vessels on the high seas by the enemy action. In the absence of any specific provision as regards sinkage, there was no clause in the contract that if the goods were not available for any reason whatsoever, the plaintiffs (buyers) should have no claim for damages. On the other hand the defendant had clearly and in unequivocal terms

(3) A. I. R. 1925 Lah. 513.
(4) A. I. R. 1927 Lah. 92.
(5) A. I. R. 1926 Lah. 404.

undertaken to deliver the goods to the plaintiff against payment as soon as the railway receipt and the invoice of those goods reached Delhi. This point is covered by a case reported as *Hurnandrai Fulchand* v. *Pragdas Budhsen* (6). In that case the defendant entered into a contract with the plaintiff to sell to the plaintiffs 864 bales of dhotis manufactured by certain named mills. The contract was that these bales were to be taken delivery of as and when the same may be received from the mills. The seller could only deliver part of the goods owing to the mills failing to manufacture or deliver the balance to the defendant (seller). The mills had in the meantime been engaged in executing certain Government orders during the days of the Great War. It was held that the plaintiff (buyer) was entitled to recover damages from the seller, their Lordships observing that the contract was for a fixed quantity, and as less than that quantity was delivered within the time fixed, the seller must find in the contract some matter of excuse or discharge otherwise he must pay damages. In view of this authority I need not discuss the cases cited by Mr. Sardha Ram in the course of his arguments. I, therefore, hold that in spite of the sinkage and the non-delivery of one bale by the defendant's sellers to the defendant the latter would still be liable for not supplying the goods contracted for to the plaintiffs.

But the case does not end here and there are still difficulties in the plaintiffs' way which in my opinion are insurmountable. Ex. D-1 dated the 2nd May 1917, is a letter written by the defendants to the plaintiffs to the effect that two bales of Mulls No. 35255 had reached Karachi. This letter is followed by Ex. D-5 dated Delhi the 18th June 1917, wherein the defendants wrote to the plaintiffs as follows:

"We beg to intimate that the railway receipt and invoice of two bales Mulls No. 35255 on your account and risk has arrived here. Please pay for and take up railway receipt immediately. Otherwise nine per cent. interest will be charged.

Exhibit D-4, dated the 14th June 1917, is an intimation of the fact that one case of Mulls No. 36556 was lying at the Allahabad Bank since the 22nd February 1917. The plaintiffs were asked to take delivery of the same on payment within ten days. This was followed by another reminder Ex. D-6, dated Delhi the 18th June 1917, which says:

Please note that so far you have not taken the delivery of the above (one case Mulls No. 36556), we therefore ask you to take its delivery within the limit of our notice, otherwise we shall act as per our notice.

Exhibit D-7 dated Delhi the 20th June 1917, is a letter written by the defendants to the plaintiffs in the following terms:

We beg to intimate that the railway receipt and invoices of three bales Mulls No. 35255 on your account and risk has arrived here. Please pay for and take up the railway receipt immediately, otherwise nine per cent. interest will be charged.

Then we come to the important Ex. D-9, dated Delhi the 7th July 1917. This is a letter from the defendants to the plaintiffs in the following terms:

We beg to intimate that the railway receipt and invoice of two bales Mulls No. 35255 on your account and risk has arrived here. Please pay for and take up railway receipt immediately, otherwise nine per cent. interest will be charged.

Lastly we come to Ex. D-11, dated Delhi the 17th September 1917. This is the letter written by the defendants to the plaintiffs re. two bales white Mulls No. 35255. It is in the nature of a reminder to Ex. D-9 already quoted and is in the following terms:

Please pay for and take delivery of the above goods within three days from the date hereof, otherwise we shall consider the goods as cancelled.

We find that the plaintiffs paid a total sum of Rs. 1,765 on the 24th November 1917, and took delivery of these two bales white Mulls No. 35255, mentioned in the last two Exs. D-9 and D-11.

Thus it would appear that with the exception of two bales the subject-matter of Exs. D-9 and D-11 noted above, the plaintiffs in spite of various intimations and reminders sent to them by the defendants did not come forward with proper tender of money with a view to obtain delivery of the goods. On the contrary we find at least four letters which go to show that the plaintiffs were not "ready and willing" to perform their part of the contract by tendering the amount due by them under the contract to the defendants. I refer to Ex. P-9 dated the 30th June 1917, Ex. P. W. 13/2, dated the 12th July 1917, Ex. E-4 (a) dated the 18th July 1917, and Ex. P. W. 13/4 dated the 31st July 1917. Reading these letters the impression that is left upon one's

(6) A. I. R. 1923 P. C. 54=47 Bom. 344=50 I. A. 9 (P. C.).

mind is that they are highly disingenious and that the plaintiffs were simply creating evidence on their behalf in their own books, e. g., in Ex. P. W. 13/2 dated Delhi the 12th July 1917, they add by way of postcript to the letter:

> Yesterday you refused to accept payment we sent to you. Money is in deposit and you are responsible for interest on it.

Again in Ex. P-4 (a) dated the 18th July 1917, (Re. 7 bales of Mulls No. 25255 and one bale of Mulls No. 36556) the plaintiffs write:

> We sent money to you many a time but you did not receive it nor did you give delivery of the goods. Your money is lying in the trust with us. Please write to us where to deposit the money. Should we send it again to your shop. Otherwise we shall put the matter in the hands of a vakil.

Then there is a postcript:

> If you do not give delivery of the goods we shall claim from you profits at the rate of Re. 1-8-0 per piece.

Exhibit P. W. 13/4, dated the 31st July is as follows:

> Please receive payment for above and give delivery of the above seven bales within three days, failing yours the matter will be handed over to proceed against you legally.

Ishar Das a member of the defendant firm, was examined in the case on the 23rd October 1920, before the settlement of issues. He says:

> We gave arrival notice of seven bales. Plaintiffs paid for two bales only. Plaintiffs never brought money to us. * * * We did not inform the plaintiffs that goods purchased from certain persons were being sold to them. We afterwards told them in May, June and July 1917 that we have purchased these goods from Jai Narain Bij Raj and G. S. Bhargo. We expressly told them that these goods would be delivered to them.

Ishar Das was again examined as a witness on the 30th October 1922, and it is significant that the plaintiffs did not cross-examine him as regards contents of the letters Ex. P. W. 13/2, Ex. P-4 (a) and Ex. P. W. 13/4 in which the plaintiffs evidenced so much solicitude to pay the money to the defendants. The result is that the plaintiffs have completely failed to prove that they were " ready and willing " to pay the price of at least five bales of Mulls of which they had received arrival notices.

Now the question is whether the plaintiffs were " ready and willing " to perform their part of the contract under S. 51, Indian Contract Act, as regards all the 31 bales including the five bales already mentioned. The law on the subject is clearly laid down in S. 51, Indian Contract Act, which is as follows:

> When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

We have to see whether the plaintiffs were ready to perform their reciprocal promise. I have already referred to Ex. P-9 dated the 30th June 1917, Ex. P. W. 13/2 dated the 12th July 1917, Ex. P-4 (a) dated the 18th July 1917. and Ex. P. W. 13/4 dated the 31st July 1917. These letters are of a very suspicious character and as already observed it is a significant fact that the contents of these letters were not put to Ishar Das, a member of the defendant firm while he was in the witness box before the Court. The evidence of the plaintiff Ram Sarup does not seem to be a frank and a straigthtforward statement either. He says:

> I was ready and willing to take delivery of the goods. Defendants were to give me arrival notice and I was to pay for them on its receipt. I was given delivery of two bales alone on Katak Sudi 10-1974, of Mulls No. 35255 The delivery of the other bales was not made. Arrival notice of eight was given (1 of No. 36556 and seven of 35255). I sent money several times through my man and I myself went to their shop but they did not receive it.

The man who is supposed to have taken the money to the defendant has not been produced, and I do not believe that such a man ever existed. It would have been easier and perhaps more business like if the plaintiffs had deposited the money in some well-known Bank at Delhi and then asked the defendants to deliver the goods against payment by the Bank. They did nothing of the kind and instead of that wrote the four letters which have already been animadverted upon. It is true that he says that in " these days " the balances were not below Rs. 10,000 or so. But this is entirely vague, and we do not know what period was meant here. All that we know is that the plaintiffs paid the price of the two bales of Mulls No. 35255 only on the 24th November 1917, although they had received intimation in respect of the same on the 7th July 1917, followed by a peremptory reminder on the 17th September 1917. In this connexion it may be noted that the four letters covered a period beginning from the 30th June 1917 and ending on the 31st July 1917. Whether the defendants were in a

position to supply the goods, having regard to the sinkages, is not material seeing that Ishar Das on solemn affirmation on the 23rd October 1920 stated:

> Plaintiffs never brought money to us, We sent intimation of loss of about 22 bales. We did not inform the plaintiffs that goods purchased from certain persons were being sold to them. We afterwards told them in May, June and July 1917 that we have purchased these goods from Jai Narain Bij Raj and G.S. Bhargo. We expressly told them that these goods would be delivered to them.

Ishar Das was cross-examined on the 30th October 1922 on this point, and he repeated and amplified the above statement.

Having regard to the evidence on the record and also to the fact that the plaintiffs did not even condescend to reply to the arrival notices of the five bales, it does not stand to reason that the plaintiffs were ready and willing to make the necessary payment against delivery. The phrase "ready and willing" has from time to time been construed by the Courts and its meaning and intendment are well understood.

In *Shriram Rupram* v. *Madan Gopal Gowardhan* (7) there was a suit for damages for breach of contract and non-delivery of goods on the part of the defendant-seller. It was held that the plaintiff was entitled to a decree under the "ready and willing" clause in S. 51, Indian Contract Act, even when no tender was actually made; but the plaintiff-purchaser, in view of the rising market, was ready and willing to carry out the bargain on his part and, further, proved that he had made preparations with the object of having the money ready in hand. In the present case we do not find that the plaintiffs made any preparations whatsoever with the object of having the money ready in hand for payment to the defendant. The case reported in *G. K. Chengarasvelu* v. *A. Vankanna & Sons.* (8) is also very instructive seeing that it was decided on the authority of the well-known case of *Morton* v. *Lamb* (9). This case lays down that when a contract relates to sale of goods, the plaintiff, if a buyer, must allege and prove that he was ready and willing to pay for the goods. In a suit for damages by the buyer for breach of contract, by non-delivery of goods, it was found that the plaintiff did not tender the price and that the defendant (sellers) was also not ready to deliver the goods. It was held that the suit must fail, as the plaintiff failed to prove that he had been ready and willing to pay for the goods.

In *Lakshmikantham* v. *V. Narayanaswami Iyer* (10) the plaintiff, buyer, sued the defendant-seller, for breach of contract and non-delivery of goods. The plaintiff did not show that the defendant was not in a position to deliver goods and that the plaintiff was ready and willing to pay the balance of the price. It was held that the plaintiff had to go to the defendant with the money and the defendant had to deliver the goods to him and the plaintiff cannot excuse himself by saying that the defendant did not possess the goods, for the defendant could have got the goods from elsewhere. Hence plaintiff would not be entitled to damages.

There is also a case of our own Court reported as *Kanwar Bhan Sukha Nand* v. *Ganpat Rai Ram Jiwan* (11). In that case the plaintiff, seller, sued the defendant, buyer for breach of contract and damages. The defence of the buyer was that the plaintiff was not ready with the goods. It was held that it was not necessary for the plaintiff, seller, to prove that on the due date he had the goods actually in his possession. It is sufficient if he is able to prove that he had control of the requisite goods or that he had the capacity to deliver them to the purchaser when called upon to do so, i.e, that he was in a position to fulfil his part of the contract on the due date on a demand being made by the purchaser.

The result of these authorities is that in a suit for damages for non-delivery of the goods it is the duty of the plaintiffs to satisfy the Court that they were ready and willing with the money, that they had capacity to pay, or, at any rate, they had made proper and reasonable preparations and arrangements for securing the purchase-money and that having thus complied with the requirements of law they demanded the goods on the due date from the defendants. In such a case the position of the plaintiffs would be secure and it would then be incumbent upon the defendants to deliver the goods to the

(7) [1903] 30 Cal. 865=8 C. W. N. 25=5 Bom. L. R. 483 (P. C.).
(8) A.I.R. 1925 Mad. 971.
(9) 4 R. R. 395=7 Term Rep. 125.
(10) A. I. R. 1926 Mad. 1109.
(11) A. I. R. 1926 Lah. 318=7 Lah. 442.

plaintiffs. The defendant Ishar Das has stated on oath that, if the money had been forthcoming, they would have purchased similar goods in Delhi market for the plaintiffs. My finding, therefore, is that, having regard to the phrase "ready and willing", as it occurs in S. 51, Indian Contract Act, the plaintiffs' suit must fail.

It was also argued on behalf of the defendants-appellants that the plaintiffs ought to have applied for delivery under the provisions of S. 93, Indian Contract Act. To this the plaintiffs replied that, under the terms of the contract, it was not necessary for them to make a formal application, seeing that the contract provided that as soon as the railway receipts and the invoice of the goods reached Delhi the plaintiffs would receive the same on payment of the price. The appellants, however, urged that there is authority of an unreported case of this Court (*First appeal No. 572 of* 1923, *decided on 28th October* 1925) which lays down that even if the seller gives notice of arrival of goods, the buyer must apply for delivery. Now, when the market was stable the defendants gave arrival notices of eight bales to the plaintiffs in June 1917. But the market began to rise in July and the plaintiffs rely upon a somewhat suspicious letter of theirs (Ex. P. W. 13-4) as an application for delivery of the seven bales of which the defendants had already given arrival notices. It is moreover significant that the plaintiffs were able to take delivery of only two bales on payment on a date as late as the 21th November 1917, and that too long after the intimation and the reminder had been sent to them by the defendant. Therefore the plea of the appellants based on the provisions of S. 93, Indian Contract Act is good and must prevail.

Having regard to all the circumstances of the case and the evidence on the record I hold that the plaintiffs were neither "ready and willing" to perform their part of the contract as required by S. 51, Indian Contract Act ; nor did they make a proper application for the delivery of the goods in suit as contemplated by S. 93.

This being so, I allow the appeal and, setting aside the decree of the Court below, dismiss the plaintiffs' suit with costs.

The cross objections filed on behalf of the plaintiffs-respondents under O. 41, R. 22, Civil P. C., were not pressed, and having regard to the order which I have made, it is not necessary to say anything about them except that they must fail.

Broadway, J.—I concur in accepting the appeal and dismissing the plaintiffs' suit with costs throughout. The cross objections are also dismissed.

G.B. *Appeal allowed.*
Cross-objections dismissed.

A. I. R. 1928 Lahore 27

ADDISON AND SKEMP, JJ.

Emperor—Appellant.

v.

Muhammad Shafi — Accused—Respondent.

Cri. A. No. 811 of 1926, Decided on 24th March 1927, from the order of the 1st Cl. Magistrate., Lahore, D/- 14th May 1926.

Punjab Municipal Act, S. 228—*Authority.*

A general authority can be given without naming each accused, 22 *All.* 123 *Rel. on*: **A.I.R. 1924 Lah. 80, Overruled.** [P 28, C 1]

C. H. Carden Noad—for the Crown.
Gullu Ram—for Respondent.

Skemp J.—This is an appeal by the Crown against the order of a Magistrate acquitting the respondent of an offence under S. 78, Punjab Municipal Act. The Magistrate did not go into the merits, but followed *Gulzar Jan* v. *Emperor* (1) Wherein

He said

it is laid down that the authority to prosecute must contain the full particulars of the person to be prosecuted.

These particulars were not given in this case. It is contended on behalf of the Crown that they are not necessary.

Gulzar Jan v. *Emperor* (1) is a single Bench judgment decided, not after hearing arguments, but on revision in accordance with the recommendations of a District Magistrate which were accepted by the learned Judge without discussion. The District Magistrate had recommended that the conviction should be set aside on two grounds. It is the second of these which is attacked in this appeal. What the District Magistrate said in this connexion was as follows ;

In explanation under S. 228, Municipal Act, it is provided that the authority in all cases

(1) A I. R. 1924 Lah. 80=4 Lah. 120.

must be in writing. This written authority is explained at p. 230 of the Act, edited by Hari Chand, M. A. LL. B. in his first edition of 1913. According to this explanation complete and full particulars of the person to be prosecuted should be given with the authority so given to the prosecutor. As this procedure was not adopted in this case hence the prosecutor who appeared in Court was not properly and legally authorized to conduct this case. Under these circumstances there remains no doubt that the prosecution of the appellant was not legal and under the strict sense of law.

The reference to page 230 of Lala Hari Chand's first edition of the Municipal Act is entirely erroneous ; there is no such statement in his book.

The explanation to S. 228 does not state that complete and full particulars of the person to be prosecuted should be given. It runs as follows :

The committee may authorize persons to make complaints or give information, without previous reference to the committee either generally in regard to all offences against this Act and the rules and bye-laws thereunder, or particularly in regard only to specified offences of a specified class. The person authorized may be authorized by office, if he is President, Vice President, Medical Officer of Health or Secretary of the Committee, or officer in charge of a police station, in other cases the authority must be personal. The authority must in all cases be in writing, and may at any time be cancelled by the committee.

It is clear from the words used that a general authority can be given without naming each accused. In *Powell* v. *The Municipal Board of Mussoorie* (2) the Allahabad High Court considered the effect of S. 69, North Western Provinces and Oudh Municipalities Act (15 of 1883) which is in the following terms:

A Court shall not take cognizance of an offence punishable under this Act, or the rules made under this Act, except on the complaint of the Municipal Board or of some person authorized by the Board in this behalf.

i. e. this, as far as the present purpose is concerned, substantially the same as S. 228, Punjab Municipal Act, but there is no explanation such as is quoted above. A Full Bench of six Judges unanimously held that this section conferred upon Municipal Board

the power to delegate generally their authority to make complaints in respect of Municipal offences

and the learned Chief Justice said at p. 129:

I can see no a priori improbability, no considerations of public policy which would make it unlikely that the legislature should entrust to a Municipal Board power to confer on other persons not only a specific authority to file a particular complaint, but a general authority to prosecute for Municipal offences, including authority to determine whether a prosecution is desirable. That the legislature itself regards such a power as one which may properly be given to a Municipal Board may be inferred from S. 186 Punjab Municipal Act, 1891, which is in terms practically indentical with S. 69, Act 15, 1883, but to which an explanation is appended providing that the committee may authorize persons to prosecute either generally in regard to all offences under this Act and the rules thereunder or particularly in regard only to specified offences or offences of a specified class.

The explanation to S. 186, Punjab Municipal Act 1891, has been amplified in the explanation to S. 228 of the present Punjab Municipal Act.

I would, therefore, hold that the reasoning in the second paragraph from *Gulzar Jan's* case (1) quoted above is erroneous and hence that the reason for acquittal given by the Magistrate is wrong. This point alone can be considered in the present appeal as no other was taken by the Magistrate. It is still open to the respondent to raise any other defence, technical or on the merits.

I would, therefore, accept the appeal, set aide the order of acquittal and direct the Magistrate to proceed with the trial in accordance with law.

Addison J.—I concur.

D.D. *Acquittal set aside.*

(2) [1900] 22 All. 123=(1900) A. W. N. 41 (F. B.).

A. I. R. 1928 Lahore 28

FFORDE AND TEK CHAND, JJ.

Firm Panna Lal Tassaduq Hussain—Plaintiff—Petitioner.

v.

Firm Hira Nand Jiwan Ram—Defendants—Respondents.

Civ. Rev. Petn. No. 604 of 1926, Decided on 9th February 1927, from the decree of the Small Cause Court Judge, Amritsar, D/- 19th June 1926.

Provincial Insolvency Act (1920), *S.* 28 (2)—*Suit against insolvent after adjudication is not permissible without leave of Court.*

No suit may be brought against an insolvment after adjudication without first obtaining the permission of the Court to bring that suit : *A. I. R.* 1924 *Nag.* 300, *Diss. from.*

[P 29 , C 2]

Kahan Chand—for Petitioner.

Duni Chand—for Respondents.

Referring order.—The plaintiff-petitioner on the 25th August 1925 instituted a suit against two defendants :

(1) Firm of Hira Nand Jiwan Ram and (2) Tassaduq Hussain for recovery of a certain sum of money due by defendant 1 to the plaintiff and defendant 2 jointly. Hira Nand proprietor of the Firm Hira Nand Jiwan Ram appeared and pleaded that the firm had been adjudicated insolvent as far back as 28th November 1922 and that the suit could not proceed without the permission of the insolvency Court. The defendant was directed to produce a copy of the order of Dera Ismail Khan Court adjudicating the defendant's firm insolvent and the plaintiff was also asked to make enquiry and if necessary obtain permission of the insolvency Court to continue the suit. At the next hearing, on the 1st May 1926 the copy of the order of the insolvency Court was not produced and the case was adjourned to the 19th June 1926. On that date again no copy of the order was produced as the record had been sent up from Dera Ismail Khan to the Judicial Commissioner's Court at Peshawar, but the statement of Hira Nand defendant, and of Kanhaya Lal pleader, who had been conducting cases on behalf of the receiver of the Firm Hira Nand Jiwan Ram was recorded and the Court held that the defendant firm had been adjudicated insolvent as alleged. On this finding the Court held that as under S. 28, Provincial Insolvency Act, a creditor whose debt is provable in insolvency cannot commence any suit or legal proceeding against the insolvent without permission of the insolvency Court and as the plaintiff had failed to obtain such permission the suit was dismissed with costs.

The plaintiff has preferred a petition for revision to this Court and on his behalf it has been contended that S. 28, Provincial Insolvency Act, has no applicability to a suit filed by a creditor, who has instituted a suit in ignorance of the adjudication order and consequently without obtaining the permission of the insolvency Court, even though the order of adjudication had been passed before the suit was instituted. In support of this contention the plaintiff's learned counsel has quoted a ruling of the Judicial Commissioner's Court at Nagpur reported in *Haji Umar Sharif* v. *Jwala Prasad* (1), which has been cited apparently without disapproval, by Rustomji, Gosh and other commentators on the Provincial Insolvency Act.

As at present advised I feel grave doubts as to the correctness of this ruling and am not prepared to follow it, but as the point involved is one of general importance and is likely to affect a large number of cases, I think it proper to refer the case to a Division Bench. The office is directed to fix this case for actual hearing at a very early date and to place it before a Division Bench of which I am a member. Counsel to be informed.

Fforde, J.—This is an application to revise an order of the Judge of the Small Cause Court at Amritsar dismissing the plaintiff's suit on the ground that the defendant had been adjudicated insolvent sometimes prior to the institution of the suit and leave had not been obtained, in accordance with S. 28, Provincial Insolvency Act, to commence the suit.

The facts are sufficiently stated in the order of reference and need not be repeated. The petitioner relies upon the case of a decision of the Additional Judicial Commissioner of Nagpur, in which it was held that where a suit had been filed against an insolvent in the civil Court in ignorance of the fact of an adjudication order having been passed, and, consequently, without obtaining the permission of the insolvency Court, a civil Court can under S. 29 of the Act permit the suit to be continued on such terms as it might think fit if it appear that the suit was brought in ignorance of the order of adjudication. With this construction of the statute I find, myself, with all respect to the learned Additional Judicial Commissioner, quite unable to agree. S. 28, Provincial Insolvency Act, which is in effect the same as S. 7, English Bankruptcy Act, 1914, expressly prohibits any suit or other legal proceedings being commenced except with the leave of the Court and on such terms as the Court may impose, that is to say, no suit may be brought after adjudication without first obtaining the permission of the Court to bring that suit. S. 29 deals with pending suits and provides that on proof of an adjudication order made against the debtor, the Court may stay or allow to continue a pending suit upon such terms as it may think fit to impose. The present suit was instituted some three years subsequent to the

(1) A. I. R. 1924 Nag. 300=21 N. L. R. 9.

adjudication ordered. No leave of the Court had been obtained to bring these proceedings and consequently they are not maintainable.

In my opinion the order of the Judge, Small Cause Court, is correct and this application in revision must, therefore, be rejected.

Tek Chand, J.—I agree. My opinion is given in the referring order, which should be read as a part of this judgment.

D.D. *Appeal dismissed.*

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ADDISON AND SKEMP, JJ.

Wazir Chand—Accused—Appellant.

v.

Emperor—Opposite Party.

Cri. Appl. No. 139 of 1927, Decided on 24th March 1927.

(a) *Evidence Act, Ss.* 133 and 114, *Ill.* (b)—*Approver's evidence must be corroborated also as to the identity of accused.*

The evidence of an approver must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner : *A. I. R.* 1922 *Lah.* 1 ; *R.* v. *Baskerville* (1916) 2 *K. B.* 658 ; and *R.* v. *Francis Stubbs* (1855) 25 *L. J. M. C.* 16, *Foll.* [P 31 C 2]

(b) *Evidence Act S.* 133—*Standard of corroboration.*

It is very difficult to vary the standard of corroborative proof required in the case of various approvers. Tender age is no ground for applying lenient standard. [P 31 C 1]

Rustomji for *Chaman Lal*—for Appellant.

Raj Krishna for *Govt. Advocate*—for the Crown.

Skemp, J.—Wazir Chand has been convicted by the learned Sessions Judge of Rawalpindi of murdering one Ramji Mal, and Deputy Ram of abetting the murder. Both have been sentenced to death. They have appealed ; Wazir Chand through Mr. Rustomji and Deputy Ram through Mr, B. R. Puri and the sentences are also before us for confirmation.

The theory of the prosecution is to be found in the statement of an approver named Ganda Mal and is as follows : Wazir Chand was working as the partner of Ramji Mal in a halwai's shop in Rawalpindi city. He had lost all he possessed in gambling and, therefore, conspired with Deputy Ram to murder Ramji Mal and take away all his property : he thought that detection would be rendered more difficult because Ramji Mal had no relations. Ganda Mal who belongs to the same village as Deputy Ram, was brought into the affair.

Wazir Chand went to Peshawar and bought poison there, returning on the morning of the 20th February 1926, and telling the other conspirators that he had bought arsenic. The following evening, i.e., 21st February, he put the arsenic in milk which Ramji Mal was in the habit of drinking every night. At 10 p. m. Ramji Mal started vomiting and complained of pain and the approver who was lying on the same charpoy went to fetch Wazir Chand. Ramji Mal died at midnight. After his death Wazir Chand with the help of the approver put his naked body in a box with some sheets of newspaper at the bottom and covered it with an old cloth. In the morning, i. e., on the 22nd February, they took the box to Rawalpindi railway station, got it placed in a train and left it there.

Wazir Chand intended to open a halwai's shop in Khour with the utensils and stock in trade of the murdered man ; and with this in view after they had been packed at the shop by all three conspirators Deputy Ram took the packages on a hand-cart to Rawalpindi railway station and booked them in the name of Wazir Chand to Fatehjang. Thence Wazir Chand conveyed them on tongas to Khour. However as Wazir Chand had not yet taken a shop he left the utensils with his uncle by marriage Ram Diyal in the neighbouring village of Hamadial or Amdal and took the other goods to his own village Varwal.

When No. 20 Down train from Rawalpindi arrived in Lahore at 7-15 p. m. on the 22nd February, a box was noticed on the upper berth of a third class compartment, and ultimately the Sub-Inspector of railway police, P. W. 2, had it removed. The lid of the box opened of itself and disclosed the body of an old man. The body was photographed and sent for post mortem examination which was carried out on the 23rd February ; the medical witness thought from the symptoms he observed that death was due to arsenical poisoning and sent portions of the internal organs for chemical analysis : arsenic was discovered in each of them.

Taking the head of the corpse and also photographs of the body the sub-inspector

proceeded to Rawalpindi where they were identified to be those of Ramji Mal. It may be added that in the box were found sheets of a newspaper called the News of the World, and copies of the same paper were found in Ramji Mal's shop. In Ramji Mal's shop were also found a khaki warm coat, a towel, a cotton blanket and a piece of gunny bag, all soiled with vomit, a brick bearing marks of vomited matter and vomited matter mixed with earth. All these clothes and other substances were found to contain arsenic. Therefore, it is proved beyond doubt that the body discovered at Lahore was that of Ramji Mal and that he died from arsenical poisoning. (After dealing with evidence and holding that it was proved that Wazir Chand worked as Ramji Mal's partner : that he took a box, subsequently found to contain the body, to the Railway Station ; that he removed Ramji Mal's entire stock of trade and left it either in his own house or with his relatives His Lordship proceeded further. In my opinion this is ample to corroborate the evidence of the approver against him, and I would reject his appeal and confirm the sentence of death.

The next question is whether Deputy Ram's abetment is proved. The learned Sessions Judge wrote :

An approver's statement if believed, need not necessarily be corroborated though as a general rule corroboration is required. In the present case the approver's statement carries truth on the face of it, and is, I consider, to be believed in itself and is corroborated as against Wazir Chand in almost every particular by evidence which there is no reason to disbelieve. There is also, in my opinion, sufficient corroboration as against Deputy Ram also to show that, though he took no actual part in the murder itself, he is guilty of its abetment.

Now, there are no doubt cases in which it has been laid down that an approver's statement need not be corroborated. See for instance *The Delhi Conspiracy case* : [*Balmokand* v. *Emperor* (1)]; *Barkat Ali* v. *Emperor* (2); and *Emperor* v. *Nilakanta* (3) (the murder of Mr. Ashe, Collector of Tinnevelly). On the other hand, in the great majority of cases it has been held that an approver's evidence requires corroboration: see for instance the *Nankana Sahib's* case, *Narain Das* v. *Emperor* (4), where Mr. Justice Scott-Smith at p. 173, wrote :

We have given full effect to the maxim that the evidence of an accomplice must, as a rule, be considered untrustworthy unless it is corroborated in material particulars.

The law of India is the same in this respect as the law of England, and a recent authoritative pronouncement is found in *R.* v. *Baskerville* (5), in which Lord Reading, C. J., delivered a judgment on behalf of five Judges. He wrote (p. 665) :

We have come to the conclusion that the better opinion of the law upon this point is that stated in *R.* v. *Francis Stubbs* (6) by Parke, B., namely, that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner. The learned Baron does not mean that there must be confirmation of all the circumstances of the crime ; as we have already stated that is unnecessary. It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation to the crime.

Again at p. 667:

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particulars not only the evidence that the crime has been committed, but also that the prisoner committed it.

Now, the evidence against Deputy Ram is : (1). that he was found by the police on the 2nd March in company with Ganda Mal in the house of Deputy Ram's sister in Wazir Chand's village Varwal, (2) ; that he took part in the removal of Ramji Mal's goods. The witnesses are Karm Chand (P. W. 14) who states that on Tuesday, the 23rd February, Wazir Chand, accompanied by Deputy Ram and the approver, came and removed some bags of *gur* and other articles from Ramji Mal's shop ; and Punjab Singh, Fakir Ullah and Bal Mukand.

Criticizms must, however, be made as to the testimony of each witness. Karam Chand was not asked whether he knew Deputy Ram previously. Had this question been put, further questions would have arisen how did he know or how did he identify Deputy Ram. Bal

(1) [1915] 17 P. R. 1915 Cr.=246 P. L. R. 1915=28 I. C. 738=11 P. W. R. Cr. 1915.
(2) [1917] 2 P. R. 1917 Cr.=36 I. C. 861=18 Cr. L. J. 29.
(3) 35 M 247=22 M. L. J. 490.
(4) A. I. R. 1922 Lah. 1=3 Lah. 144.
(5) [1916] 2 K. B. 658=86 L. J. K. B. 28=60 S. J. 696=115 L. T. 453=80 J. P. 446=25 Cox. C. C. 524.
(6) [1855] Dears 555=25 L. J. M. C. 16=19 J. P. 760=7 Cox. C. C. 48=4 W. R. 85=1 Jur. (N. S.) 1115.

Mukund stated that he did not know Deputy Ram before, but subsequently the police brought Deputy Ram whom Bal Mukand identified. It is contended that if a police officer simply put Deputy Ram before Bal Mukand and said " Is this the man, " Bal Mukand would naturally reply in the affirmative. On the other hand, no reason has been shown why Bal Mukand should swear falsely. But the evidence of this witness clearly has less weight than if he had picked out Deputy Ram from among a number of other persons, as Ganda Mal picked out the tonga-wala Fatta and the railway porter Ali Muhammad.

The other two witnesses Punjab Singh and Fakir Ullah do not establish any connexion between Deputy Ram and the crime. Punjab Singh simply proves that about the time in question Deputy Ram engaged his hand-cart from the Landa Bazar to the railway station; and Fakir Ullah, that Deputy Ram brought some goods from a shop in the Landa Bazar which he loaded in the hand-cart and took to the railway station. The date, the identity of the shop and the goods are all unproved.

In my opinion the abetment of Deputy Ram is not sufficiently proved by this corroborative evidence. Recognizing this Mr. Raj Krishna, who represented the Crown argued that in the nature of things there could be no evidence of conspiracy to kill Ramji Mal and urged that as the approver was only eighteen years of age and had previously a good character, a more lenient standard should be given to his evidence than to that of most approvers. It is, however, very difficult to vary the standard of proof required in the case of various approvers. In my opinion the guilt of Deputy Ram is not established beyond doubt, and I would accept his appeal and acquit him.

Addison, J.—I concur.

R.D. *Order accordingly.*

A. I. R. 1928 Lahore 32

JAI LAL, J.

Rahella and *others* — Plaintiffs—Appellants.

v.

Wazira and *others*—Defendants—Respondents.

S. A. No. 191 of 1927, Decided on 9th June 1927, from the decree of the Dist. Judge, Hoshiarpur, D/- 18th October 1927.

(*a*) *Evidence Act, S.* 101—*Burden of proof.*

Where in a case for possession by ejectment of the defendants who, it was alleged, had taken forcible possession of the lands two years before the institution of the suit, it was expressly stated in the plaint that the defendants had no right whatsoever to dispossess the plaintiffs.

Held: that the burden of proving possession by the plaintiffs within 12 years of the institution of the suit was on them. [P 33 C 1]

(*b*) *Civil P. C., O.* 6, *R.* 17—*Amendment of plaint was not allowed in second appeal.*

Permission for amendment of the plaint so as to plead a different plea cannot be granted in the second appeal when the prayer was neither made in the first appeal nor even in the grounds of appeal to the second appellate Court. [P 33 C 1]

N. C. Pandit—for Appellants.

Faqir Chand—for Respondents.

Judgment.—This judgment will dispose of appeals 191—198 of 1927 as they all arise out of the same judgment of the District Judge of Hoshiarpur.

The appellants instituted the suits out of which these appeals have arisen for possession by ejectment of the defendants, who, according to the allegations made in the plaint, had taken forcible possession of the lands two years before the institution of the suits. It was expressly stated in the plaint that the defendant had no right whatsoever to dispossess the plaintiffs. The District Judge has held that on the allegations made by the plaintiffs in the plaint the burden of proving possession by them within 12 years of the institution of the suit was on them and they had failed to discharge this burden.

It appears that in the revenue records relating to these lands it is recorded that the lands belong to the plaintiffs, but that they are in possession of the defendants at any rate since 1911-12. It also appears that with regard to certain plots the entries in the revenue records of

1907-08 show that the defendants were in possession of those particular plots as tenants of the plaintiffs. It does not appear from the judgment of the learned District Judge to which particular plots these last entries relate; but in my opinion it is unnecessary to ascertain this in view of the fact that I agree with the conclusions of the District Judge that the burden was on the plaintiffs to establish the cause of action that they set out in their plaint. An ingenious argument has been addressed to me by the learned counsel for the appellants that the allegations contained in the plaint as to the dispossession of the plaintiffs by the defendants, properly interpreted, mean that, though the defendants were originally in permissive possession of the lands, it was two years before the institution of the suit that they denied the plaintiff's title to the lands, and, therefore, their possession became adverse as against the plaintiffs. I am unable to read the plaint in that manner. It clearly asserts that for the first time the defendants took the lands in suit two years before the institution of the suits. It is admitted by the learned counsel for the appellants that on that interpretation of the plaint the burden would be on the plaintiffs to prove that they were in possession of the lands within 12 years of the suit.

Finally the learned counsel asked me to allow him to amend the plaint so as to plead that the defendants were in permissive possession of the plaintiffs two years before the suits. This prayer is made in order to divert the burden of proof on the defendants in view of the entries in the revenue records. I am unable to accede to this prayer at this stage, considering that it was not made before the District Judge and is not even made in the grounds of appeal to this Court. I may mention that the view that I have taken is supported by a judgment of a Division Bench of this Court which is reported as *Mian Muhammad* v. *Sharaf Shah* [*L. P. A. No.* 57 *of* 1924, decided on 17th February 1925] and on which the learned Judge below has relied in support of his conclusion.

One more point needs mention, and that is the contention of the learned counsel for the appellants, that according to the entries made in the revenue records from the year 1912 onwards, the defendants are entered as tenants of the plaintiffs. In resisting this contention the learned counsel ignores the remark made in the last column of the entries which is to the effect that the possession is either on the ground of assertion of title or on account of encroachment made by the defendants. Properly interpreted, these entries merely mean that the defendants are in cultivating possession of the lands, but they do not mean that they are the tenants of plaintiffs or that they admit the right of the plaintiffs as to the ownership of the lands. On the other hand, read as a whole, the entries clearly mean an assertion of adverse title.

The result is that on a correct interpretation of the pleadings of the parties I must hold that the learned District Judge has rightly arrived at the conclusion that the burden of proving their possession within 12 years of the institution of the suit lay on the plaintiffs, and that they have failed to discharge this burden. The consequence is that I dismiss these appeals with costs.

N.D. *Appeals dismissed.*

A. I. R. 1928 Lahore 33

ADDISON, J.

Devi Dayal—Defendant—Petitioner.

v.

Narain Singh and *others*—Plaintiffs—Respondents.

Civ. Rev. Petn. No. 298 of 1926, Decided on 20th January 1927, from the decree of the Sub-Judge, Batala, D/- 8th February 1926.

(*a*) *Contract Act, S. 23—Grant of monopoly to sell vegetables by panchayat is opposed to public policy.*

Grant of a monopoly in favour of a person by a panchayat to sell vegetables in the village is opposed to public policy under S. 23: 28 *Mad.* 520, *Foll.* [P 34 C 1]

(*b*) *Limitation Act, S. 22—Necessary party added after limitation—Entire suit must be dismi sed.*

If a necessary party is joined as plaintiff or defendant after time for the suit has run out, the entire suit must be dismissed. [P 34 C 2]

(*c*) *Promissory Note—Suit on—Note in favour of Government—One member of panchayat cannot sue, but Government only can.*

The members of a panchayat cannot sue on a promissory note in favour of the Sircar daulatmadar through a member of the panchayat. Only Government can authorize a suit on such a promissory note. [P 34 C 2]

Arjan Das—for Petitioner.

Muhammad Din Jan—for Respondents

Judgment.—This suit was brought in the name of the Panchayat, Dharam Kot, which claimed the sum of Rs. 63 on a promissory note, dated the 25th May 1919, executed by the defendant. This panchayat is a self-constituted body without any legal powers and obviously it could not bring a suit: see p. 796, Mulla's Civil Procedure Code, 8th Edn. After the period of limitation had expired, the Small Cause Court Judge allowed the suit to be amended by striking out the name of the plaintiff, that is, the Panchayat Dkarm Kot, and by substituting the names of six persons, who allowed themselves to be members of this self-constituted body.

The plaintiffs' case was that they sold by auction to defendant the sole right to sell vegetables in the village for the sum of Rs. 84, Rs. 21 of which were paid by him while he executed a promissory note for the balance of Rs. 63. The defendant pleaded that the panchayat had no power to sell such a license, that he had not executed the promissory note in favour of the plaintiffs or in favour of the panchayat, and that the suit was barred by limitation. The Small Cause Judge, however, decreed the suit with costs and against this decision this revision has been admitted.

It was first contended that the creation of a monopoly in favour of the defendant to sell vegetables in the village was opposed to public policy under S. 23, Indian Contract Act, and that the agreement being void, the plaintiffs had no right to sue for the amount of the promissory note. There is clear authority for this proposition in *Somu Pillai* v. *Municipal Council, Mayavaram* (1). It was held in that case that even a properly constituted District Municipality had no power to create a monopoly in favour of one person. It was further held that any amount collected under this void agreement must be refunded. It follows, therefore, that the present suit should have been dismissed on the principle that the grant of the monopoly to the defendant was against the provisions of S. 23, Indian Contract Act, being in restraint of trade.

It is further contended that the suit was barred by limitation as the plaintiffs' names were only substituted after the suit was barred by limitation. This is also correct. There was no plaintiff at all until the plaintiffs' names were substituted after limitation had expired. A suit can only be brought in the names of all the members of an unregistered or unincorporated society. If a necessary party is joined as plaintiff or defendant after time for the suit has run out, the entire suit must be dismissed: see Rustomji's Law of Limitation, 3rd Edn. p. 191. It may be the case that I would not interfere in revision me rely because I hold that the suit was barred by limitation, but in the present case, as I have already shown, other considerations also enter.

In the third place it was contended that the panchayat or the members of the panchayat could not sue on the promissory note in question, as it was in favour of the Sircar daulatmadar through, Jat Mal, a member of the panchayat and not in favour of the panchayat or of the members of the panchayat. There seems to me also to be considerable force in this. There is no doubt that some members of the panchayat did grant the monopoly, on condition of payment of a certain amount, to the defendant, but the promissory note they took was not in their favour, but in favour of Government through one of their members. In my opinion only Government could authorize a suit on such a promissory note.

For the reasons given I accept this revision and dismiss the suit, but leave the parties to bear their own costs throughout.

R.D. *Revision accepted.*

(1) [1905] 28 Mad. 520.

A. I. R. 1928 Lahore 34

BHIDE, J.

Mohammad Khan—Accused — Appellant.

v.

Emperor—Opposite Party.

Cr. A. No. 476 of 1927, Decided on 2nd July 1927, from the order of the Sub-Divl. Mag. Chakwal, D/- 17th March 1927.

Criminal trial—Placing on the record mere copies of the evidence of witnesses recorded during the course of a trial relating to another charge against the same accused make the whole trial illegal.

A person was charged with two offences namely, under S. 307, I. P. C., and under S. 20,

Indian Arms Act. The witnesses in the two cases were more or less the same. The trying Magistrate recorded the evidence of the witnesses in the case under S. 307 and copies of the evidence of these witnesses were placed on the record of the case under S. 20, Arms Act, except the case of one witness who did not appear in the case under S. 307.

Held : that the procedure was illegal and the trial was vitiated. The general rule in the case of criminal trials is that there should be a separate trial with respect to each distinct offence. The object evidently is that the attention of the trial Court should be directed to the evidence relating to the charge under inquiry and irrelevant matter should be excluded. This object is not achieved but defeated by placing on the record mere copies of the statements of witnesses recorded during the course of a trial relating to another charge : *A. I. R.* 1924 *Lah.* 104, *Rel. on.* [P 35 C 2]

Nand Lal—for Appellant.

Edmunds—for the Crown.

Judgment.—The appellant Muhammad Khan has been convicted under S. 20, Indian Arms Act, and sentenced to rigorous imprisonment for seven years, including three months solitary confinement. Muhammad Khan was wanted by the police for two murders and was absconding since the year 1924. On the night of the 1st January 1927, information was received by the Sub-Inspector of Nila that Muhammad Khan was in his own house in the village Nila. The sub-inspector organized a raiding party and Muhammad Khan was arrested at his house. The house was then searched and a revolver and some cartridges were found concealed behind a gahi. On these facts Muhammad Khan was challaned under S. 20, Indian Arms Act.

A preliminary objection to the manner in which the trial was conducted in the lower Court was taken by Dr. Nand Lal who appeared on behalf of the appellant. Muhammad Khan was charged with two offences, namely, under S. 307, I. P. C. and under S. 20, Indian Arms Act. The witnesses in the two cases were more or less the same. The trying Magistrate recorded the evidence of the witnesses in the case under S. 307, I. P. C. and copies of the statements of these witnesses appear to have been placed on the record of the case under S. 20, Arms Act, except in the case of one witness, namely, Ibad Ali (P. W. 3) who did not appear in the 307, I. P. C., case.

It is contended by Dr. Nand Lal that this procedure was illegal and the trial is vitiated. The learned counsel for the Crown did not attempt to defend this procedure, but merely argued that the accused was not prejudiced thereby. It seems to me that the contention of Dr. Nand Lal is sound and the appeal must succeed.

It is not denied that the trials under S. 307, I. P. C. and under S. 20, Arms Act, ought to have been separate and this means that the evidence with respect to each charge should have been separately recorded. The general rule in the case of criminal trials is that there should be a separate trial with respect to each distinct offence, except in certain cases mentioned in Ss. 234, 235, 236 and 239, Criminal P. C., vide S. 233, Criminal P. C. The object evidently is that the attention of the trial Court should be directed to the evidence relating to the charge under enquiry and all irrelevant matter should be excluded. This object is not achieved but defeated by placing on the record mere copies of the statements of witnesses recorded during the course of a trial relating to another charge. In the present instance the statements of witnesses under S. 307, I. P. C., case include a good deal of matter which was really not relevant for the purposes of the charge under S. 20, Indian Arms Act. It has been laid down in *Allu* v. *Crown* (1) that

S. 537, Criminal P. C., only applies to errors, omissions or irregularites of a formal nature and does not cover a substantial departure from the mode of conducting criminal trials laid down by law.

In my opinion the present case comes under the latter category. I, therefore, accept the appeal and setting aside the conviction, direct the re-trial of the appellant on a charge under S. 20, Indian Arms Act, in accordance with law. The appellant will be transferred to the judicial lock-up pending the result of the re-trial.

N.D. *Appeal accepted.*

(1) A. I. R. 1924 Lah. 104=4 Lah. 876.

A. I. R 1928 Lahore 35

TEK CHAND AND AGHA HAIDAR, JJ.

Raj Mal—Plaintiff—Appellant.

v.

Harnam Singh and *others*—Defendants—Respondents.

S. A. No. 2038 of 1923, Decided on 29th June 1927, from the decree of the District Judge, Jullundur, D/- 1st June 1923

(a) *Punjab Custom (Power to contest) Act (2 of 1920), S. 6—Lineal male descendant of great-great-grand father of alienor only can contest an alienation.*

The Act has the effect of limiting the right to contest an alienation of ancestral land only to those persons who are descended in the direct male line from the great-great-grandfather of the alienor. [P 38 C 2]

(b) *Interpretation of Statutes—Statement of objects and reasons should not be looked to.*

It is well settled that in construing an Act of the legislature where the words are absolutely clear and unambiguous it is not within the province of a Court to look to the statement of the objects and reasons or to the proceedings of the council with a view to discover whether the words used mean something above and beyond what they say: 22 *Cal.* 788 (*P. C.*); *A. I. R.* 1920 *P. C.* 56 and *A. I. R.* 1922 *Lah.* 211, *Foll.* [P 38 C 2]

(c) *Interpretation of Statutes—Preamble and statute not co-extensive—Enactment clear and unequivocal—Enactment overrides.*

Where the enacting part of a statute is not exactly co-extensive with the preamble, the former, if expressed in clear and unequivocal terms, will override the latter, but if ambiguous or doubtful phraseology is used in the body of the Act, the preamble may be referred to, to resolve the ambiguity: *A. I. R.* 1919 *P. C.* 72 and 45 *Cal.* 343, *Foll.* (*English Law Considered*). [P 38 C 2]

H. D. Bhalla—for Appellant.

Jagan Nath Bhandari—for Respondents.

Tek Chand, J.—The suit out of which this second appeal has arisen, relates to land which originally belonged to one Mala Singh, who on the 6th April 1893, gifted it to his pichhlag son Hazara Singh, defendant 1. This gift was not challenged by the collaterals of Mala Singh, donor. On the 27th August 1920, by a registered sale-deed, the donee Hazara Singh sold the gifted land to Harnam Singh, Basant Singh and Chhajju, defendants 2 to 4. On the 29th July 1921, Raj Mal, who is a collateral of Mala Singh, donor, in the third degree, instituted the present suit, alleging that the land was ancestral of himself and Mala Singh, that on Hazara Singh donee's line becoming extinct it would revert to the plaintiff and that the alienation by Hazara Singh had been made without consideration and necessity. He accordingly prayed for (1) a declaration that the sale by Hazara Singh, donee, in favour of Harnam Singh and others shall not affect his reversionary rights after the death of Hazara Singh, or (2) in the alternative, a decree for possession by way of pre-emption.

The defendants inter alia pleaded that the plaintiff had no locus standi to maintain the suit for declaration and that the sale was for consideration and necessity.

The trial Court, finding the land to be ancestral of Raj Mal plaintiff and the donor Mala Singh, held that he was competent to contest the alienation by Hazara Singh donee and that the sale was without necessity. It accordingly decreed the claim for declaration, but gave no decision on the alternative claim for pre-emption. On appeal by the vendee, the learned District Judge held that the plaintiff had no locus standi to contest the sale under S. 6, Punjab Custom (Power to Contest) Act 2 of 1920, and that, therefore, the plaintiff's claim for declaration was not maintainable. He accordingly accepted the appeal and remanded the case to the trial Court for decision of the claim for pre-emption. Against this order of remand the plaintiff has preferred a miscellaneous appeal to this Court.

It will be seen from the statement of facts given above that the alienation in question was made by Hazara Singh donee to whom the plaintiff is not in any way directly related. The plaintiff is a collateral of Mala Singh donor and he claims to contest the alienation on the ground that under the customary rule of reversion he had a residuary right to succeed to the gifted property on the line of the donee becoming extinct. The defendants resist the claim on the ground that the right to contest alienations of immovable property is now by statute restricted only to the male lineal descendants of the great-great-grandfather of the alienor and even if it be assumed that the land is ancestral of the donor and the plaintiff and that the gifted land might, in certain eventualities, revert to the plaintiff, he has no right to contest the alienation. They contend that the power to control alienations which could formerly be exercised under the rules of Punjab Customary Law by persons having a residuary right to succeed to ancestral property, has been materially cut down by Act 2 of 1920, and as the plaintiff is not among the persons to whom alone the right to sue is reserved under S. 6, he has no right to question the alienation. The plaintiff rejoins, that the preamble of the Act indicates that it was intended only to restrict the power

of descendants and collaterals of the alienor to contest his alienations and as the plaintiff is not a descendant or collateral of the alienor, therefore, the Act does not in terms apply to him, and that the power to control alienations by the person in possession, which the plaintiff had under the General Customary Law, has not in any way been affected by the Act and can still be exercised by him.

In order to appreciate the legal position properly it is necessary to examine carefully the wording of the preamble and the operative parts of the Act. The preamble runs as follows:

> Whereas it is expedient to enact certain restrictions on the power of descendants of collaterals to contest an alienation of immovable property or the appointment of an heir on the ground that such alienation or appointment is contrary to custom. And whereas the previous sanction of the Governor-General has been accorded under S. 79 (2), Government of India Act 1915, to the passing of this Act, it is hereby enacted as follows :

It is clear that the preamble describes the Act as laying down restrictions on the power of descendants and collaterals of the alienor only and not on that of the other reversionary heirs.

In the body of the Act itself S. 1 gives the short title of the Act as the Punjab Custom (Power to Contest) Act 1920, and states that it extends to the Punjab. S. 2 defines certain words, and Ss. 3, 4 and 5 contain provisions, which are not material for our present purposes. Then comes S. 6, which is worded as follows:

> Subject to the provisions contained in S. 4, and notwithstanding anything to the contrary contained in S. 5, Punjab Laws Act, 1872, no person shall contest any alienation of ancestral immovable property or any appointment of an heir to such property on the ground that such alienation or appointment is contrary to custom, unless such person is descended in male lineal descent from the great-great-grandfather of the person making the alienation or appointment.

It will be noticed that this section distinctly lays down that notwithstanding any rule of custom, which the Courts were bound to give effect to under S. 5, Punjab Laws Act, no person is now entitled to contest an alienation of ancestral immovable property unless he is descended in the male line from the great-great-grandfather of the alienor. The words used in S. 6 are clear and explicit and there is no ambiguity about them. The legislature has used language the plain meaning and effect of which is to take away the right to contest alienations of ancestral property from all persons (whether agnatically related to the alienor or not) who had heretofore the right to contest alienations and to confine it only to the descendants of the great-great-grand father of the alienor.

There is thus an apparent conflict between the preamble of the Act and S. 6. The plaintiff in this case is, as already pointed out, a collateral of the original donor Mala Singh and not a descendant of the great-great-grandfather of the donee Hazara Singh, who is the person whose alienation is in dispute. If S. 6 is to be literally interpreted, the plaintiff has obviously no locus standi to sue. If, on the other hand, that section is controlled and qualified by the preamble, then the Act is inapplicable to the plaintiff and whatever rights he possessed under the Customary Law, they are still left intact. The question to be determined, therefore, is which of these two conflicting provisions is to prevail.

In order to decide this question it is necessary to ascertain the true place of the preamble in a statute. In England different opinions have been held at different times on the subject. There have been distinguished jurists who have maintained that the preamble is not an integral part of the Act, but that it is something outside it. No less an authority than Lord Holt is reported to have said that

> a preamble of a statute is no part of it, bu contains generally the motives of inducemen thereof. *Mills* v. *Wilkins* (1).

On the other hand, equally eminent, lawyers have considered

> the preamble as undoubtedly a part of the Act ; a key to open the meaning of the makers of the Act and the mischiefs it was intended to remedy. (*Coke* 4 *Inst* 330).

In modern times neither of these extreme views is accepted as correct in its entirety. The prevailing rule of construction which seeks to reconcile these conflicting dicta may be thus expressed: Where the enacting part is explicit and unambiguous, the preamble cannot be resorted to to control, qualify or restrict it ; but where the enacting part is ambiguous, the preamble can be referred to to explain and elucidate it. It was laid down by Lord Tenterdon in *Doe* v. *Brandling* (2) :

(1) [1701] 6 Mod. 62=87 E. R. 822.
(2) [1828] 7 B. & C. 643=6 L. J. K. B. (O.S.) 162=1 Man. & Ry. 600.

If on a review of the whole Act a wider intention than that expressed in the preamble appears to be the real one, effect is to be given to it notwithstanding the less extensive import of the preamble.

This position was further explained by Lord Denman in *Fellowes* v. *Clay* (3):

The preamble is often no more than a recital of the inconveniences, and does not exclude any others for which a remedy is given by the statute. The evil recited is but the motive for the legislation ; the remedy may both consistently and wisely be extended beyond the cure of that evil.

Similarly Tindal, C. J., observed in the well-known *Sussex Peerage* case (4) :

If the words of the statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which according to Chief Justice Dyer, is a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.

The latest authoritative pronouncement on the subject is that of Lord Halsbury, L. C., in *Powell* v. *Kempton Park Racecourse Co.* (5), where his Lordship expressed himself as follows :

Two propositions are quite clear: one that a preamble may afford useful light as to what a statute intends to reach; and another that if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment.

This rule has been applied in the interpretation of several Acts of the Indian and Provincial Legislatures. In the *Secretary of State* v. *Maharaja of Bobbili* (6) their Lordships interpreted the plain meaning of the Madras Irrigation Cess Act regardless of the restrictive provisions of the preamble thereof. Lord Shaw, in delivering the judgment of the Judicial Committee, remarked that as the section of the Act made operative provisions in excess of the apparent ambit of the preamble, "It is the section that must govern" and not the preamble. A Full Bench of the Calcutta High Court in the well-known case of *Manilall Singh* v. *Trustees for the Improvement of Calcutta* (7) followed the same rule and held that the preamble of the Calcutta Improvement Act did not restrict or control its enacting provisions.

It may, therefore, be taken as settled law that where (as in Act 2 of 1920) the enacting part of a statute is not exactly co-extensive with the preamble, the former, if expressed in clear and unequivocal terms, will override the latter, but if ambiguous or doubtful phraseology is used in the body of the Act, the preamble may be referred to to resolve the ambiguity.

Now the wording of S. 6 Punjab Act 2, 1920 is, to my mind, absolutely clear and unambiguous. I can find no doubt or ambiguity in it, and following the rule enunciated above, I feel bound to ignore the restrictive provisions of the preamble and to hold that the Act has the effect of limiting the right to contest an alienation of ancestral land only to those persons who are descended in the direct male line from the great-great-grandfather of the alienor. As the plaintiff does not fulfil this description, the learned District Judge came to a correct conclusion in deciding that he had no locus standi to sue.

I wish, however, to point out that the learned District Judge has, in construing the Act, fallen into an error in relying upon the statement of objects and reasons attached to the Bill, which ultimately passed into Act 2 of 1920, the report of the Select Committee and the controversy which raged befor the passing of the Act.

It is well settled that in construing an Act of the Legislature, where the words are absolutely clear and unambiguous, it is not within the province of a Court to look to the statement of the objects and reasons or to the proceedings of the council with a view to discover whether the words used mean something above and beyond what they say. *The Administrator of Bengal* v. *Prem Lal Mullick* (8), *Krishna Ayyangar* v. *Nallaperumal Pillai* (9), and *Rup Kishore* v. *Govind Das* (10). The appeal fails and I would dismiss it with costs.

Aga Haidar, J.—I agree.

R.K. *Appeal dismissed.*

(3) [1843] 4 Q. B. 313=12 L. J. Q. B. 202.
(4) [1844] 11 C.L. & Fin. 85=8 Jur. 793.
(5) [1899] A. C. 143=68 L. J. Q. B. 392=47 W. R. 585=63 J. P. 260=80 L.T. 538=19 Cox. C. C. 265=15 T.L.R. 266.
(6) A.I.R. 1919 P. C. 52=43 Mad. 529=46 I. A. 302 (P.C.).
(7) [1918] 45 Cal. 343=44 I. C. 770=22 C.W. N. 1=27 C. L. J. 1 (F.B.).
(8) [1895] 22 Cal. 788=22 I. A. 107=6 Sar. 603 (P.C.).
(9) A. I. R. 1920 P.C. 56=43 Mad. 550=47 I. A. 33 (P. C.).
(10) A. I. R. 1922 Lah. 211.

A. I. R. 1928 Lahore 39

JAI LAL, J.

Kishore Chand—Defendant—Appellant

v.

Hans Raj and *another* — Plaintiffs—Respondents.

Misc. First Appeal No. 2693 of 1926, Decided on 24th June 1927, from an order of the 1st Cl. Sub-J., Ferozepore, D/- 30th July 1926.

Civil P. C., O. 23, R. 3—Order rejecting application for recording of compromise is appealable.

An order refusing to record a compromise or adjustment whatever may be the reason therefor, is appealable. [P 40 C 1]

Badri Das—for Appellant.

Moti Sagar and *Hem Raj*—for Respondents.

Judgment.—A suit for partition of joint property, both moveable and immovable, was referred to arbitration by the parties. It appears that there was some settlement before the arbitrator, according to the plaintiff, regarding some of the property in dispute, and according to the defendant, about the whole of it. The arbitrator made his award on the 6th December. Objections were taken to the award by the plaintiff and were allowed on the 19th April 1926. The consequence was that the award was declared void and the reference to arbitration superseded by the Court. The case was fixed for the 8th and 9th June 1926, for the evidence of the plaintiff. On those two dates some evidence of the plaintiff was recorded and the case was adjourned to the 26th, 27th and 28th July, for the remaining evidence.

On the 26th July 1926, an application was presented by the defendant that the matters in dispute had been settled by the parties before the arbitrator and a prayer was made under O. 23, R. 3, Civil P. C., that the compromise or adjustment be recorded and a decree be passed in accordance therewith. On the same day an application was made by the plaintiff alleging that the dispute relating to 13 items in suit had been settled between the parties and that the compromise so made be recorded and a decree passed accordingly and the suit proceeded with regard to the rest. The Court thereupon framed three issues :

(1) Whether there has been a compromise between the parties on all points of difference between them ?

(2) Cannot the plea of compromise be raised at this stage of the suit ?

(3) Is defendant debarred from raising this plea by his conduct ?

It may be mentioned that it is admitted before me that out of the 13 matters mentioned in the plaintiff's application of the 26th July 1926, some were settled before the arbitrator, though the case of the defendant is that all of them were settled before him. It thus appears that admittedly there was some compromise before the arbitrator and the parties are at issue only as to the extent of that compromise. The Senior Sub-Judge, in a judgment which is self contradictory, has held against the defendant on issues 2 and 3 mentioned above but has refrained from giving a finding on issue 1. In fact, he has taken no evidence thereon. At the same time, in his judgment he holds and, in my opinion, quite correctly :

But I find that the delay though not well explained, is not fatal and the plea of the defendant cannot be defeated by mere delay in putting it up. *Nidhan* v. *Buta* (1) and *Peer Mahomed* v. *Mahomed Ibrahim* (2), are authorities in support of this view which have been quoted on defendant's behalf, the gist of which is that mere delay does not create waiver and is not in itself sufficient to defeat the defendant's plea. But at the same time, I hold that the failure of the defendant to plead razinama just at the filing of the award or immediately afterwards is a serious matter affecting the two issues A-2 and A-3 and shows that no razinama was really made, for, had a razinama been made, no question of award would have arisen and no party would have been allowed even to file objections to the award .....

Further on the learned Judge again remarks that the matters discussed by him previously show that the plea of complete adjustment is not genuine, and this finding he has given without recording the evidence of the defendant. I need give no reasons for holding that the final conclusion of the learned Senior Sub-Judge is erroneous except those given by him in the extract that I have first given above.

A preliminary objection was taken by Mr. Moti Sagar, who appeared for the respondents, that no appeal lies from the order complained against. In my opinion there is no force in this objection. O. 43, R. 1 (m) permits an appeal from order under R. 3, O. 23 recording or refusing to record an agreement, compromise or satisfaction. Therefore, an order

(1) [1916] 107 P. R. 1916=36 I. C. 700.
(2) [1905] 29 Bom. 234=6 Bom. L. R. 1013.

refusing to record a compromise or adjustment is appealable. The counsel urges that in this case there has been no adjudication by the Sub-Judge on the merits of the defendant's claim that there was an adjustment but that his application has been dismissed on the ground that it was belated. But the net result of the order of the Sub-Judge is, whatever may be the reason therefor, that he has declined to record the adjustment or compromise. I hold, therefore, that the order is appealable and that it cannot be sustained for the reasons already given.

I set aside the order of the Senior Sub-Judge and remand the case to him with direction to record the evidence of the parties and to give a finding whether or not the case was compromised or adjusted as alleged by the defendant and to proceed with the case in accordance with law. Costs will abide the result.

N.D. *Case remanded.*

A. I. R. 1928 Lahore 40

EFORDE AND ZAFAR ALI, JJ.

Mt. Chiragh Bibi—Defendant—Appellant.

v.

Sultan Bakhsh and *others*—Plaintiffs—Defendants—Respondents.

F. A. No. 2033 of 1923, Decided on 26th October 1927, from the decree of the Senior Sub-J., Hoshiarpur, D/- 7th May 1923.

(a) *Custom (Punjab) — Naru Rajputs of Hoshiarpur—Daughter succeeding to her father dying—Her daughter succeeds in preference to collaterals in 6th degree.*

In the case of Musalman Naru Rajputs in the Hoshiarpur District, where the daughter of the last male owner has succeeded to his ancestral estate excluding his collaterals in the 6th degree, the latter are not entitled on her death to succeed in the presence of her daughter: 5 *P. R.* 1910, *Foll.*; 32 *P. R.* 1895 (*F. B.*), *Expl.*; 14 *P. R.* 1907, *Dist.* [P 40, C 2]

(b) *Custom (Punjab)—Exceptions to general rule can be proved.*

Almost every general rule has exceptions to it, and no person is precluded from establishing a special custom at variance with the general one. [P 40, C 2; P 41 C 1]

(c) *Custom (Punjab) — 'Aulad' includes females where right of females to succeed is widely recognized—Words.*

In places where the right of females to succeed is widely recognized the word "aulad" should be construed as including both male and female issue: 19 *P. R.* 1906, *Foll.* [P 41. C 2]

Niaz Muhammad and *Muhammad Amin*—for Appellant.

Shamair Chand and *Qabul Chand*—for Respondents.

Zafar Ali, J.—The last male owner of the land in suit was Khuda Baksh, a Musalman Naru Rajput of village Harta in the Hoshiarpur District. On his death there was a contest as to succession between his daughter Mt. Mamon and his collaterals in the sixth degree; but the suit brought against her by the collaterals ended in dismissal. Mt. Mamon enjoyed possession of the estate all her life and died some four years before the present suit, leaving her surviving a daughter named Chiragh Bibi. On the death of Mt. Mamon the collaterals again laid claim to the estate of her father and took possession of it. But the revenue authorities sanctioned mutation in favour of Mt. Chiragh Bibi. The collaterals therefore sue for a declaration that by the customary law of inheritance the estate reverted to them on the death of Mt. Mamon and that they were entitled to oust Mt. Chiragh Bibi. The latter contested their claim and pleaded that the estate should descend to her. So the sole question on which the parties joined issue was whether, where the daughter of the last male owner had succeeded to his ancestral estate excluding his collaterals in the sixth degree, the latter were entitled to succeed on her death in the presence of her daughter. The suit was tried by the learned Senior Subordinate Judge of Hoshiarpur who granted the plaintiffs the declaration that they sought, holding that a daughter's daughter had no right to succeed. Mt. Chiragh Bibi appeals.

In arriving at the above finding the learned Judge of the Court below has given effect to the general rule of the customary law of the province that a daughter like any other female successor is a limited owner and that she inherits the estate of her father to transmit it eventually to his agnates or to her own sons but not to her daughter. He failed to realise that the real question for determination was one of a special custom which might obtain in a particular tribe in spite of the general custom being to the contrary. Almost every general rule has exceptions to it, and no person is precluded from establishing a special custom at variance with the general one

In the present case the appellant's claim was that she was by custom entitled to succeed to the exclusion of the distant collaterals of her maternal grandfather. One thing is quite clear, viz., that among Naru Muhammadan Rajputs of Hoshiarpur daughters are by custom entitled to succeed in presence of collaterals more remote than the descendants of the great grandfather of the deceased proprietor. This was ruled so far back as 1889, vide *Ranjhi Khan* v. *Mt. Kaman* (1). The appellant goes a step further and claims her right of succession by custom on the death of her mother. This claim should not have been thrown out merely because it was opposed to the general custom. The question is whether the special custom set up by the daughter was proved or not. For an answer to a question of this description one naturally looks first of all to the Riwaj-i-am of the District, but the Riwaj-i-am was unfortunately not consulted by the learned Senior Subordinate Judge, presumably because his attention had not been drawn to it. But *Ilahi Bakhsh* v. *Mt. Budhi* (2), was brought to his notice in which a division Bench of the Punjab Chief Court had held that:

among Muhammadan Rajputs of Hoshiarpur (an endogamous tribe) where daughters have succeeded to their father's land as heirs, excluding his collaterals, their daughters are entitled to succeed to their mother's estate in the absence of direct male heirs, ...

The Court below refused to follow the above ruling on the greund that

" the weight of authority was against the defendant.

It may be observed here that the plaintiffs examined no less than ten witnesses but every one of them made a very brief statement each to the effect that among Muhammadan Naru Rajputs where a daughter succeeded to the ancestral estate of a sonless proprietor the collaterals of the latter, however remote, excluded from succession the daughter's daughter. None of them could, however, give even one instance of the exclusion of a daughter's daughter by the collaterals. The Riwaj-i.-am being however clearly against the plaintiffs on this point, the onus of establishing the alleged custom lay heavily upon them. The defendants produced only two witnesses who cited a judicial instance. This was no other than that of *Ilahi Bakhsh* v. *Mt. Budhi* (2). We could not decide the case without taking into consideration the Riwaj-i-am and we, therefore, allowed the appellant's counsel to refer to it. We did not consider it necessary to remand the case because the plaintiffs were not in a position to supplement their evidence in order to rebut the Riwaj-i-am when confronted with it.

The question and answers of the Riwaj-i-am that are in point are Nos. 45 and 47. To question 45:

Under what circumstances can daughters inherit?

the answer of Rajputs and several other tribes was that

daughters can succeed in the absence of descendant of a great-grandfather.

To the further question No. 47:

What is the nature of the daughter's interest in property that she inherits ?

the answer was:

Where a daughter succeeds by inheritance as is related in answer to question 45, if she has children she succeeds as full owner, if she is childless she succeeds to a limited life estate the same as that of a widow " without rights of alienation."

The word " children " (aulad) applies to sons as well as daughters, and it was held in *Chiragh Bibi* v. *Hassan* (3), that in places where the right of females to succeed is widely recognized the word "aulad" should be construed as including both male and female issue.

The answer to question 47, therefore, is to the effect that a daughter becomes full owner if she has sons or daughter.

In *Ilahi Bakhsh* v. *Mt. Budhi* (2), counsel for the plaintiff's collaterals contended that as the daughter left only daughters and no sons, the daughter's daughter could not succeed in the presence of collaterals. In respect to this contention the learned Judges observed as below :

Now this is a proposition (i. e. a daughter's daughter cannot succeed and the collaterals are entitled to come in) which we are unable to accept. We have considered the ruling quoted to us for the appellant, *Lehna* v. *Mt. Thakri* (4), inter alia, Roe's Tribal Law, p. 61, S. 13, etc. We do not think that there is sufficient authority for saying that when a daughter has been allowed to succeed as heir to her father's estate her daughter again cannot succeed to her. We admit that in dealing with customary law, logic is often apt to lead us astray, but we can see no logic in the proposition: why is the succession to be limited to one female step ?

(1) [1889] 179 P. R. 1889.
(2) [1910] 5 P. R. 1910=159 P. L. R. 1910=5 I. C. 247=10 P. W. R. 1910.
(3) [1906] 19 P. R. 1906=70 P. L. R. 1906.
(4) [1895] 32 P. R. 1895 (F. B.)

The learned Senior Subordinate Judge chose for his guidance *Lehna* v. *Mt. Thakri* (4), and certain other rulings to the same effect based generally on the principles laid down in Roe and Rattigan's Tribal Law at p. 61, S. 13. Now all that was decided in *Lehna* v. *Mt. Thakri* (4) was that the ancestral estate of a sonless proprietor does not cease to be ancestral when it devolves upon his daughter or descends from her to her sons etc. There can be no quarrel with this proposition in the present case. In Roe and Rattigan's Tribal Law, S. 13, general principles are stated relating to the rights of female successors but exceptions to the general custom are also noted and it is mentioned that in Multan and Dera Ismail Khan where a daughter succeeds at all she succeeds absolutely with a full power of disposing, as she pleases, of the property. Thus the right to succeed as full owner is given to daughters by some tribes and there can be no wonder if Naru Rajputs did the same. In *Ilahi Bakhsh* v. *Mt. Budhi* (2) Roe and Rattigan's Tribal Law, S. 13, and *Lehna* v. *Mt. Thakri* (4), were taken into consideration and these authorities do not in any way militate against the finding arrived at in *Ilahi Bakhsh* v. *Mt Budhi* (2).

Another case relied upon by the Court below was *Sharfo* v. *Ramzan* (5). The parties to that case were Gujars of the Gujrat District and it was found that among Gujars of that District a daughter's daughter had by custom no right to succeed. Obviously it does not follow that Naru Rajputs of Hoshiarpur follow the same custom.

The Riwaj-i-am being in favour of the daughter's daughter and *Ilahi Bakhsh* v. *Mt. Budhi* (2) being in accordance with the Riwaj-i-am, the plaintiff's claim to the contrary must fail. This appeal is accordingly accepted and the plaintiff's suit dismissed with costs throughout.

Fforde, J.—I agree.

D.D. *Appeal accepted.*

(5) [1907] 14 P. R. 1907=20 P. L. R. 1908=126 P. W. R. 1907.

A. I. R. 1923 Lahore 42

TEK CHAND, J.

Atma Singh—Accused—Petitioner.

v

Emperor—Opposite Party.

Cr. Rev. Petn. No. 512 of 1927, Decided on 24th June 1927, from the order of the Dist. Magistrate, Lahore, D/- 21st January 1927.

Criminal P. C., S. 436—Discharge—Further inquiry can be ordered only if discharge order is perverse or foolish.

Further inquiry after discharge is improper unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete : 10 *P. R.* 1911 *Cr., Foll.* [P 42, C 2]

Brij Lal—for Petitioner.

C. L. Mathur for *Government Advocate*—for the Crown.

Judgment. — The petitioner Atma Singh was sent up for trial under S. 379 I. P. C., before the Magistrate, First Class, Kasur, for having picked the pocket of a passenger at the Patti Railway Station and taken Rs. 5 in cash and a few cardamom seeds. Seven witnesses for the prosecution were produced but the Magistrate in a well-considered judgment discharged the petitioner on the 11th September 1926.

On revision at the instance of the Assistant Inspector General of the Railway Police, the District Magistrate of Lahore has set aside the order of discharge and sent back the case for further enquiry by another Magistrate. Against this order the petitioner has filed a petition for revision in this Court and after hearing Mr. Brij Lal for the petitioner and Mr. Mathur for the Crown, I am of opinion that this petition must succeed.

The learned District Magistrate in his order cancelling the order of discharge gives no reason whatsoever for his decision. The rule of law is firmly established that, generally speaking, further enquiry after discharge is improper, unless the order of discharge was manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete : *Emperor* v. *Kiru* (1). It cannot be said that the order of the Magistrate in this case was manifestly perverse or foolish. The prosecution produced seven witnesses and closed their

(1) [1911] 10 P. R. 1911 Cr.=11 I. C. 132=21 P. W. R. 1911 Cr.

case. The Magistrate considered this evidence and discharged the accused. The mere fact that the prosecution did not choose to produce evidence as to identification of thumb-marks is in itself no ground for ordering further enquiry. As already pointed out the District Magistrate has given no reason in support of his order and Mr. Mathur for the Crown has very properly and frankly admitted that he is unable to support it.

I, therefore, accept the petition for revision and set aside the order of the District Magistrate and cancel the order of discharge.

N.D. *Petition accepted.*

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* A. I. R. 1928 Lahore 43

TEK CHAND AND AGHA HAIDAR, JJ.

Saru Khan—Plaintiff—Appellant.

v.

Jan Muhammad and *others*—Plaintiff and Defendants—Respondents.

S. A. No. 1738 of 1923, Decided on 22nd June 1927, from the decree of the District Judge, Amritsar, D/- 25th April 1923.

* (a) *Civil P. C., O. 41, R. 4—One plaintiff may appeal for benefit of other plaintiffs only if the co-plaintiffs are made parties to appeal.*

Rule 4 authorizes one of the plaintiffs to an action, in which other co-plaintiffs are also interested, to appeal for the benefit of the latter, only if they are made parties to the appeal: *A. I. R.* 1923 *All.* 211; *A. I. R* 1924 *All.* 873; *A. I. R.* 1922 *Pat.* 4 and 53 *I. C.* 543, *Rel. on.* [P 43 C 2]

* (b) *Civil P. C., O. 41, R. 20—Party not joined by mistake of pleader may be impleaded.*

Where the pleader for plaintiff-appellant did not implead co-plaintiffs in the appeal under mistaken view of O. 41, R. 4, the Court allowed them to be joined as respondents at the hearing. [P 44 C 1]

(c) *Civil P. C., O. 22, R. 3—Plaintiff's right devolving on co-plaintiffs—Plaintiff dying—His heirs need not be brought on record.*

Where the deceased plaintiff was a joint occupancy tenant with his co-plaintiffs, and his rights in the tenancy lapsed to his co-tenants who were already on the record,

Held: it was not necessary to implead the heirs of the deceased plaintiff. [P 44 C 2]

(d) *Practice—New plea—Appeal.*

Court of appeal should not set up an entirely new case for a party in appeal. [P 44 C 2]

(e) *Evidence Act, S. 33—Ejectment proceedings in revenue Court—Suit for possession—Evidence in former is not admissible in latter.*

Neither the findings in the ejectment proceedings before the revenue authorities nor the evidence led in those proceedings can be legally relied upon in a suit in civil Court to recover possession by person ejected in consequence of the proceedings in the revenue Court. [P 45 C 1]

Amar Nath Chopra—for Appellant.

Kishan Dial—for Respondents.

Order

Tek Chand, J.—Three persons Saru Khan, Piru Khan and Amir, descendants of one Hakim, instituted the suit out of which this second appeal arises for possession of land, alleging that the occupancy rights in the land were acquired by their ancestor Hakim and that they were entitled to hold the tenancy, and that the defendants who are the descendants of Nawab, brother of Hakim, had no right to be in possession of these rights. The suit was decreed in favour of all the three plaintiffs by the trial Court. On appeal by the defendants, the learned District Judge dismissed the suit with costs in both Courts.

Against the appellate decree of the District Judge a second appeal has been preferred to this Court and in the memorandum of appeal Saru Khan, plaintiff 1, alone has been shown as the appellant. The contesting defendants Jan Muhammad and Sheru and Kartar Singh and Sher Singh, who were pro forma defendants, were made respondents. The other two co-plaintiffs, namely, Piru and Amir, were not impleaded as parties to the second appeal. To the memorandum of appeal, however, was added a foot-note by Mr. Amar Nath Chopra, the learned advocate, who had preferred the appeal on behalf of Saru Khan, that the appeal was for the benefit of all the plaintiffs.

On the case coming up for hearing before us to-day Mr. Kishan Dayal for the respondents raised a preliminary objection that it was not competent to Saru Khan to appeal on behalf of all the other co-plaintiffs without making those co-plaintiffs parties to the second appeal as respondents. In reply reliance is placed on O. 41, R. 4, and it is argued that Saru Khan could appeal on behalf of the other co-plaintiffs, without joining them as parties to the appeal. That Rule, however, authorizes one of the plaintiffs to an action, in which other co-plaintiffs, are also interested, to appeal for the benefit of the latter, only if they are made parties to the appeal. The proposition is too obvious to require discussion. Authority for it will be found in

Ambika Prasad v. *Jhimull Singh* (1), *Balkaran Lal* v. *Malik Nandar* (2), *Jitendra Nath* v. *Juku Mandar* (3) and *Haji Begum* v. *Shankar Rao* (4). We, therefore, hold that Saru Khan was not entitled to appeal on behalf of Piru and Amir, plaintiffs.

Mr. Amar Nath Chopra, however, states that he omitted to implead these two persons as parties under the erroneous belief that under O. 41, R. 4, Civil P. C., it was not necessary for him to implead them as parties. He has now frankly admitted his mistake and asks us that we should exercise our powers under O. 41, R. 20, Civil P. C., and implead Piru and Amir, plaintiffs, as respondents to the appeal. After hearing Mr. Kishan Dayal for the respondents we are of opinion that it is not desirable to decide the case in the absence of the other plaintiffs and we think this to be a fit case in which we should exercise our powers under O. 41, R. 20, Civil P. C. We, therefore, direct that Piru and Amir be made respondents to the appeal. Mr. Amar Nath Chopra undertakes to communicate with these two persons so that they may be present or be represented before us at the next hearing.

As the case is a very old one, we are not inclined to adjourn the case for a long time. We accordingly direct that it be placed before us as No. 1 on the list on Monday, 20th June 1927. As the adjournment is caused by an omission on the part of the appellant to implead these two persons as parties, we allow Mr. Kishan Dayal Rs. 32 as costs of the adjournment, which must be paid by the appellant on or before the next date of hearing.

Judgment.—The main facts of the case are given in our order of 15th June 1927 which should be read as a part of this judgment. By that order we decided to implead Piru and Amir, plaintiffs, as respondents to the appeal under O. 41, R. 20, Civil P. C., and Mr. Amar Nath Chopra for Saru Khan, appellant, undertook to communicate with these two persons and to produce them to-day. Amir has appeared to-day and is present in Court. He states that Piru died sonless more than two years ago. This fact is admitted by Mr. Amar Nath Chopra for the appellant and by Jan Muhammad, the contesting respondent, who is also present in person. As Piru deceased claimed to be a joint occupancy tenant of a common holding, and as he has died sonless, his rights in the tenancy lapse to his co-tenants, namely, Saru Khan appellant, and Amir, respondent, both of whom are already on the record. It is, therefore, not necessary to adjourn the hearing of the case to implead the heirs, (if any), of Piru, deceased, as respondents. Piru's name will be struck off the record.

On the merits the second appeal can be disposed of very briefly. The plaintiffs came into Court alleging that their ancestor Hakim had acquired the occupancy tenancy in question, that they were in possession of these occupancy rights but that on a notice issued by the defendants they had been wrongly ejected by order of the revenue authorities. They, therefore, sued to recover back possession of the land comprised in the occupancy tenure. The defendants resisted the suit on the plea that the occupancy tenancy in question was not acquired by Hakim, but that it was acquired by Sher Khan who was the father of Hakim and of Nawab Khan, the grandfather of the contesting defendants. The plaintiffs in their replication denied that the occupancy rights were acquired or that the land was ever occupied by Sher Khan. The Subordinate Judge found against the defendants' contention and held that on the materials on the record it could not be held that the land was occupied by Sher Khan.

In their grounds of appeal before the learned District Judge the defendants reiterated their contention that Sher Khan, the common ancestor of the parties, had held possession of the land. The learned District Judge, however, gave no finding on this point. On the other hand he held that though the occupancy rights were held by Hakim alone in the settlements of 1852 and 1865, after the death of Hakim for some reason or other the plaintiff's line decided "to pool the occupancy land of the family" and that it was in pursuance of some arrangement that the occupancy rights were transferred by the plaintiff's branch of the family to the defendants. This, however, is an entirely new case which the learned District Judge has set up in appeal for the defendants, but which he

(1) A. I. R. 1923 All. 211=45 All. 286.
(2) A. I. R. 1924 All. 873.
(3) A. I. R. 1922 Pat. 4.
(4) [1919] 53 I. C. 543.

was not entitled to do. No such arrangement was put forward in the written statement, nor was any issue framed on it. As pointed out already the defendants' main plea was that the occupancy rights had been acquired by Sher Khan. The learned District Judge does not discuss the point at all. His judgment in so far as it proceeds on grounds not put forward in the pleas, cannot be supported.

The learned District Judge further bases his judgment on the decision of the Revenue Assistant dated 17th June 1920, in a suit brought by Amir plaintiff to challenge a notice of ejectment issued by the defendants in regard to the land in suit. He also relies upon the evidence that was led before the revenue authorities in that litigation and also in certain previous litigation. Now, there can be no doubt whatever, that neither the findings in the ejectment proceedings before the revenue authorities nor the evidence led in these proceedings could be legally relied upon in this case. Mr. Kishan Dial for the respondent has very properly conceded that he is unable to contend that this evidence was legal evidence in the case. The learned District Judge also relies on a certain lease, alleged to have been executed by Amir plaintiff in favour of the defendant. But his discussion of this matter is very confused. For the foregoing reasons the judgment of the learned District Judge cannot be called a proper judgment and we are constrained to set it aside. The case will have to be sent back to the lower Court for re-decision in accordance with law. The Court must examine afresh such of the evidence as is on the record and come to a definite finding on the issues that arose in the case. The appeal is accepted and the case remanded to the District Judge for decision in accordance with law. Court-fee on appeal will be refunded. Costs will be costs in the case.

Aga Haidar, J.—I agree.

D.D. *Case remanded.*

A. I. R. 1928 Lahore 45

CAMPBELL AND ADDISON, JJ.

Bhiwani Cotton Spinning and *Weaving Mills Co., Ltd.*—Defendants—Appellants.

v.

Firm Bishen Sahai-Bhagwan Dass—Plaintiffs—Respondents.

Second Appeal No. 2450 of 1922, Decided on 18th June 1927.

Civil P. C., O. 41, R. 1—Decision on preliminary points.

Some preliminary issues were decided on a previous date and the suit was decided later. The memorandum of appeal was presented with the final judgment but without the order which was passed deciding preliminary issue. This decision was objected to in the grounds of appeal.

Held : that there was no proper presentation of the appeal. [P 46 C 1]

Shamair Chand—for Appellants.

Jagan Nath Aggarwal — for Respondents.

Campbell, J.—In the suit out of which this second appeal arises three preliminary issues were framed as follows :

(1) Was the order of the District Judge without jurisdiction ?

(2) Does S. 11 bar the suit ?

(3) Does O. 2, R. 2 bar the suit ?

These issues were decided against the defendants by the Subordinate Judge on the 12th November 1919, in an order of that date. Further issues were then framed on the remaining points arising in the suit and were decided by order of the Sub-Judge dated the 12th August 1921. An appeal to the District Judge failed and the defendants have come to this Court on second appeal.

A preliminary objection has been taken that there is no proper presentation of the second appeal because although a copy of the order of the 12th August 1921, has been filed with it, no copy has been filed of the order of 12th November 1919, and the requirements of O. 42, R. 2, Civil P. C., have not been complied with.

According to O. 42, R. 1, the rules of O. 41, apply, so far as may be, to appeals from appellate decrees, and by O. 42, R. 2, in addition to the copies specified in O. 41, R. 1, a memorandum of second appeal must be accompanied by a copy of the judgment of the Court of first instance. "Judgment" is defined in S. 2, sub-S. (9), of the Code as the statement given by the Judge of the grounds of a decree or order Under O. 41, R. (2), which read with O. 42, R. 1, applies to appeals against appellate decrees, the memorandum of appeal must set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from.

The first two grounds of objection set forth in the memorandum of appeal before us are : (1) that the suit was barred by S. 11, Civil P. C., and (2) that the suit was also barred by O. 2, R. 2 of the Code.

The judgment of the trial Court on these two points was recorded and delivered on 12th November 1919, and was manifestly a part of the judgment on which the decree is based. The situation is that a copy of the judgment of the Court of first instance has not been filed with the memorandum of appeal, but only a portion of that judgment.

In these circumstances there was no proper presentation of the appeal within time, and we see no reason for granting further time for the deficiency to be made good. We must accordingly, dismiss the appeal, and the appeal is dismissed with costs.

N.D. *Appeal dismissed.*

** A. I. R. 1928 Lahore 46

FFORDE AND DALIP SINGH, JJ.

Firm Nanhe Mal Panna Mal—Defendants—Appellants.

v.

Firm Piare Lal Debi Sahai—Plaintiffs—Respondents.

F. A. No. 1578 of 1922, Decided on 24th September 1927, from the decree of the Sr. Sub-Judge, Gurgaon, D/- 31st March 1922.

** *Civil P. C., O. 41, R. 1—Judgment on preliminary issue referred or not referred in final judgment copies of both must be filed with memo.—Preliminary judgment incorporated in final—Copy of preliminary judgment need not be filed—Absence or presence in memo. of appeal of grounds attacking preliminary judgment may be considered for dispensing with the preliminary judgment or extending time for its filing.*

Where the judgment on the preliminary issue is not referred to at all in the final judgment, the latter cannot be held to be the complete judgment in the case, and, therefore, copies of both are necessary: [*A. I. R.* 1927 *Lah.* 451, *Ref.*] In such a case the judgment is really embodied in two documents. So also where there is a reference in the final judgment to the judgment on the preliminary issues, so that the intention of the Court may be by that reference to make the previous judgment a part of the final judgment, the judgment is embodied in two separate documents and the appeal is not properly presented unless both the documents are filed along with the copy of the decree. [P 47, C 1, 2]

Where, however, the Court incorporates the judgment on the preliminary issues in the judgment finally delivered, the judgment finally delivered is the whole judgment in the case and the appeal will be properly presented even though the first judgment is not filed with it. [P 47, C 2]

The question whether the grounds of appeal did or did not attack the preliminary judgment, would be a good ground for dispensing with the preliminary judgment, or for extending time for the filing of that judgment or the contrary, but it has nothing to do with the question whether the appeal when filed was properly presented or not: (*Case-law discussed.*) [P 47, C 2, P 48, C 1]

Kishan Dyal and *Bishan Narain*—for Appellants.

Jagan Nath Aggarwal and *Lal Chand*—for Respondents

Dalip Singh, J.—A preliminary objection has been taken to the hearing of the appeal on the ground that the provisions of O. 41, R. 1, Civil P. C., have not been complied with and that, therefore, there was no proper presentation of the appeal.

The facts are that a preliminary issue as to jurisdiction was decided by the Court in favour of the plaintiff on the 25th February 1921. The Court then proceeded to try the other issues and finally on the 31st March 1922, gave judgment in favour of the plaintiff. The defendants appealed and put in a copy of the judgment dealing with the issues other than the issue of jurisdiction. So far as the judgment on the question of jurisdiction is concerned at the time of the presentation of the appeal the counsel made a note that this judgment would be supplied before the preliminary hearing. When the appeal was filed the office again reminded the counsel of the absence of the judgment and the counsel again undertook to supply the missing portion of the judgment before the date of the hearing. The copy, however, was never supplied and was, therefore, never included in the appeal as presented.

The case was admitted to a Division Bench by a Single Bench of this Court and the usual order for printing the record was passed. The objection taken is that as O. 41, R. 1 requires that a copy of the decree appealed from and of the judgment on which it is founded should be filed with the appeal, the appeal in this case has not been properly presented because only a portion of the judgment so required has been filed with the appeal.

Counsel for the respondents has cited a number of rulings which support his contention. In *Bhiwani Cotton Spinning and Weaving Mill Co Ltd.* v. *Firm Bishen Sahai Bhagwan Dass* (1) in a

(1) A I. R. 1928 Lah. 45.

similar case this Court held that the appeal was not properly presented and that, therefore, the appeal failed. This case was followed in another Division Bench ruling reported in *All India Reporter* 1926 *Lahore* 638. In *A. I. R.* 1927 *Lah.* 449 another Division Bench similarly held that there was no proper presentation of the appeal though they extended the time for filing the missing judgment in the circumstances of that particular case. In *A. I. R.* 1927 *Lah.* 451, another Division Bench ruling, the appeal was dismissed and the preliminary objection was sustained. So also in civil appeal No. 2055 of 1923, a Division Bench ruling, the preliminary objection was sustained and the appeal failed, as also in a Single Bench judgment civil appeal No. 876 of 1927 which is the latest ruling on the point. On the other hand in *H. B. Morton* v. *E. Woodfall* (2) a Division Bench of this Court held that the judgment in that particular case was a self-contained judgment and that, therefore, the preliminary objection failed, and in *Dhani Ram* v. *Mt. Goman* (3) another Division Bench held that as no grounds of appeal were taken against the judgment on the preliminary issue it was unnecessary to file a copy of the judgment and the preliminary objection was rejected. In *H. B. Morton* v. *E. Woodfall* (2) the final judgment referred to the decision on the preliminary issues and gave a succinct account of that preliminary issue and the result of the decision and stated that certain evidence had been held to be inadmissible in the case by reason of the provisions of S. 92, Indian Evidence Act. This case, in my opinion, is clearly distinguishable. The essence of the judgment is that the final judgment is a self-contained document which by the terms of its reference to the previous order incorporated and embodied the decision given on the preliminary issues in the final judgment and, therefore, the final judgment did contain a decision of all the issues.

In cases of this nature various classes of cases can arise. There may be a case in which the judgment on the preliminary issue is not referred to at all in the final. Such a case occurred in the ruling reported as *A. I. R.* 1927 *Lah.* 451. It is difficult to see how in any circumstances the final judgment in such a case can be held to be the complete judgment in the case. It seems to me that in such a case the judgment is really embodied in two documents and the decree is founded on the judgment contained in these two documents and not on the judgment which disposes of the remaining issues in the case.

In another class of cases there may be a reference in the final judgment to the judgment on the preliminary issues and the intention of the Court may be by that reference to make the previous judgment a part of the final judgment. In other words the Court either expressly or impliedly states that the judgment on the preliminary issues should be read and considered as a part of the judgment delivered at the end of the case. In such a case again it seems clear to me that the judgment is embodied in two separate documents and the appeal is not properly presented unless both the documents are filed along with tha copy of the decree.

In a third class of cases the Court may intend to incorporate the judgment on the preliminary issues in the judgment finally delivered and, however succinctly, embody the preliminary judgment in the final judgment, and in a such a case the judgment finally delivered, is the whole judgment in the case and the appeal will be properly presented even though the first judgment is not filed with it.

H. B. Morton v. *E. Woodfall* (2) seems to me to fall into this last category of cases If, however, it be held that it falls really in the first or second of these classes then with the greatest respect to the learned Judges who decided that case, I must differ from it and it seems to me that the whole trend of the authorities of this Court is against that particular judgment.

In some judgments it seems to have been successfully contended that the question whether the grounds of appeal did or did not attack the preliminary judgment would make some difference in the case. But it seems to me that the presence or absence of grounds of appeal attacking the preliminary judgment, while it may very well be a good ground for dispensing with the preliminary judgment, or for extending time for the filing of that judgment, or the contrary, has nothing to do with the question

(2) A. I. R. 1927 Lah. 103=8 Lah. 257.
(3) A. I. R. 1927 Lah. 610.

whether the appeal when filed was properly presented or not. In order to determine this question what we have to look at is only to see whether the provisions of O. 41, R. 1, have been complied with or not and the presence or absence of grounds of appeal against the preliminary judgment has nothing to do with the question at all.

Mr. Kishan Dyal for the appellant has contended that in all these classes of cases the judgment finally delivered is the whole judgment in the case. The decisions of the previous issues according to him are orders and the reasons given for those orders are judgments on which the order is based. The final judgment according to his contention rests on the orders so passed and the reasons for those orders are wholly unnecessary to the final judgment. This argument would imply that the provisions of O. 20, R. 5 do not apply to a case in which certain issues of law or fact are separately dealt with under the provisions of O. 14, R. 2, but O. 20, R. 5 does not make any such distinction and it seems to me that to hold what counsel wishes us to do might involve this Court in great absurdities. For instance it would logically follow from the arguments of the counsel that a judgment which contained nothing except a reference to decisions of all the issues, would be a complete and good judgment in the case. This seems to me to be wholly unreasonable and it is the more logical way of looking at the matter to take the view that the provisions of O. 20, R. 1 have not been complied with by the Court in that the judgment has not been delivered finally in the case, but has been delivered piecemeal, a proceeding which is not really contemplated by the terms of the Code of Civil Procedure and which is an irregularity, though, of course, it does not really affect the merits of the case in any way. From this point of view the decision in *Dhani Ram* v. *Mt. Goman* (3), may be upheld on the ground that what the Court really did, was to dispense with the necessity of putting in a portion of the judgment which was contained in a separate document and which was not attacked in the ground of appeal in any way. In the present case the very first ground of appeal does attack the decision of the preliminary issue and, therefore, the case is not on all fours with *Dhani Ram* v. *Mt. Goman* (3). Further, it is clear that the counsel in the case thought that it was necessary to file the judgment and it was merely carelessness, either on his part or on the client's part, that the judgment was not so filed. There is, therefore, no occasion for this Court to exercise any dispensing power in favour of the appellant.

It has been contended that as the case was admitted by a Single Bench as a first appeal and a note existed that a copy of the judgment would be supplied later and had not been so supplied it should be presumed that the learned Judge who admitted the case dispensed with a copy of this judgment. It seems to me far more probable that the point was not brought to the notice of the learned Judge at all, and *G. I. P. Ry. Co.* v. *Radha Kishan Jai Kisan* (4), is a ruling which is distinguishable even if that ruling lays down correct law. It was further contended that the preliminary issue decided, being only one of jurisdiction, the decree was not founded on that portion of the judgment in any way, and that, therefore, it was not necessary to file that portion of the judgment. There might be much to say for this line of argument if the matter were res integra, but I do not see that the matter is open so far as this Court is concerned in view of the decision of the Full Bench reported in *Lal Chand Mangal Sen* v. *Behari Lal Meharchand* (5). There may possibly be cases where the decree may not be founded on the judgment on the preliminary issue, but I must not be taken to express any opinion on this point.

For the above reasons, I am of opinion that the preliminary objection must prevail and I would accordingly dismiss the appeal with costs.

Fforde, J.—I agree.

D.D. *Appeal dismissed.*

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(4) A. I. R. 1926 Nag. 57.
(5) A. I. R 1924 Lah. 425=5 Lah. 288 (F. B.)

A. I. R. 1928 Lahore 49

ADDISON, J.

Kundan—Accused—Petitioner.

v.

Emperor—Opposite Party.

Cr. Revn. Petn. No. 294 of 1927, Decided on 14th June 1927.

Criminal P. C., S. 110—Respectable witnesses testifying to good character of accused—Prosecution evidence meagre—Order demanding security is not justifiable.

Mere suspicion of complicity in this or that isolated offence is not evidence of general reputation. A man's general reputation is that which he bears amongst the fellow-townsmen or in the neighbourhood in which he lives. [P 49 C 2]

Where a large body of apparently respectable witnesses of the neighbourhood testify to the good character of the accused as against meagre prosecution evidence or the evidence of police officers, an order demanding security is not justifiable : 37 *P. W. R.* 1910, *Cr., Foll.* [P 42 C 2, P 50 C 1]

When as good witnesses come forward to state that a man's reputation is good as those who state the contrary it cannot be said that his reputation is bad, unless there is something to corroborate the witnesses against him : 2 *P. R.* 1898, *Cr., Foll.* [P 50 C 1]

Shamair Chand—for Petitioner.

Des Raj Sawhney—for the Crown.

Judgment.—The petitioner has been ordered by a Magistrate of the First Class to execute a bond with one surety in the sum of Rs. 1,000 under S. 110, Criminal P. C., to be of good behaviour for three years on the finding that he is a habitual thief or receiver of stolen property. His appeal has been dismissed by the learned District Magistrate.

Twelve prosecution witnesses were examined. A Sub-Inspector of Police, a Sufed posh of Khithal, and a Zaildar of another circle gave evidence of his general repute. Three persons stated that their stolen cattle were restored through the petitioner's influence on payment of various sums of money or otherwise. Their evidence standing alone is of little value. Four persons said that their stolen cattle were traced to the petitioner, though not recovered. This evidence does not amount to more than that the petitioner was suspected by these witnesses of being concerned in thefts of their cattle.

The Zaildar of petitioner's own circle deposed that. though he used to hear complaints against him, he had not done so for seven or eight months.

Mere suspicion of complicity in this or that isolated offence is not evidence of general reputation. The petitioner was challaned twice by the police, but this was very many years ago, and of late years no complaint has been made against him of being concerned in any crime. He has never been convicted of offence and he has from time to time been helping the police in various investigations. The principal evidence against the petitioner is, therefore, that of three witnesses first mentioned above. None of them belongs to his own village, but the Sub-Inspector of Police and Sufed posh would have better means of knowing his reputation, as the petitioner lives within their circle, than the Zaildar who belongs to a different circle.

On the other hand the petitioner has produced 46 respectable witnesses. Ten of these are lambardars of neighouring villages and nine are residents of his own village. Numerous mahajans, who pay income-tax, belonging to the neighbouring town of Kaithal, have also given evidence in his favour, while Jats of neighbouring village have done the same. All have deposed that his character is reputed to be good. The trial Magistrate was unable to say that the defence witnesses were not respectable, but he rejected their evidence on the ground that, as the petitioner was so influential as to be able to produce so many witnesses, the few who gave evidence against him must be speaking the truth. I am unable to understand this point of view. The learned District Magistrate thought that the defence witnessses gave evidence either because they had dealings with the petitioner or were respectable but timid people who were afraid to refuse to help him. This is going beyond the record. The mahajans of Kaithal are in a secure position as they do not live in villages. The lambardars and other Jats cannot be said to be timid and have not been proved to have dealings with the petitioner.

A man's general reputation is that which he bears amongst the fellow townsmen or in the neighbourhood in which he lives. It was held in *Soman* v. *Emperor* (1), that where a large body of apparently respectable witnesses of the neighourhood testify to the good character of the accused as against the evidence of police officers, an order demanding security is

(1) [1910] 37 P. W. R. 1910 Cr.=8 I. C. 249 =10 Cr. L. J. 603.

not justifiable. The zaildar and Sufed posh are not police officers, but it is to their interest to give evidence on the police side. There should be no doubt what a man's general reputation is : [*Wasir Bukhsh* v. *Empress of India* (2).] Can it be said that there is no doubt in this case, when the defence is considered ? When as good witnesses come forward to state that a man's reputation is good as those who state the contrary, it cannot be said that his reputation is bad, unless there is something to corroborate the witnesses against him : [*Ajmal Shah* v. *Empress* (3).] In the present case there is nothing to corroborate the witnesses against the petitioner as suspicion is of little or no avail, and the three witnesses who state that they recovered their cattle through him are not corroborated and their evidence is also of little value.

In my opinion the evidence of the respectable witnesses for the defence establishes beyond any doubt that the general reputation of the petitioner is good. Such a large volume of evidence cannot be rejected with safety, especially in view of the meagre prosecution evidence. I accept the petition and discharge the petitioner from his security.

J.V. *Petition accepted.*

(2) [1901] 18 P. L. R. 1901.
(3) [1898] 2 P. R. 1895 Cr.

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* A. I. R. 1928 Lahore 50

COLDSTREAM, J.

F. Bwye of Simla—Accused—Petitioner.

v.

Kirk—Opposite Party.

Cr. Revn. Petn. No. 166 of 1927, Decided on 14th October 1927, for quashing the connected proceedings in the Criminal Court.

* *Divorce Act, S. 61—The section does not forbid the Crown to prosecute and punish an alleged adulterer under S. 497, I. P. C., when moved to do so by an injured husband—Penal Code, S. 497.*

Section 61, Divorce Act, is not intended to be anything more and does nothing more than preclude a civil suit for damages of the nature of the English common law action, for criminal conversation which lay at the suit of a husband to recover damages against an adulterer. There is no authority statutory or otherwise, warranting the view that S. 61 forbids the Crown to prosecute and punish an alleged adulterer under S. 497, I. P. C., when moved to do so by an injured husband. [P 50 C 2]

Norman Edmunds—for Petitioner.
Sain Das—for Opoposite Party.

Order.—The applicant is being prosecuted in the Court of Mr. Phailbus, Magistrate, 1st Class, Lahore, under S. 497, I. P. C., and is at the same time being proceeded against as a co-respondent in a divorce petition (based on the same allegations as are made in the criminal action) presented by the complainant and now pending in the High Court. He asks: (1) that the criminal proceedings be quashed on the ground that S. 61, Indian Divorce Act, renders the criminal prosecution unmaintainable. In the event of this request being refused he prays: (2) that the criminal proceedings be stayed pending the decision of the divorce proceedings. Mr. Edmunds, who appears for the petitioner, has addressed me at great length in support of his contention that the use of the word "suit" in S. 61, Indian Divorce Act, shows that the intention of the section was to bar not only civil suits but criminal prosecutions at the instance of a person competent to present a petition under Ss. 2 and 10. He cannot, however, cite any judicial decision in favour of his interpretation.

There is in my mind no doubt whatever that S. 61 was not intended to do anything more, and does nothing more, than preclude a civil suit for damages of the nature of the English common law action for criminal conversation which lay at the suit of a husband to recover damages against an adulterer, a form of action which had been abolished in England by S. 59, Matrimonial Causes Act, 1857. I can find no authority, statutory or otherwise, warranting Mr. Edmund's view that S. 61 forbids the Crown to prosecute and punish an alleged adulterer under S. 497. I. P. C., when moved to do so by an injured husband, who is entitled to relief under the Indian Divorce Act. There does not appear to be anything illegal in the prosecution and the request that the proceedings be quashed is rejected.

After hearing Mr. Sain Das, who, on behalf of the complainant-respondent, opposes the petition for stay of proceedings and having regard to all the circumstances I think it proper to pass the following order. The proceedings will continue provided that: (1) the judgment is not pronounced till the divorce petition presented by the complainant has been

disposed of and (2) Mrs. Kirk is not called upon to give evidence until after the date of the first hearing in the divorce proceedings.

N.D. *Petition rejected.*

A. I. R. 1923 Lahore 51 (1)

DALIP SINGH, J.

Abdul Rahman— Defendant— Appellant.

v.

Kirpa Ram—Plaintiff—Respondent.

S. A. No. 413 of 1927, Decided on 29th June 1927, from a decree of the 1st Class Sub-Judge, Shahpur.

Registration Act, S. 17 (1) (c)—Receipt for consideration for oral sale of immovable property is inadmissible for want of registration.

A receipt for a certain amount in lieu of an oral sale of a certain land is only a receipt and not a contract of sale: and this receipt is inadmissible for lack of registration; but oral evidence can be given to prove the sale and the payment of money aliunde. [P 51 C 1, 2]

Niaz Muhammad—for Appellant.

Shambhu Lal Puri—for Respondent

Judgment.—The plaintiff in this case sued for possession of certain property alleging that the defendant had forcibly taken possession of it a few days before the suit. The defendant pleaded that the land was orally sold to him by the plaintiff in lieu of Rs. 460 and that a receipt for the amount was subsequently given by the plaintiff on the 20th December 1916. The trial Court held that the oral sale, etc., was proved and that the plaintiff's suit failed. The appellate Court held that the receipt was really a contract of sale and was inadmissible in evidence for lack of registration and no oral evidence could also be given because of S. 91, Indian Evidence Act. It, therefore, decreed the plaintiff's suit with costs throughout.

In second appeal it has been argued that this document is not a contract of sale. Rulings have been cited by counsel on either side. I hold, however, with respect to this particular document that it is only a receipt and not a contract of sale.

Next it is contended by counsel for the respondent that even if it is a receipt it comes within S. 17 (1) (c), Indian Registration Act. *Ram Chand* v. *Chattar Singh* (1) which was followed in *Sher Khan* v. *Muzaffar Khan* (2) supports this contention, and I hold accordingly that this receipt is inadmissible for lack of registration. But it follows then that oral evidence can be given to prove the sale and the payment of money aliunde. No decision has been given on the evidence produced in the case by the appellate Court.

I, therefore, accept the appeal and remand the case under O. 41, R. 23, Civil P. C. to the lower appellate Court for decision on the merits with reference to the above remarks. Costs will abide the event. The stamp on appeal will be refunded.

N.D. *Case remanded.*

(1) [1910] 78 P. L. R. 1910=5 I. C. 618=37 P. W. R. 1910.

(2) [1920] 1 Lah. 25=55 I. C. 944=40 P. W. R. 1920=31 P. L. R. 1920

A. I. R. 1923 Lahore 51 (2)

ADDISON, J.

Karam Chand-Sant Ram—Defendants—Petitioners.

v

Daya Nand-Damodhar Das—Plaintiffs—Respondents.

Civ. Revn. Petn. No. 646 of 1926, Decided on 17th January 1927, from the decree of the Small Cause Court Judge, Delhi, D/- 12th July 1926.

(a) Limitation Act, Arts. 64 and 85—Scope.

Even in a suit by commission agent, where the accounts were stated and balance struck, Art. 64 applies and not Art. 85. [P 52 C 1]

(b) Provincial Small Cause Courts Act, S. 25—Wrong decision on a point of limitation is not a ground for interference.

A wrong decision on a question of limitation is not per se ground for interfering in revision: 93 *P. R.* 1911, *Foll.* [P 52 C 1]

G. S. Salariya—for Petitioners.

Kishan Dayal—for Respondents.

Judgment.—The plaintiff firm as commission agents supplied the defendant firm with certain goods. When the dealings ceased, the accounts were stated and the defendant firm struck a balance of Rs. 4 0-14-0 in the books of the plaintiff firm. The plaintiff firm then sued the defendant firm, stating that Rs. 150 only had been paid. They claimed Rs. 578-0-6 for the balance unpaid together with interest. They obtained a

decree in the Small Cause Court for Rs. 160 and against this decision this revision petition has been admitted.

The case of the defendant firm was that Rs. 280 had been paid at Delhi in Sambat 1979 and later Rs. 150 was paid at Gangapore in full settlement of the claim. It was also pleaded that the suit was barred by limitation as it was a suit by commission agents and, therefore, fell within Art. 85, Sch. 1, Limitation Act. The Small Cause Judge, however, held that the suit fell within Art. 64 as accounts had been stated between the parties.

The petitioner's counsel first argued that the suit was barred by limitation. In my opinion, as accounts were stated and a balance struck the Court below was correct in holding that Art. 64 applied. Besides a wrong decision on a question of limitation is not per se ground for interfering in revision as was held in *Ghasita* v. *Sultan* (1).

The next point taken was that the judgment of the Court below was perverse in holding that the receipt for Rs. 150 was not in full settlement of the account between the parties. This question requires serious consideration. The defendant firm examined two witnesses who proved that two men came from Delhi to collect the debt for the plaintiff firm and they have both deposed that at that time the receipt in question for Rs. 150 was given in full settlement of the account between the parties. It is also in their evidence that the return third class fare for one man from Delhi to Gangapore City is only Rs. 7, whereas in the accounts of the plaintiff firm a sum of Rs 16-8-0 is debited for the expenses of the persons who went to Gangapore City in connexion with this account. This means that two persons undoubtedly went. In the official Railway Guide book Rs. 7-2-0 is the ordinary third class return fare from Delhi to Gangapore City. It must, therefore, be held that two men did go to collect this debt.

The defendants' statement is to the effect that the body of the receipt was written by one of these persons, namely, Madan Mohan, while Data Ram signed the receipt. The plaintiff stated that Data Ram was his agent and that he did go to collect money from the defendant firm. He added that Data Ram had gone out of Delhi. He denied employing a man of the name of Madan Mohan. He admitted that Part B of the receipt was written by his agent Data Ram, but he could not say who wrote the first Part A of the receipt.

I have seen this receipt. The first portion is written in Deva Nagri characters while the second portion is written in Mandi characters. The plaintiff, therefore, admits that the writing in the Mandi characters was by his agent Data Ram, but he stated that he did not know who wrote the other portion. But what was written by Data Ram is merely the signature, which could not stand by itself. He has, therefore, merely admitted the signature to the receipt while stating that he does not know who wrote the body of the receipt. As he had failed without sufficient cause to produce his admitted agent, Data Ram, it must be held in face of the above evidence that the sum of Rs. 150 was taken in full satisfaction of the account. This means that the defendants' case that Rs. 280 were previously paid in Delhi was correct.

The exact words written by Data Ram are as follows:

dastkhat Data Ram munim ropaya 150 *ankan* 150 *rokar liya babat Daya Nand-Damodar Daske.*

If this had been the only receipt the signature would have come last. It is the usual thing for the person signing the receipt to add the amount received again, though this has been written in the body of the receipt. This is all that Data Ram did and it must be presumed that he knew what the receipt was which he signed. When the plaintiff has admitted his signature it was upon him to prove that Data Ram was deceived or that Data Ram was not authorized to settle the account as he did. No such attempt has been made. In these circumstances the plaintiffs' suit should have been dismissed. I accept the revision petition with costs and dismiss the plaintiffs' suit.

R.D. *Revision accepted.*

(1) [1911] 93 P. R. 1911=151 P. W. R 1911=11 I. C. 445=228 P. L. R. 1911.

* A. I. R. 1928 Lahore 53

ADDISON AND COLDSTREAM, JJ.

District Board, Sialkot—Defendant—Appellant.

v.

Sultan Muhammad Khan and *others*—Plaintiffs—Respondents.

S. A. No. 1087 of 1927, Decided on 31st October 1927, from the decree of the Senior Sub-Judge, Sialkot, D/- 18th January 1927.

(a) Punjab District Board's Act, (1883), Ss. 30, 31 (2)—*Profession tax on vakils is not illegal.*

Where a Notification issued under S. 31 (2) described the class of persons to be taxed as "All persons who carry on any trade or follow any profession or calling within the said area"

Held: the notification sufficiently defined the class of persons to be taxed.

It may be that this definition may give rise to certain suits on the ground that the persons taxed do not carry on a trade or follow a profession or calling and that they are therefore not liable to be taxed. The tax is not therefore illegal by reason of the want of definition of the class of persons to be taxed and the members of the bar cannot object to its imposition as they come within the class defined. [P 54, C 1, 2]

(b) Tax—Second income-tax cannot be imposed without sanction of Governor-General—Income-tax.

A second income-tax cannot be imposed though a tax on professions, trades or callings can be imposed. If the method of assessment in reality makes the tax one on income, it is illegal and ultra vires even though it purports to be a tax on persons practising a profession or carrying on a trade or calling. The tax which can be imposed without the sanction of the Governor-General in Council, on professions, trades or callings must be one which is not a second tax on the incomes of such persons, i. e., there must be a flat rate imposed by the tax on each profession, trade or calling, or rather on all persons practising a particular profession or carrying on a particular trade or calling. [P 54, C 2]

(c) Jurisdiction—Civil Court—Tax illegally imposed—Civil Court can grant relief.

A civil Court has jurisdiction to determine whether the impositon of a tax is illegal or ultra vires and to give relief if it has been levied from persons who for that reason are not liable to pay the same: *A. I. R.* 1924 *Lah.* 147, and 74 *P. L. R.* 1918, *Rel. on.* [P 55, C 1]

Abdul Rashid—for Appellant.

Badri Das and *Jagan Nath Aggarwal*—for Respondents.

Addison, J.—Sixty-two members of the Sialkot Bar sued the District Board of Sialkot for a declaration that a certain tax imposed by that local body was ultra vires and illegal, and for an injunction restraining the Board from recovering the tax from them. The trial Court decreed the suit on the ground that the tax, though it purported to be a tax on trade, professions and callings, was in reality a tax on the incomes of persons carrying on trades or following professions or callings and that as an income-tax could not be imposed without the consent of the Governor-General in Council it was illegal. On appeal the Senior Subordinate Judge held that it was not a tax on incomes but that it was illegal as the class of persons to be taxed was not defined. Against this decision the District Board has preferred this second appeal.

It is clear that under S. 30, Panjab District Boards Act, a District Board may impose a tax on trades, professions and callings, and the procedure in imposing a tax of this nature is given in S 31 of the Act. Under S. 31 (2) it is the duty of the Board to publish a notice defining the class of persons, or descriptions of the property proposed to be taxed, the amount or the rate of the tax to be imposed, and the system of assessment to be adopted This is, of course, prior to imposing the tax. When, however, the imposition has been notified, it is enacted by S. 31 (7) that the notification shall be conclusive evidence that the tax has been imposed in accordance with law.

The tax in question was imposed by Punjab Government Notification No. 14672, dated 23rd May 1924. This notification gave the class of persons to be taxed and the rate of the tax and runs as follows:

Under Sub-S. (7) of S. 31, Punjab District Board Act, 1883, the Punjab Government (Ministry of Education) are pleased to notify that with the requisite sanction the District Board of Sialkot has directed that, with effect from the 1st June 1924, the following tax be imposed within the area, exclusive of Notified Area, subject to its jurisdiction.

DESCRIPTION OF TAX.

(1) Class of persons to be taxed. All persons who carry on any trade or follow any profession or calling within the said area.

(2) Rate of tax.

The tax shall be levied according to the following scale on the total annual income derived by each assessee from any such trade, profession or calling, provided that such annual income shall not include that (a) received by way of wound or disability pensions for

service in His Majesty's Naval, Military or Air Forces; (b) received on account of wages in kind by agricultural Kamins for Sep work done by them; and (c) derived from land subject to local rate or from livestock and agricultural produce owned by persons mainly defendant on agriculture for their livelihood :

Group	Annual Income	Amount of tax payable.
	Rs.	Rs.
1	201-300	2
2	302-400	4
3	401-750	7
4	751-1000	12
5	1001-1500	15
6	1501-2000	20
7	2001 and over	30

The method of assessment was given in a subsequent Notification.

It was contended by the learned counsel who appeared for the appellant that the class of persons to be taxed was sufficiently defined by stating that all persons who carry on any trade or follow any profession or calling were to be taxed. It was further contended by him that in any case the plaintiffs had no cause of action as they undoubtedly are following a profession within the jurisdiction of the District Board of Sialkot. Lastly, it was contended by him that under sub-S. (7) of S. 31 the Notification must be taken to be conclusive evidence that the tax was imposed in accordance with law.

There is no doubt that sub-S. (2), S. 31, has reference only to the stage when it is proposed to impose the tax and that at that stage no objection seems to have been taken. The notification, therefore, must be taken to be conclusive evidence that the tax was imposed in accordance with law. In any case, I would hold that the words of the Notification already quoted 'sufficiently define the class of persons on whom the tax is imposed. All persons carrying on any trade or following any profession or calling come within the definition and that is as good as to give an exhaustive list of all trades, professions or callings. It may be that this definition may give rise to certain suits on the ground that the persons taxed do not carry on a trade or follow a profession or calling and that they are, therefore, not liable to be taxed. But it is clear that the plaintiffs are liable to be taxed under the notification. In fact, in nearly all cases this will be evident. I therefore hold that the tax is not illegal by reason of the want of definition of the class of persons to be taxed, and I further hold that this objection is not open to the plaintiffs who clearly come within the class defined.

It remains to decide whether the tax, though purporting to be a tax on trades, professions or callings, is in reality an income-tax or not. If it is an income-tax it is conceded that it cannot be imposed under S. 80, Punjab District Boards Act without the consent of the Governor-General in Council. This sanction has not been obtained. The Notification makes it clear that the tax is on the incomes of persons, practising any profession or carrying on any trade or calling within the jurisdiction of the District Board. These incomes are already liable to ordinary income tax. Prima facie the tax under discussion does impose a second tax on the incomes of persons practising professions or carrying on trades or callings. It was argued, however, on behalf of the appellant that as it is a tax only on persons practising a profession or carrying on a trade or calling, it is legal even though the method of assessment amounts to imposing a tax on the incomes of those persons. This argument appears to me to be fallacious. A second income tax cannot be imposed though a tax on professions, trades or callings can be imposed. If the method of assessment in reality makes the tax one on income, it is illegal and ultra vires even though it purports to be a tax on persons practising a profession or carrying on a trade or calling. The tax which can be imposed without the sanction of the Governor-General in Council, on professions trades or callings must be one which is not a second tax on the incomes of such persons, i. e., there must be a flat rate imposed by the tax on each profession, trade or calling, or rather on all persons practising a particular profession or carrying on a particular trade or calling. This difficulty seems to have been realised subsequently, and I notice that flat rates are given in the case of Punjab Government Notification No. 23447, dated 16th August 1926. By this Notification a tax on trades, professions or callings was imposed within the area subject to the jurisdiction of the District Board at Multan.

A tax on animals is another tax which can be imposed by District Board with the previous section of the Local Govern-

ment only. There are numerous instances of such a tax being imposed and the method adopted is to impose a flat rate on each class of animals. If the present tax, however, is legal, it would also be legal to impose a tax on animals as follows namely the tax to be so much on an income of so much and rising or falling in accordance with the incomes of the persons owning the animals Can it be said that such a tax is not an income tax, that is a tax on incomes? In my judgment there is no escape from the conclusion that the tax imposed under Punjab Government Notification No. 14672, dated 23rd May 1924 within the area subject to the jurisdiction of the District Board of Sialkot is illegal and ultra vires in that it is a second income tax on persons practising professions or carrying on trades or callings. There is clear authority of this Court in *Pala Ram* v. *Notified Area Committee Kotaddu* (1) and *Committee of Notified Area Una* v. *Chatar Behari* (2) that a civil Court has jurisdiction to determine whether the imposition of a tax is illegal or ultra vires and to give relief if it has been levied from persons who for that reason are not liable to pay the same.

In these circumstances I would dismiss this appeal but leave the parties to bear their own costs.

Coldstream, J.—I agree.

D.D. *Appeal dismissed.*

(1) A. I. R. 1924 Lah. 147=4 Lah. 256.
(2) [1918] 74 P. L. R. 1918=44 I. C. 910=74 P. W. R. 1918.

A. I. R. 1928 Lahore 55

SHADI LAL, C. J., AND ZAFAR ALI, J.

Jodh Singh—Plaintiff—Appellant.

v.

Mahla and *others*—Defendants—Respondents.

S. A. No. 993 of 1923, Decided on 23rd May 1927, from the decree of the Dist. J., Shahpur, D/- 8th March 1923.

Will—Construction—Legatee dying after testator but before a life-holder created by the will—Legatee's heir takes after the life-holder.

Where by a will the testator bequeaths his property to his adopted son subject to the life interest of his widow and the adopted son dies during the widow's lifetime leaving behind him a son, a heritable vested interest is created in favour of the legatee on the testators' death and his son is the rightful successor to the property after widow's death : *A. I. R.* 1922 *Lah.* 433, (*F. B.*), *Dist.* [P 56 C 1]

M. L. Puri—for Appellant.

G. C. Narang—for Respondents.

Zafar Ali. J.—The plaintiff sues for a declaration of his title to the property of which the last male owner was Hardit Singh and which is now in the plaintiff's possession. His claim is based on a deed executed by Hardit Singh on 20th August 1895, by which he gifted the whole of his property to Attar Singh, father of the plaintiff, with this reservation that he (Hardit Singh) would have full power to deal with his property so long as he would live and that after his death his wife Har Devi, whose nephew Attar Singh was, would have the same power during her lifetime. Thus the gift was not to take effect immediately. It was further recited in the deed that Attar Singh was the duly adopted son of Hardit Singh. Hardit Singh died in 1896 leaving him surviving his wife Har Devi and his adopted son Attar Singh and in accordance with the provisions of the deed Mt. Har Devi succeeded to his entire estate.

Attar Singh died in 1903. His son, the plaintiff, lived with Mt. Har Devi till her death which occurred in 1920. Mt. Har Devi during her lifetime put the plaintiff in possession of her property and applied for mutation of the landed estate in his name. This was sanctioned about a week before her death. Hardit Singh's collaterals (who figure as defendants in this litigation) appealed against this mutation order and the Collector accepting their appeal directed the plaintiff to establish his title in a civil Court. This is the origin of the suit.

The defendants pleaded, inter alia, that the document was a forgery and that even if it was genuine it was inadmissible in evidence for want of registration because it was a deed of gift. The trial Court overruled both these pleas and decreed the plaintiff's suit, finding that the deed was duly executed by Hardit Singh and was to all intents and purposes a will and that as Attar Singh had a vested interest in the property of Hardit Singh, who had died before him the collaterals of Hardit Singh could not divest the son of Attar Singh of that interest. On appeal the District Judge also came to the conclusion that the document was genuine and that it was not a deed of gift ; but relying on *Mela Singh* v. *Gur Das* (1),

(1) A. I. R. 1922 Lah. 433=3 Lah. 362 (F.B.).

he dismissed the plaintiff's suit on the ground that what Hardit Singh intended was to appoint Attar Singh his heir and that the son of the heir thus appointed had no right of succession. Against that decision the plaintiff has appeared in this Court in second appeal.

From the provisions of the deed taken as a whole it appears to us that it is not a deed of gift or alienation or adoption as contended by the respondent's counsel nor is it a deed appointing an heir as held by the lower appellate Court. It is clear that Hardit Singh did not adopt Attar Singh as his son by this deed. The adoption had taken place some time before the execution of the deed, and the deed only contains a recital of that adoption. Further, the intention of the executant, as evidenced by the deed, undoubtedly was to bequeath his property to his adopted son or the heir appointed by him, because the incidents enumerated in the deed appertain to a disposition by will and not to a gift. Consequently the term "gift" applied to the disposition was undoubtedly a misnomer. Further it is clear that the legatee acquired a heritable vested interest in the property on the death of the testator, as the property was certainly to come to him on the death of the testator's widow who had succeeded only to a life interest therein. This being so, the plaintiff was the rightful successor on the death of the widow. The principle laid down in *Mela Singh* v. *Gur Das* (1), does not affect the plaintiff's right, his father having as the appointed heir survived the appointer.

We, therefore, accept the appeal and, reversing the judgment and decree of the lower appellate Court, restore that of trial Court. The respondents will pay the plaintiff's costs throughout.

D.D. *Appeal accepted.*

✻ A. I. R. 1928 Lahore 56

DALIP SINGH, J.

Secy. of State—Defendant—Petitioner.

v.

Tulsi Das Krishan Dial—Plaintiffs—Respondents.

Civ. Revn. Petn. No. 278 of 1927, Decided on 5th November 1927, from the decree of the Small Cause Court Judge, Delhi, D/- 31st January 1927.

(a) *Railways Act, S. 72—Evidence of railway servants should not be disbelieved merely because they would not admit failure of duty.*

In the majority of cases of claims against railway for loss, the railway can produce no other evidence of how it dealt with the goods except by producing those of its servants who had dealt with the goods and therefore to disbelieve the evidence of these servants on the ground that they naturally would not admit any dereliction of duty would be to cast an impossible onus on railway administration. [P 57 C 2]

✻ (b) *Railways Act, S. 72—Risk-note Form B—New form—Nature of pleadings of parties indicated.*

Under the new form of risk-note B, possibly it is initially the plaintiff's duty to call upon the railway administration to disclose its dealings with the consignment, and the railway should in its pleadings disclose how the consignment was dealt with. The plaintiff should call upon the railway to prove either its pleadings of its previous disclosure or the Court should decide if it is necessary for the railway to give evidence. [P 57 C 2]

C. H. Garden Noad—for Petitioner.

Jai Gopal Sethi—for Respondonts.

Judgment.—In this case the plaintiff sued the Secretary of State for India on the ground that he had delivered certain bales to the defendant railway and two of these bales had not been delivered by the railway. Various pleas were taken but they were evidently based on an entire misconception of the facts of the new form of risk-note B. As the form is new I propose in this case to point out possible constructions of the meaning of the form in order that the public and the railway may be warned what sort of evidence should be led or expected of them in future cases. The Court below held that the railway administration had failed to explain how the consignment was dealt with when it was in its possession or control and it, therefore, held that the plaintiff was entitled to recover Rs. 258 and decreed accordingly.

The relevent words in the new risk-note are as follows :

The railway administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and if necessary to give evidence thereof before the consignor is called upon to prove misconduct but if misconduct on the part of the railway administration or its servants cannot be fairly inferred from such evidence the burden of proving such misconduct shall lie upon the consignor.

It has been contended by the learned Government advocate in revision that these words mean that the plaintiff in every such case should call npon the railway to make the necessary disclosure and

thereupon the railway shall be bound to make the said disclosure and that if the plaintiff is dissatisfied with the disclosure or does not accept the truth of the disclosure made, he can call upon the railway to give evidence of its dealings with the consignment. If this evidence itself is sufficient to lead to an inference of misconduct then the case can be decided against the railway. If it is not so sufficient then it is open to the plaintiff to give evidence tending to prove such misconduct, but if the railway has not been asked to make the disclosure it is not necessary for it to give any evidence, or if it is not called upon to give evidence it is not necessary for it to give any evidence, and therefore, the Court below was wrong in decreeing the plaintiff's suit without any proof of misconduct on the part of the railway administration on its servants. It is clear to me from the pleas of the railway that the parties seem to have been under the impression that the old risk-note form was still being used and therefore the position of neither side was clearly grasped in the trial in the Court below. Counsel for the respondent has contended that the fact that the railway tendered such evidence purporting to show how it dealt with the consignment proves that the railway did realise its position. This, however, is not necessarily so.

The railway did not give evidence disclosing their dealings throughout the time that the consignment was in their possession or control. It seems to me that they were endeavouring to prove that there had been a loss of the consignment. This conduct could be explained by reference to the conflict of rulings under the old risk-note form, as to whether it was sufficient for the railway merely to plead loss or whether the railway had to go further and prove loss before they could claim exemption under the risk-note form B. I, therefore, think that the best course in the circumstances is to remand the case for retrial to the Court below and give both parties a chance of producing what evidence they may wish to. The plaintiff will be presumed to have called upon the railway to give evidence as to how they dealt with the consignment throughout the time it was in their possession or control, and the railway shall give such evidence as they may consider fit as regards this. In this connexion, I will point out that the Court should not have disbelieved a railway servant merely on the ground that he was a railway servant and that, therefore, he was bound to state that he had done his duty. It is obvious that in the majority of cases the railway can produce no other evidence of how it dealt with the goods except by producing those of its servants who had dealt with the goods and to disbelive the evidence of these servants on the ground that they naturally would not admit any dereliction of duty would be to cast an impossible onus on the railway administration. At the same time I would point out that wherever possible the railway should support the oral evidence of its servants by books which should be proved to have been duly kept in the course of business. But before the Court can disbelieve the railway servants the plaintiff must cross-examine these servants or otherwise prove that relevant books could have been forthcoming and that there was no reason for their non-production. If this is done, it, of course, is open to the Court to disbelive the oral evidence on the ground that the corroborative evidence of the books had not been produced in the case.

I now proceed to point out the possible construction of the new form of risk-note in order that the parties may be warned, as I have said before, as to what their respective rights and duties are. It is possible to hold that it is initially the plaintiff's duty to call upon the railway administration to disclose its dealings with the consignment. It is also possible to hold that what the risk-note really means is that the railway should in its pleadings disclose how the consignment was dealt with. As regards the construction of the words "if necessary" it may be that it means that the plaintiff may call upon the railway to prove either its pleadings or its previous disclosures or it may mean that on the pleadings and facts stated it is for the Court to decide if it is necessary for the railway to give evidence. In the circumstances I would, therefore, if I were plaintiff, give due notice to the railway to disclose and if not satisfied with the disclosure I would call upon the railway to give evidence making this a portion of my pleas. On the other hand if I were the railway then whether called upon or not by the plaintiff I would take the precaution of dis-

closing the dealings in my pleadings and would enquire from the Court whether it would require further evidence thereon other than pleadings supported by such relevant copies of entries from books as the railway might think fit to put in along with its pleadings or at the time of production of documents. Both parties will then be in a position, whatever interpretation was given by the Courts to this risk-note, to avoid the expense of retrial and appeals or revisions. In the present case, I, as stated above, hold that the plaintiff may be presumed to have called upon the railway to give evidence of its dealings and produce such evidence, oral or documentary, as it may think fit and the plaintiff shall then be at liberty to give evidence tending to prove misconduct if so advised. In my opinion, as at present advised if the Court is not satisfied that the railway have given good evidence to prove its dealings with the consignment it is open to the Court to decree the plaintiff's suit on the ground that the railway have failed to discharge a statutory obligation. I must not, however, be taken to decide this point finally and it is open to the Court to hold that even if the evidence given by the railway is not satisfactory it is still for the plaintiff to prove misconduct before the railway can be saddled with responsibility. No order as to costs in this revision.

D.D. *Case remanded.*

A. I. R. 1928 Lahore 58

FFORDE AND TEK CHAND, JJ.

Wazir Chand and *others*—Plaintiffs—Appellants.

v.

Mt. Jiwan Devi and *others*—Defendants—Respondents.

F. A. No. 1873 of 1923, Decided on 30th March 1927, from the decree of the 1st Cl. Sub-Judge, Jhang, D/- 8th May 1922.

Hindu Law—Widow having only one daughter, inheriting property worth Rs. 8,000*—Gift of property worth Rs.* 2,000 *to son-in-law at the time of marriage is valid.*

It is established beyond any doubt whatever that a Hindu widow may make a gift of a reasonable portion of her deceased husband's estate to her son-in-law on the occasion of her daughter's marriage. The amount of land which may be alienated for this purpose depends in each case upon the whole of the circumstances, upon the position of the family, the number of children to be provided for, the nature of the land alienated, and any other circumstances which may arise in a particular case. [P 59 C 2]

Where a Hindu widow, having no sons but only one daughter, made a gift to her son-in-law, at the time of her daughter's marriage, of property worth about Rs. 2,000 out of the property worth about Rs. 8,000 inherited by the widow from her husband [P 60 C 1]

Held: that the gift was valid.

Amar Nath Chona and *Gobind Ram Khanna*—for Appellants.

Jiwan Lal Kapur and *Anant Ram Khosla*—for Respondents.

Fforde, J.—The plaintiffs in this case sued for a declaration that certain alienations made by Mt. Jiwan Devi, defendant 1, shall not affect their reversionary interests in the property, and they also asked for an injunction to prohibit Mt. Jiwan Devi from making further alienations. The alienations which have been attacked are four namely:

(a) A lease for a term of five years dated 22nd February 1921, in favour of Karm Narain, defendant 2.

(b) A gift of three marlas of land in favour of Chanan Das and his wife Mt. Maya Devi, defendants 3 and 4, dated 28th May 1921

(c) A mortgage of three marlas of land mortgaged to Lal Chand defendant 5 by deed dated 15th June 1921, for Rs. 1,175 and

(d) A sale of certain lands for Rs. 600 to Lal Chand, defendant 5, by deed dated 1st December 1921.

So far as the lease is concerned the trial Judge held that the alienations referred to as (a), (b) and (c) were valid and he dismissed the plaintiffs' suit in respect of these particular matters. He held, however, that the sale of the 1st December 1921, was invalid and he gave the plaintiffs the decree sought in respect of this alienation. The injunction was refused. The plaintiffs-appellants do not pres for a declaration in respect of the lease, as the lease has now expired; nor do they press for the injunction, but they now appeal against the decision in favour of the validity of the gift of the 28th May 1921, and the mortgage of the 15th June 1921 Mr. Amar Nath Chona who appears for the plaintiffs-appellants contends that the mortgage is invalid inasmuch as it was not made for legal necessity and consideration. The deed sets out with meticulous care everyoney in respect of which the mortgage money was required. The sums in question are recited as being required for the expenses of the marriage of defendant 4, Mt.

Jiwan Devi's daughter, Mt. Maya Devi, to Chanan Das defendant 3. These sums amount to Rs. 946-4-9. In addition to these particular items the deed states that a further sum of Rs. 179-9-0 was paid to discharge a debt due by Mt. Jiwan Devi's deceased husband Har Dial to a stranger, Rs. 35 was stated to have been paid in cash before the Sub-Registrar for the discharge of revenue, etc., and Rs. 14-2-3 had been taken in cash for the purchase of stamp paper. The total of these sums comes to Rs. 1,175-0-0 which is the amount for which the lands are stated to have been mortgaged.

It is not denied that the marriage in question did in fact take place on the 26th May 1921. A number of witnesses have been produced by the defendants to show that the sums alleged to have been expended upon the marriage ceremonies and festivities have been accurately stated in the mortgage-deed. The witnesses include the person who supplied the provisions, the person who made the ring, and the tailor who provided the clothing. In some instances these witnesses have produced their account books to show that the sums they have charged correspond with the sums that appear in the mortgage-deed. I can see no reason why these witnesses' testimony should not be believed, especially as the total expended on the marriage celebrations cannot be said to be excessive in view of the rank and position in life of the parties to the marriage.

The item of Rs. 179-9-0 has been proved by the production of the bahi of B. Hari Das the creditor concerned and the evidence of Tara Chand, D. W. 20, the scribe of the entry. The evidence in respect of the other smaller items, in my opinion, is perfectly satisfactory.

Mr. Amar Nath Chona has very strongly urged that Mt. Jiwan Devi was not driven by need to raise the sums in question by mortgaging the land, as she was already possessed of an annual income out of which she could have defrayed these expenses. This the plaintiffs have attempted to substantiate by calling a number of witnesses to show that Mt. Jiwan Devi was in affluent circumstances. The plaintiff Sakhir Chand, however, has himself admitted that he acted as agent for Mt. Jiwan Devi in the managing of her property. He has also added that he had got no regular accounts of her income and expenses, though he admits that she had sold several lands. He alleges that she never trusted him with the bahis though he admits that he never took a receipt from her for sums paid to her. He also states that he did not remember the prices which he received for these pieces of land.

It seems to me on the whole of the evidence that Mt. Jiwan Devi was not in affluent circumstances and that she was driven to mortgaging the land in question for the purposes of defraying the marriage expenses of her daughter. I would, therefore, uphold the decision of the trial Judge as regards the mortgage transaction.

With regard to the gift, the main contention of Mr. Amar Nath Chona is that the gift is invalid under Hindu Law as it exceeds a reasonable portion of the inheritance of Mt. Jiwan Devi's deceased husband. It is now established beyond any doubt whatsoever that a Hindu widow may make a gift of a reasonable portion of her deceased husband's estate to her son-in-law on the occasion of her daughter's marriage The amount of land which may be alienated for this purpose depends in each case upon the whole of the circumstances, upon the position of the family, the number of child en to be provided for, the nature of the land alienated, and any other circumstance which may arise in a particular case.

The only question which we have to decide in this appeal is whether or not the gift in question exceeds a reasonable portion of the deceased husband's estate. According to the plaintiff the value of the property left by Har Dial amounts to Rs. 8,000 and according to the same interested witness the value of the portion gifted amounts to Rs. 4,000. The probabilities are that the property left amounts to a great deal more than Rs. 8,000, in view of the fact that this witness has himself admitted having sold various portions without having kept any accounts of such sales. But, even accepting the value to be Rs. 8,000 0-0 the defendant has produced some evidence to show that the land gifted was valued only at Rs. 760-0-0 per marla. This would bring the total value of this land to about Rs. 2,000-0-0.

In my opinion, taking all the circumstances of this case into consideration, the fact that Mt. Jiwan Devi had only one daughter who on her mother's death

would ultimately succeed to the whole inheritance, and the fact that the land gifted amounts, according to the defendants' evidence which I see no reason to disbelieve, to less than one-third of the whole inheritance, I would agree with the learned trial Judge that this gift is valid under Hindu Law. The appeal, therefore, must be dismissed with costs.

Tek Chand, J.—I agree.

R.D. *Appeal dismissed.*

A. I. R. 1923 Lahore 60

BROADWAY AND BHIDE, JJ.

Joti Ram—Plaintiff—Appellant.

v.

Harbakhsh Singh and *others*—Defendants—Respondents.

S. A. No. 2056 of 1923, Decided on 1st July 1927, from the decree of Senior Sub-J., Lyallpur, D/- 20th April 1923.

Civil P. C., O. 42, R. 2—Filing copy of the intermediate order on preliminary issues along with memorandum of appeal was necessary prior to Punjab Government Notification.

Where a copy of the intermediate order disposing of the preliminary issues is not attached with the memorandum of appeal, appeal cannot be entertained. Punjab Government Notification No. 138-G, dated 19th March 1926, empowers the High Court to dispense with a copy of the preliminary order, but the power to dispense with a judgment should ordinarily be exercised at the first hearing: *A. I. R.* 1926 *Lah.* 638 and *Civil Appeal No.* 2450 *of* 1922, *Ref.*

[P 61 C 1]

Faqir Chand—for Appellant.

Nand Lal—for Respondents.

Broadway, J.—This second appeal has arisen out of a suit brought by one Joti Ram against Sardar Harbakhsh Singh and another. It was based on S. 18, Specific Relief Act.

The facts briefly are that the defendants were tenants of Government under Act 5 of 1912 in the year 1916. In 1919 they executed a lease transferring the land to Joti Ram for a period of five years on certain conditions. That lease was not given effect, inasmuch as Joti Ram was not put in possession. In 1920 defendants completed the payment of the instalments due to Government which would render them entitled to proprietary rights in the land In March 1921 the present suit was instituted and it was prayed that specific performance of the agreement to lease should be decreed or in default damages awarded.

The trial Court granted a decree for damages, but on appeal the learned District Judge dismissed the plaintiff's suit, holding that the contract of lease offended against the provisions of S. 19, Act 5 of 1912, and being void could not be specifically performed and could not give rise to any relief by way of damages.

Against this decision Joti Ram preferred this appeal to this Court which was admitted to a hearing on 6th November 1923. On the case coming before us yesterday Dr. Nand Lal for respondents raised a preliminary objection to the effect that the appeal was incompetent for the following reasons :

It appears that when the defendants filed their written statements certain objections were taken to the form of the suit, to its valuation and to the jurisdiction of the civil Courts. Issues were framed on these points and decided by a separate order. The decision being in favour of the plaintiff the suit proceeded. Further issues were settled and the case decided as has already been stated. When this appeal was filed, with the memorandum of appeal were attached a copy of the judgment of the learned District Judge, a copy of the judgment of the trial Court dated 14th May 1922, and a copy of the decree. A copy of the intermediate order disposing of the preliminary issues was not attached. Dr. Nand Lal's contention was that under the provisions of O. 42, R. 2, Civil P. C., a copy of this intermediate order was absolutely necessary, inasmuch as the judgment of the trial Court consisted not of the judgment dated 14th May 1922 alone but of that judgment and the judgment which culminated in the order deciding the preliminary issues.

Mr. Fakir Chand for appellant contended that the view pressed by Dr. Nand Lal was erroneous and would lead to all sorts of difficulties It has been held in certain unreported cases of this Court which are to be found in *Abdullah* v. *Behari Lal* (1) and *Bhiwani Cotton Spinning and Weaving Mill* v. *Bishen Sahai* (2) that an order such as was passed in the present case formed part of the judgment of the trial Court and the absence of a copy with the memorandum of appeal was fatal to the appeal.

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(1) A. I. R. 1926 Lah. 638.

(2) A. I. R. 1928 Lah. 45.

After hearing counsel on this point we decided to hear the appeal itself in which the point for determination is whether the contract in question was void having regard to the provisions of S. 19, Act 5 of 1912. As to this it has been urged that under this contract what was transferred were not the tenancy rights but the proprietary rights in the land and that therefore there was no contravention of the section in question. The learned counsel on both sides have cited a large number of authorities dealing with the result of void contracts. There is, I think, something to be said for the view contended for by Mr. Fakir Chand, but it seems to me that the appeal must fail on the ground that the copy of the trial Court's judgment was not filed along with the memorandum of appeal.

Having regard to the authorities referred to, there can be no doubt that the copy of the order disposing of the preliminary points was a part of the judgment of the trial Court. It was contended, however, that under the provisions of O. 42, R. 2, applicable to this Court as amended by Punjab Government Notification No. 138-G, dated 19th March 1926, this Court has power to dispense with this portion of the judgment. No doubt the rule, as it now stands, gives this Court power to dispense with the judgment of the trial Court. At the time when this appeal was admitted, however, no such power was possessed by this Court and it cannot, therefore, be assumed that the Judges admitting the appeal had decided to dispense with a copy of the judgment. As at present advised I am inclined to the opinion that the power to dispense with a judgment should ordinarily be exercised at the first hearing. In this view of the case it is not necessary to deal further with the appeal which is accordingly dismissed. In the circumstances, however, we leave the parties to pay their own costs in this Court.

Bhide, J.—I concur.

N.D. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 61

DALIP SINGH, J.

Thakar Datt—Decree-holder—Appellant.

v.

Ram Singh and *Janother*—udgment-debtor and Surety—Respondents.

Misc. S. A. No. 1306 of 1927, Decided on 26th October 1927.

* (*a*) *Civil P. C., S. 145—Security bond is a contract and can be enforced as such—Contract Act, S. 56.*

A security bond in essence is no more than a contract for the due performance of a certain thing and a party is entitled to have that contract enforced by the Courts unless there is some reason why it should not be so enforced. [P 62 C 2]

* (*b*) *Civil P. C., O. 21, R. 2.—Adjustment by surety with decree-holder may be proved.*

The Civil Procedure Code is not exhaustive and an adjustment of decree by surety of judgment-debtor with decree-holder might be proved unless there is something to bar its proof. [P 63 C 1]

Badri Das—for Appellant.

D. C. Ralli—for Respondents.

Judgment.—The facts of this appeal are as follows :—

The decree-holder, Pandit Thakar Datt, got Ram Singh, judgment-debtor, arrested in execution of a decree. Bhaget Mukand Lal stood surety for the appearance of the judgment-debtor on the 4th August 1926. It is not apparent on the record and neither counsel has been able to show me under what section the Court purported to act in taking security from the judgment-debtor. Order 21, R. 40, Civil P. C. has been suggested by counsel for the decree-holder, but there is nothing to show that the conditions necessary for the application of this section were present to the Court's mind or on the record at the time when this order was passed.

On the 4th August 1926, neither the surety nor the judgment-debtor put in an appearance and on the application of the decree-holder notice was issued to the surety to show cause why the full decretal amount should not be realized from him in accordance with the terms of his bond. On the 1st October 1926, the surety appeared and put in objections to the execution of the decree against him on the ground that the judgment-debtor was ill on the 4th August 1926, and, therefore, was unable to attend; and secondly that the judgment-debtor's counsel was present and that was sufficient appearance within the meaning of the bond on behalf of the judgment-debtor. The 29th October 1926, was fixed for evidence of the parties on these issues and on the 29th October, the judgment-debtor and all parties were present and the Court ordered the arrest of the judgment-debtor. Before, however, anything was done the judgment-debtor applied to be given time to make an application in insolvency and on his furnishing the

requisite security the Court ordered him to be released. On the same date the case was adjourned to the 1st November 1926, because it was represented to the Court that the parties might arrive at a compromise on the 1st November 1926, the surety put in an application stating that the decree-holder had compromised the case or had agreed to compromise the case against the surety for Rs. 500 and that the surety was willing to pay a cheque for Rs. 500 to the decree-holder in accordance with the arrangement made at the last hearing. The cheque was accordingly tendered duly in Court. The Court then framed a preliminary issue as to whether the question of the parties having entered into a compromise could be gone into by him as the decree-holder denied the alleged compromise. The trial Court thereupon held that this alleged adjustment with the decree-holder could not be considered by him at all and that the surety had given no proof of the alleged illness of the judgment-debtor and, therefore. it held that the surety was liable for the decretal amount and directed that execution should also be issued out against him. On appeal the learned Additional District Judge held that the question of the compromise could not be gone into by the Court at all and that at best it was inchoate contract and as such could not, therefore, be pleaded in bar of the execution. He also held that the trial Court should have given an opportunity to the surety to prove the fact of the illness of the judgment-debtor and that he would have been prepared to remand the case for this purpose. He, however, did not remand the case as he decided on the authority of *Makanji Mavji* v. *Bhukan Das Nagar Das* (1), *Tan Kin Shan* v. *U. Che Si* (2) and *Abdul Hussein* v. *D. J. Mistri & Co.* (3) that S. 145, was not mandatory and the Court could in its discretion either refuse to execute against the surety or that having taken action against the judgment-debtor the Court had no power also to proceed against the surety.

Makanji Mavji v. *Bhukan Das Nagar Das* (1) and *Abdul Hussein* v. *D. J. Mistri & Co.* (3) are authorities under S. 55 (4) Civil P. C. and have no application to the present case. In *Tan Kin Shan* v. *U. Che Si* (2) the surety produced the judgment-debtor two days after the due date and there were other factors also in the case; it was held by the Court to be substantial compliance with the terms of the bond. In this case, however, the judgment-debtor was not produced till nearly 2½ months after the due date and there is no explanation at present of the cause of this long delay. Therefore, it seems to me that none of the rulings relied on by the learned Additional District Judge applies to this case at all and I hold that the learned Additional District Judge was in error in discharging the surety from the liability incurred on the security bond. A security bond in essence is no more than a contract for the due performance of a certain thing and a party is entitled to have that contract enforced by the Courts unless there is some reason why it should not be so enforced.

It has been further contended by counsel for the decree-holder that as the bond provides for the surety being liable, if the judgment-debtor fails to appear and this term is quite unconditional therefore, there can be no point in going into the question of the judgment-debtor's illness. He has cited *Rameswar Das* v. *Sri Lal* (4) in support of this contention. In that case, however, it was held that the possible absence of the judgment-debtor by reason of his conviction in a criminal case was present to the mind of the surety, who had full knowledge of all the facts and circumstances of the case There is nothing to show that the present surety had in mind the possible serious illness of the judgment-debtor. I, therefore, consider that evidence may be led on this point and it will be for the Court to decide whether in view of all the circumstances the parties may be considered to have bound themselves unconditionally or whether a serious illness of the judgment-debtor, if proved, would execuse the surety. See S. 56, Contract Act.

Counsel for the surety has further argued that the factum of compromise can be proved by the surety. Counsel for the decree-holder urges that O. 21, R. 2 bars, or is not applicable to such an alleged adjustment. He further contends that as the so-called adjustment was

(1) A. I. R. 1924 Bom. 423=48 Bom. 500.
(2) A. I. R. 1925 Rang. 135=2 Rang. 567.
(3) A. I. R. 1922 Bom. 340=46 Bom. 702.
(4) A. I. R. 1922 All. 390=44 All. 174.

really an agreement to adjust, the Court could not take notice of such an alleged agreement to adjust even if it could take notice of an adjustment. It seems to me that the Civil Procedure Code is not exhaustive and an adjustment might be proved unless there was something to bar its proof. There is no reason why the ordinary rule of law should not apply and why a party should not be able to prove such an adjustment. Under O. 23, R. 3, if the decree-holder had brought a suit instead of putting in an application to execute the decree against the surety and the surety had alleged that a compromise had taken place, the surety could have proved such a compromise. It is at present impossible to decide whether the so-called compromise was an adjustment or an agreement to adjust or what difference that fact would make in the case. I, therefore, allow the surety to put in such proof as he likes as to the alleged compromise. The Court should before proceeding to take evidence record in detail what the statement of the surety as to the place and the time and the terms of the compromise is. After taking all the evidence both as to the illness of the judgment-debtor and as to the terms of the compromise, if any, the Court will proceed to decide the case. I leave it open to the Court to decide whether the agreement to adjust, as distinct from adjustment, can or cannot be proved and I leave it open to the Court to decide whether, on the facts proved as to the illness of the judgment-deb or, the surety's conduct is or is not excusable.

I accept the appeal and remand the case to the trial Court for disposal. As both sides have succeeded to some extent, I make no order as to costs, which will throughout this case abide the event.

D.D. *Case remanded.*

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SHADI LAL, C. J., AND JAI LAL, J.

Azim (deceased) and *others*—Defendants—Appellants.

v.

Bahdur Khan and *another*—Plaintiff and Defendant—Respondents.

S. A. No. 587 of 1923, Decided on 23rd April 1927, from the decree of the Dist. J., Attock, D/- 18th December 1922.

Civil P. C., O. 2, R. 2—Two successive mortgages—Sale to prior mortgagee—Suit for redemption by puisne mortgagee entitled to pre-empt decreed—His subsequent suit for pre-emption is not barred—Pre-emption.

A certain property was mortgaged successively to two persons and then sold to the prior mortgagee; the puisne mortgagee sued for redemption of the prior mortgage and succeeded without expressly reserving the right of pre-emption to which he was entitled.

Held: that his subsequent suit for pre-emption was not barred: 133 *P.R.* 1888 and 161 *P. W. R.* 1906, *Dist.* [P 64 C 1]

Shambu Lal for *M. L. Puri*—for Appellants.

Sain Das—for Respondents.

Jai Lal, J.—This is an appeal by Azim, Jalal and Gulab, the vendee-defendants, in a suit for pre-emption.

A preliminary objection is taken on behalf of the respondents that Azim appellant has died and that his legal representatives not having been substituted in his place within the time fixed for the purpose, the appeal has abated. An affidavit has, however, been filed by counsel for the appellants from which it appears that Jalal and Gulab, the two remaining appellants, are the sole heirs of Azim. We, therefore, hold that the right to appeal survives in favour of Jalal and Gulab and overrule the preliminary objection.

On the merits the only ground taken before us is that the plaintiff had waived his right to sue for pre-emption, the other ground that the suit was barred under O. 2, R. 2, Civil P. C. having been expressly abandoned.

It appears that the land in suit was originally mortgaged to the appellants for Rs. 1,000 on the 25th February 1920. It was then mortgaged to the plaintiff for Rs. 1,800 on 3rd January 1921. Rs. 1,000 out of this were to be paid to the appellants in satisfaction of the mortgage of the 25th February 1920. Then it was sold to the appellants on 20th of April 1921. On 8th February 1922 the plaintiff instituted a suit for redemption of the mortgage of the 26th February 1920, in his capacity as a puisne mortgagee by virtue of the mortgage dated 3rd January 1921, and apparently succeeded. Thereafter he instituted the present suit for pre-emption.

It is contended on behalf of the appellants that in the redemption suit the plaintiff, not having mentioned in the plaint that he reserved his right to pre-empt the sale which had taken place in

favour of the defendants before the date of that suit, is now estopped from pre-empting the sale, and reliance is placed in support of this contention on *Bawa Lehna Singh* v. *Jagan Nath* (1) and *Chandras* v. *Itbar Khan* (2). In both these cases the plaintiffs were mortgagees of the land sold and instituted suits against the vendees for recovery of the amount due to them as mortgagees. The liability of the defendants was based on the sales in their favour which were subsequently sought to be pre-empted. It was held by the Chief Court that the plaintiffs having sued to recover the mortgage debt from the vendees accepted the validity of the sales and were, therefore, estopped from denying it in the pre-emption suits. The facts in the present case are quite different. In the previous suit for redemption of the mortgage instituted by the plaintiff the liability of the defendants was based on the mortgage-deed in their favour on the 26th February 1920. They were not, either expressly or impliedly admitted to be the owners of the land, but were sued merely as mortgagees. There is no provision of law which requires the plaintiff under the circumstances mentioned above to reserve, in the plaint, any other rights that he may possess by virtue of separate transactions or causes of action. Holding that there has been no waiver of the plaintiff's right to pre-empt the sale in question. We dismiss this appeal with costs.

R.D. *Appeal dismissed.*

(1) [1888] 138 P. R. 1888.
(2) [1906] 164 P. W. R. 1906.

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* A. I. R. 1928 Lahore 64

ADDISON, J.

Emperor—Petitioner.

v.

Muhammad Akbar—Accused—Respondent.

Cri. Ref. No. 1462 of 1927, Decided on 18th November 1927, made by the S. J., Delhi.

* *Criminal P. C., Ss. 118 and 123 (2) — Security not given immediately—Accused sent to jail — Security offered afterwards—Magistrate can accept.*

A man was ordered by a Magistrate of the first class under S. 118 to give security for his good behaviour under S. 110 for a period of three years. He failed to furnish security then and there and he accordingly was ordered to be detained in prison, pending the orders of the Sessions Judge. A day or so later he offered security to the Magistrate who accepted it and he was released from jail.

Held : that the Magistrate can accept security. A reasonable view of the matter should be taken as there is nothing in the Act, clearly indicating what should be done if security is offered to the Magistrate after he has referred the matter to the Sessions Judge and before the latter has heard the reference. The purpose of the security sections is not that the persons proceeded against should be sent to or kept in jail but that should only be done when they are unable to give security.

Held : further that reference to the Sessions Judge automatically ends with the acceptance of security by the Magistrate. [P 65 C 1]

Carden Noad—for Petitioner.

Bishen Narain—for Respondent.

Order.—This is a case reported by the Sessions Judge of Delhi, one Muhammad Akbar was ordered by a Magistrate of the first class under S. 118, Criminal P. C., to give security for his good behaviour under S. 110, Criminal P. C., for a period of three years. Muhammad Akbar failed to furnish security then and there and he accordingly was ordered to be detained in prison, pending the orders of the Sessions Judgr, in accordance with the provisions of S. 123 (2), Criminal P. C. A day or so later he offered security to the Magistrate who accepted it and he was released from jail. This came to the notice of the learned Sessions Judge when he was hearing the reference. The learned Sessions Judge was of opinion that the Magistrate had no jurisdiction to accept the security after making the reference to him and he had accordingly forwarded the proceedings of the Magistrate to this Court with the recommendation that the Magistrate's order accepting the security be quashed and Muhammad Akbar be ordered to be re-arrested and detained in prison, pending the orders of the Sessions Judge on the reference.

Sub-S. (1), S. 123, Criminal P. C., directs that in cases where security is demanded up to the limit of one year and security is not given the person ordered to give security shall be committed to prison until the security is given or the period fixed expires. Sub-S. (2) provides that where security for a period exceeding one year is demanded from a person the Magistrate shall, if security is not given, issue a warrant directing him to be detained in prison, pending the orders of the Sessions Judge before whom the proceedings shall be laid. Sub-S. (3) lays

down that the Sessions Judge after examining the proceedings may pass such orders as he thinks fit. Finally, sub-S. (4) is to the effect that if security is tendered to the officer in charge of the jail he shall forthwith refer the matter to the Court or Magistrate who made the order and shall await the orders of such Court or Magistrate.

The argument of the learned Government Advocate was that it follows from the fact that sub-S. (4) comes after both sub-Ss. (1) and (2) that it is left to the Magistrate who made the order to deal with the security offered in both cases when such security is tendered to the officer in charge of the jail. What corresponded to sub-S. (4) in the old Code of 1882 came at the end of what is now sub-S. (1). According to him the change effected in the later Code was a clear indication that it was intended that the Magistrate should still take security even though the matter had been referred to the Sessions Judge if such security was offered before the Sessions Judge dealt with the case. The matter is not free from difficulty and it must be said that there is nothing in the Act clearly indicating what should be done if security is offered to the Magistrate after he has referred the matter to the Sessions Judge and before the latter has heard the reference. It must be a common occurrence that sureties are only available a day or two later. In my judgment, therefore, a reasonable view of the matter should be taken. The purpose of the security sections is not that the persons proceeded against should be sent to or kept in jail but that that should only be done when they are unable to give security. I do not think that it was intended that persons should remain in jail possibly for months while the Sessions Judge owing to pressure of work was unable to deal with their cases. It must have been meant that they could offer security to the Magistrate when they were able to procure it and in this way get out of jail. That implies that the reference to the Sessions Judge, if not disposed of, would automatically come to an end when security is taken In my judgment this is the most responsible and convenient view to take, seeing that there is no specific provision of the Code dealing with this matter. At the same time it follows that the right of appeal given under S 406, Criminal P. C., to the person from whom security is demanded is revived once he has given security and in the present case if an appeal is preferred the fact that Muhammad Akbar has been engaged in these proceedings should be taken into account by the Court or Magistrate hearing the appeal if one is preferred.

For the reasons given I decline to set aside the proceedings of the Magistrate accepting security and hold that the reference to the Sessions Judge automatically ended when Muhammad Akbar gave security to the Magistrate a day or two after he was ordered so to do, and at the same time that the right of appeal which was in abeyance by reason of the reference revived when he gave security.

N.D. *Order accordingly.*

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BROADWAY AND ADDISON, JJ.

In the matter of *Mehta Krishan Chandra, Pleader.*

Civ. Misc. No. 223 of 1927, Decided on 22nd April 1927, on reference by Dist. J. Multan, on 19th February 1927.

Legal Practitioners Act (18 *of* 1879), *S.* 13 (*a*)—*Pleader drafting complaint for complainant in one case and acting for accused in a different case instituted by same complainant — No offence is committed.*

A pleader was consulted by the complainant and he drafted a complaint on his behalf relating to incidents that occurred on a certain date. Later on in a case instituted by the same complainant in connexion with a incident of a different date against the same accused, the pleader not being engaged by the complainant appeared and defended the persons charged.

Held: that he did not commit any breach of S. 13 : 2 *P. R.* 1904, *Dist.* [P 66 C 1]

Moti Sagar and *Mehr Chand Mahajan* —for Respondent.

Order

Broadway, J.—Lala Krishan Chand, a pleader, practising in Multan, has been reported to this Court by the learned District Judge for having committed an offence under the Legal Practitioners Act. It is said that he is guilty of an offence under S. 13 (a), Legal Practitioners Act 18 of 1879 in, that having been engaged by the complainant in certain criminal proceedings he subsequently appeared for some of the persons accused at a later stage of those proceedings. The learned District Judge has found that the com-

plaint which led him to make an enquiry into the conduct of this pleader was clearly the outcome of personal spite and party feeling. He also appears to have found that the main story told by the complainant was false. Nevertheless. on general grounds he appears to have thought that the pleader should be censured and has placed reliance on *Ali Muhammad* v. *Sham Lal* (1). In my judgment the facts of that case are quite different from those of the present one. Here all that the complainant has been able to establish is that he had asked the pleader to draft a certain complaint relating to incidents that occurred on 4th September 1925. The complaint itself is cast in very general terms, the names of the parties are not given in it, nor even the date of the occurrence. The proceedings that took place later related to an incident that was alleged to have occurred on 20th November 1925, so that the complaint drafted by the pleader had clearly nothing whatever to do with the proceedings in which he later appeared. The learned District Judge thinks that the complainant must, in the course of consultation have disclosed certain matters relating to title to the pleader. It is not easy to understand what these matters could have been. In any event in my judgment no breach of S. 13 (a), Legal Practitioneas Act has been committed by the pleader. All that appears to have happened is that he was consulted by the complainant, who later on did not think fit to engage him to prosecute the case instituted by him in connexion with a totally different incident. In these circumstances had the pleader appeared and defended the persons charged throughout the case he would not, in my judgment, have committed any breach of the Legal Practitioners Act and no further action is necessary.

Addison, J.—I agree.

N.D. *Reference dismissed.*

(1) [1904] 2 P. R. 1904.

✻ A. I. R. 1928 Lahore 66

FFORDE AND AGHA HAIDAR, JJ.

Emperor—Appellant.

v.

Walli Mohammad—Accused—Respondent.

Cri. A. No. 257 of 1927, Decided on 10th November 1927, from the order of Sess. J., Hissar, D/- 4th January 1926.

✻ *Criminal P. C., S.* 190 (1) (*a*) (*b*)—*Non-cognizable offence—Magistrate taking cognizance without jurisdiction—Proceedings are validated if he acts in good faith.*

The law requires that the Magistrate, who takes cognizance of a non-cognizable offence under S. 190, Sub-S. (1),Cl. (a) or Cl. (b) without having jurisdiction, should only act in good faith, though erroneously, to make his proceedings valid: *A. I. R.* 1926 *Mad.* 865, (*F.B.*); *A.I.R.* 1924 *Cal.* 614, *Foll.*; 32 *Mad.* 3; *A. I. R.* 1925 *Mad.* 672; 1 *P. L. T.* 73; 11 *A. L. J.* 331; 26 *Bom.* 150, *Dist.* [P 68 C 1]

C. H. Carden Noad—for Appellaut.

S. R. Laul—for Respondent.

Order.—This is an appeal by the Local Government against an order of the learned Sessions Judge of Hissar Division acquitting the respondent, Walli Muhammad, who was convicted of an offence under S. 161, I. P. C., and sentenced to one years's rigorous imprisonment by the District Magistrate, Gurgaon. The learned Sessions Judge has disposed of the appeal, which had been preferred by the respondent, Walli Muhammad, on a purely legal ground and has ordered his acquittal.

Walli Muhammad, the respondent, was a foot-constable in the Gurgaon District. It is alleged on behalf of the prosecution that he received a currency note of Rs. 100 from one Sohan Lal as illegal gratification. The Deputy Superintendent of Police made a report to the Superintendent of Police about Wali Muhammad's misconduct as a police officer and the Superintendent of Police on the 12th December 1924, submitted the following note to the District Magistrate:

I send these papers to you for information. Foot constable Wali Muhammad is accused of taking Rs. 100 from one Sohan Lal of police station Puhana who was suspected of complicity in tbe Jainarain murder case. The offence against Wali Muhammad is clear. I, therefore, suggest that a judicial enquiry should be held against him under S. 161/165, I. P. C. The note of Rs. 100 is attached with these papers in an envelope bearing on both ends of one side my initials.

On receipt of this note the District Magistrate passed an order in Urdu which may be translated as follows:

The case may be entered in the register. Witnesses and the accused may be called by means of summons for the 14th January 1925, dated the 13th December 1924.

On appeal to the learned Sessions Judge, the counsel for Walli Mohammad raised the objection that as a result of communication addressed by the Superintendent of Police to the District Magistrate, the latter could only punish Walli Mohammad departmentaly but could not take any action against him under the

general penal laws. This contention found favour with the learned Sessions Judge who put a certain construction upon S. 190, Criminal P. C., quashed the conviction and sentence and acquitted the appellant without going into the merits of the case.

The sole question, therefore, in appeal is whether the view taken by the learned Sessions Judge is correct or not. It may be observed here that before the Criminal Procedure Amendment Act, 1923, the language of Cl. (b), S. 190 (1) was "upon a police report of such facts". By the Criminal Procedure Amendment Act 1923, an organic change was introduced in S. 190, Criminal P. C., and Cl. (b), S. 190 (1) now runs thus:

> Upon a report in writing of such facts made by any police officer.

This had a very important bearing upon the matter under consideration. As S. 161, I. P. C., refers to a non-cognizable offence the argument on behalf of the respondent is to the effect that a police officer could only make a report of a cognizable offence and that he was not empowered under the law to make a report in a non-cognizable case. In other words, the word "report" as used in the amended clause of S. 190, should be interpreted as meaning "police report" in spite of the change in the phraseology introduced by the amendment and that the words "police report" should be construed as meaning technically the report on a cognizable offence. The learned Government Advocate, on the other hand, argued that this interpretation was no longer possible, having regard to the alteration in Cl. (b) the word "report" not being limited or restricted as meaning "police report", as the words occur in the various sections of Ch. 14, e. g., S. 173.

There has been considerable divergence of judicial opinion on the subject and reference was made during the course of the argument to a number of cases. It is unfortunate that, although the appeal was argued on the 7th and again on the 10th November 1927, the learned Government Advocate did not invite the attention of the Court to the Full Bench decision reported in *Public Prosecutor* v. *Ratnavelu Chetty* (1), as this would have shortened the discussion very considerably. It was only a mere accident that the attention of the Court was drawn to this important decision after the arguments had been over. The learned Government Advocate referred to *Dilan Singh* v. *Emperor* (2). That case does not seem to have any direct bearing upon the matter in controversy and need not be discussed. The case reported in *Mehr Chiragh Din* v. *Emperor* (3) though it does not meet the real point in controversy, yet has some bearing upon the question before us. In this case, at the instance of the Superintendent of Police., the Sub-Inspector filed a document which purported to be a complaint, though it was not addressed to any particular officer, and the Sub-Inspector was not examined under the provisions of S. 200, Criminal P. C. It was held that this defect of the Sub-Inspector not having been examined under the law, as it stood before the amendment, was cured by S. 537, Criminal P. C, seeing that the accused did not suffer any injury, and it was also held that the document filed by the Sub-Inspector was to all intents and purposes a complaint.

The case of *Bhairab Chandra* v. *Emperor* (4), was also relied upon. The importance of that decision lies in the fact that, although it was given before the amendment of the year 1923, the learned Judges placed a liberal construction upon the language of S. 190 and held that a "police-report" in a non-cognizable case is either a "complaint" under S. 4 (h) or a "police report" within S. 190 (1) (b), Criminal P. C., and the Magistrate has jurisdiction to take cognizance of an offence disclosed by that report, although the offence may be a non-cognizable one.

Then we come to the case reported in *Bholanath Das* v. *Emperor* (5). This case was decided after the amendment of the year 1923, and the learned Judges held that

> the provisions of S. 190 extend to any offence and notwithstanding the use of the words "police report" in S. 173, S. 190 (1) (b) cannot be restricted merely to non-cognizable offences, and a Magistrate is empowered by S. 190 (1) (b) to take cognizance both in cognizable and non-cognizable offences, upon a report such as is mentioned in S. 190 (1) (b)

Two more cases were cited by the learned Government Advocate during the course of the argument, namely, *Chandri*

(1) A.I.R. 1926 Mad. 865=49 Mad. 525 (F.B.)

(2) [1913] 40 Cal. 360=17 I. C. 570=13 Cr. L. J. 826.
(3) A. I. R. 1924 Lah. 258=4 Lah. 359.
(4) [1919] 46 Cal. 807=29 C.L.J. 318=53 I.C. 698=23 C W.N. 484.
(5) A. I. R. 1924 Cal. 614.

Bawoo v. *Emperor* (6) and *Lee* v. *Adhikary* (7). The case reported in *Chandri Bawoo* v. *Emperor* (6) was decided after the amendment of the year 1923, but the circumstances of that case are peculiar, seeing that the question decided in that case depended largely upon the scope and meaning of certain local Acts and cannot be considered as an exposition of the meaning of S. 190 (1) (b) which may be of general importance. The case in *Lee* v. *Adhikary* (7), does not seem to have any bearing upon the question under consideration.

Emperor v. *Ghulam Hussain* (8) is very important and instructive. It was a case decided after the amendment of the year 1923, and the learned Judges observed as follows:

> Now S. 190 of the Code is, and intended to be very wide. It empowers a Magistrate to take cognizance of an offence in almost every conceivable set of circumstances.

The matter, however, seems to be definitely settled by the Full Bench decision reported in the *Public Prosecutor* v. *Ratnavelu Chetty* (1), which, as already stated, was not cited by the Government Advocate. I may observe that during the course of the argument I referred to the provisions of S. 529, Criminal P. C., and observed that, even when a Magistrate is not empowered by law to take cognizance of an offence under S. 190, Sub-S. (1), Cl. (a) or Cl. (b) on the ground that he was not competent to receive from the police the report of a non-cognizable offence, the defect could be cured if he acted in good faith and the proceedings shall not be set aside merely on the ground that he had not power under the law to entertain the report. I am glad to find that my view finds full support in the judgment of the Full Bench, which lays down, among other things, that the law requires that the Magistrate, who takes cognizance of an offence under S. 190, Sub-S. (1), Cl. (a) or Cl. (b) without having jurisdiction, should only act in good faith, though erroneously, to make his proceedings valid. It further lays down that S. 190 (1) (b) authorizes certain Magistrates to take cognizance of any offence upon a report in writing of facts which constitute such offence made by any police officer, and S. 200 (aa) provides that, where a public servant, acting or purporting to act in the discharge of his official duties, makes a complaint of an offence, nothing shall require the Magistrate to examine him before taking cognizance of the offence. This Full Bench decision fully covers the question raised in the present appeal, and I follow the same, as well as the care reported in *Bholanth Das* v. *Emperor* (5).

On behalf of the respondent a certain number of cases were cited, e. g., *V. O. Chidambaram Pillai* v. *Emperor* (9), *Perumal Naick* v. *Emperor A. I. R.* 1925 *Mad.* 672; *Ram Lal* v. *Emperor* (10) and *Sarferaz Khan* v. *Emperor* (11).

V. O. Chidambaram Pillai v. *Emperor* (9), does not seem to have any direct bearing upon the present case as it merely lays down that, where a police officer files a complaint in a non-cognizable case or regarding an offence of which it is not his duty to report, such complaint is a complaint within S. 4 (b), Criminal P. C., and is not a police report. The case reported in *Perumal Naick* v. *Emperor A. I. R.* 1925 *Mad.* 672 consists of a very short judgment in which there is no discussion of any principles of law or reference to any reported case. *Ram Lal* v. *Emperor* (10) was a case under the old law and cannot be invoked in aid as an authority, having regard to the alteration in the section introduced by the Legislature in 1923. *Sarferaz Khan* v. *Emperor* (11) is a case which really supports the contention of the Crown. In that case Knox, J., held that reports of investigations made by the police into non-cognizable offences under orders of a Magistrate passed under S. 155 (2) fell under S. 173, and that Magistrates could take cognizance of the cases upon receiving such a police report.

I may note that the Full Bench case reported in *King-Emperor* v. *Sada* (12), has also been discussed before us. That case lays down that, where a police officer of his own motion makes a report in a non-cognizable case, it is not a police report as there is no provision in the Criminal Procedure Code which empowers a police officer to make such a report.

(6) A. I. R. 1925 Bom. 131=49 Bom. 212.
(7) [1910] 37 Cal. 49=5 I. C. 553=14 C.W.N. 304.
(8) A.I.R. 1925 Lah. 237.
(9) [1909] 32 Mad. 3=1 I. C. 22=5 M.L.T. 1.
(10) [1919] 1 Pat. L.T. 73=55 I. C. 285=21 Cr. L.J. 269.
(11) [1913] 11 A.L.J. 331=19 I. C. 314=14 Cr. L. J. 218.
(12) [1902] 26 Bom. 150=3 Bom. L. R. 586. (F.B.).

Having regard to the change introduced in S. 190, Criminal P. C,, this case loses all its importance as an authority.

Thus we see that the weight of authority after the amendment of the law, is entirely in favour of the Crown. This being so, the order of the learned Sessions Judge cannot be maintained. I would accordingly allow the appeal, set aside the order of the learned Sessions Judge and, as the case had been disposed of on a purely technical ground and the evidence had not been gone into, I would remand the case for decision on the merits.

R.D. *Appeal allowed.*

A. I. R. 1928 Lahore 69

BROADWAY AND JAI LAL, JJ.

Bhag Singh and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Cri. A. No. 987 of 1924, Decided on 27th February 1925, from the order of the 1st Cl. Magistrate, Kusur.

Criminal Trial—Evidence—Record of.

Where, in an examination of medical witness, the Magistrate, instead of recording the statement describing the injuries on the person injured, recorded a brief statement to the effect that the witness had examined the injured person and that injuries found on his person and their nature were given in detail in a certain exhibit:

Held: that it amounted to giving evidence by reference and was not justified. [P 69 C 2]

M. Sleem—for Appellants.

Judgment.—Bhag Singh and Dhara Singh, sons of Wadhawa Singh, and one Balwant Singh, have been found guilty of having caused grievous hurt to one Karam Singh and under S. 325, I. P. C., Bhag Singh and Balwant Singh have been sentenced to seven years rigorous imprisonment and Dhara Singh to one year's rigorous imprisonment. They have appealed to this Court and on behalf of Karam Singh an application for enhancement of sentence has been filed.

On behalf of the appellants it has been urged by Mr. Sleem that in the case of Dhara Singh, a boy of 15 years of age, the charge did not specify that he was guilty under S. 325, I. P. C., by the operation of S. 34 of the same Code. Further he has contended that the evidence on the record, so far as it implicated him, at any rate, was exceedingly weak.

Taking the case of Dhara Singh first, a reference to the record shows that the police sent up only Bhag Singh and Balwant Singh in the first instance and it appears that Dhara Singh was made an accused under orders of the Court after the case commenced. It is true that Karam Singh, the injured person, implicates Dhara Singh attributing to him, however, a very minor part. He says that while he was riding home from Chunian he met Dhara Singh walking along the road and on his enquiry was told that he was going to Chunian and that this Dhara Singh caught the reins of his mare and immediately afterwards the other two appellants came from behind a *ber* tree and attacked him. The witnesses for the prosecution other than Karam Singh named all three appellants but, after a careful consideration of that evidence, we cannot ignore the circumstance that as a result of that investigation Dhara Singh was not sent up for trial. This raises in our mind so serious a doubt as to his complicity that we feel compelled to give him the benefit of this doubt. So far as he is concerned, therefore, we set aside his conviction and direct his release.

In the case of the two other appellants the position was somewhat different from the outset. They had been named as having taken a very active part in the assault. Karam Singh has sworn that both his arms and both his legs were broken and that he spent three months in the hospital at Chunian and two months in the hospital at Lahore. Mr. Sleem has pointed out that the trying Magistrate has been grossly slack in recording the evidence of the Doctor, Captain K. S. Bhatia. A reference to the record discloses that instead of recording the statement describing the injuries that Karam Singh had received, all that the trying Magistrate thought fit to record was a brief statement to the effect that Captain Bhatia had examined Karam Singh and that the injuries found on his person and their nature were given in detail in Ex. PB. In order to ascertain those injuries it would be necessary to refer to Ex. PB. In other words, this is giving evidence by reference which, in our opinion, is not justified. The attention of the trying Magistrate is drawn to *Lal Singh* v. *Emperor* (1). The statement as recorded, however, does bear out

(1) A. I. R. 1925 Lah. 19=5 Lah. 396.

Karam Singh's allegation that he was for three months in the Chunian hospital as a result of the injuries received by him and that his condition was dangerous owing to the multiplicity of those injuries. We, therefore, feel satisfied that the injuries caused to Karam Singh amounted to grievous hurt.

We are also convinced that these injuries were caused by the two appellants, Bhag Singh and Balwant Singh. It is true that the defence set up consists of the statements of two sweepers to the effect that they were responsible for the grievous hurt, but we find ourselves in agreement with the view taken of this evidence by the Court below and regard it as worthless.

It has next been urged that the punishment awarded is the maximum prescribed for the offence. In our opinion it would be difficult to find a more appropriate case for the awarding of the maximum sentence.

We, therefore, dismiss the appeal of Bhag Singh and Balwant Singh.

R.D. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 70

ZAFAR ALI, J.

Jaswant Rai Datta Chawdhry — Decree-holder—Appellant.

v.

Mt. Lajwanti and *others*—Judgment-debtors—Respondents.

Misc. A. No. 2799 of 1926, Decided on 10th December 1927, from the order of Senior Sub-Judge, Gurdaspur, D/- 27th August 1926.

* (*a*) *Civil P. C., O.* 21, *R.* 16—*Assignee of a part of decree can apply for its execution.*

The transferee of a part only of a decree is competent to apply for execution thereof: 15 *P. R.* 1917, *Diss. from* and 33 *Mad.* 80 and 17 *Cal.* 341, *Foll.* [P 71 C 2]

(*b*) *Registration Act, S.* 17—*Assignment of a decree is valid though it is not registered.*

An assignment of a decree does not require registration as it has been incorporated in a decree and the assignment of a decree though it is one for possession of immovable property is not equivalent to a transfer of property: 23 *Cal.* 450; 35 *All.* 524 and 94 *P. R.* 1982, *Foll.* [P 71 C 1]

Badri Das—for Appellant.

Judgment.—This is a miscellaneous first appeal against an order refusing an application for execution by the alleged assignee of a part of a decree. Nobody has appeared in this Court on behalf of the respondents who opposed the application successfully in the Court below, and the appeal had been heard exparte. The facts are as below:

A lady of the name of Lajwanti, joining with herself Jaswant Rai and others as co-plaintiffs, brought a suit for possession of certain lands left by her father. Jashwant Rai and the other plaintiffs were strangers to her but they had undertaken to finance the litigation and in consideration for that she had assigned two-fifths of the property in suit to them. The suit was dismissed by the Chief Court, but the plaintiffs appealed successfully to the Privy Council and obtained a decree on 29th January 1924.* That decree was, however, amended by the Judicial Committee on 19th March 1925 † and according to that amendment the suit was decreed in favour of Mt. Lajwanti alone to the exclusion of Jaswant Rai and other plaintiffs. Their Lordships pronounced judgment in favour of Mt. Lajwanti, but with the addition that the judgment was to be

without prejudice to the appellants other than Mt. Lajwanti to recover in respect of any conveyance or assignment made or of any contract to convey or assign such share of the property recovered under the judgment as may appertain to them in respect of such conveyance, assignment or contract.

Jaswant Rai then brought a suit for a declaration that he and certain other persons who were impleaded as defendants 8 to 16 were entitled to two-fifths of the property according to the award of 1922 or in the alternative for a declaration and injunction that the other defendants including Mt. Lajwanti should not realize the produce of the two-fifths of the property which belonged to the plaintiff and defendants 8 to 16. Defendants 8 to 16 were co-plaintiffs in the former suit but the real defendants in the former suit were not made defendants in this case. Jaswant Rai and the lady eventually came to terms which were reduced to writing and the compromise thus entered into was filed in Court and a decree followed embodying the terms of the compromise. Jaswant Rai and the lady then jointly made an application for execution of the decree of His Majesty in Council, but soon after that the lady and Jaswant

* [A. I. R. 1924 P. C. 121—Ed.]
† [A. I. R. 1925 P. C. 168—Ed.]

Rai fell out again and she refused to proceed with her application for execution stating that she had been the victim of a fraud, and that there was no valid assignment of the decree to Jaswant Rai.

The executing Court came to the following conclusions:

(1) That the alleged fraud was not proved.

(2) That as the compromise went beyond the scope of the suit, so much of the consent decree as was not within the ambit of the suit must be ignored.

(3) That though according to the compromise, two-fifths of the decree were assigned, and Jaswant Rai was empowered to take possession of two-fifths of the property by taking out execution jointly with Mt. Lajwanti, this was beyond ths scope of the suit and could not be given effect to. (Here it was observed by the Court below that the compromise was not registered but it did not say that it was inadmissible in evidence for want of registration).

(4) That as the assignee of a part of the decree Jaswant Rai had no power to apply for execution.

Conclusions Nos. (2) and (3) do not appear to be sound. There was no denying the fact that the lady made the assignment and as it was reduced to writing and embodied in a decree. It fulfilled the necessary conditions and fell within the purview of O. 21, R. 16, Civil P. C. Further it is clear that it did not require registration because it had been incorporated in a decree and also because the assignment of a decree, though the decree should be for possession of immovable property, is not equivalent to a transfer of property. In *Gous Mahomed* v. *Khawas Ali Khan* (1), a Division Bench of the Calcutta High Court held that S. 17 (b), Registration Act, 1877, does not apply to a kabala or deed of assignment of a decree and an unregistered kabala of a decree dealing with immovable property of more than Rs. 100 in value is not admissible is evidence under S. 49 of that Act. The same view was taken by a Division Bench of the Allahabad High Court in *Mumtaz Ahmad* v. *Sri Ram* (2): see also *Lashkari* v. *Johar* (3).

Number(4) was based on *Mohkam Chand* v. *Ganga Ram* (4). In that case Sir Donald Johnstone, Chief Judge of the Punjab Chief Court, held that the transferee of a part of a decree has no power at all to apply for execution and that O. 21, R. 16, Civil P. C., applies when the whole of a decree has been transferred. This view was opposed to that of the Madras and Calcutta High Courts as expressed in *Venkataramaniah* v. *Venkatachainulu* (5) and *Kishore Chand Bhakat* v. *Gisborne & Co.* (6), which were brought to the notice of the learned Chief Judge, Sir Donald Johnstone, but were not followed. These Madras, Calcutta and Panjab cases were cited before a Division Bench of the Allahabad High Court in *Ram Sahai* v. *Madan Lal Kanhaiya Lal* (7) and Walsh, J., made the following observations at p. 348 (49 of *A. I. R.*—Ed.) in respect thereof:

I, therefore, take the view that it was wrong to say that this rule (R. 16) does not apply to an assignment by mortgage or to any transfer which has the effect of conferring upon the transferee or assignee a merely fractional interest in a decree and I am confirmed in this view by the fact, as I have already stated, that in Calcutta and Madras this question has been settled for nearly 30 years. I refer to *Kishore Chand Bhakat* v. *Gisborne & Co.* (6) and *Venkataramaniah* v. *Venkatachainulu* (5). These cases, I think, rightly draw attention to the fact that there was no prohibition in the Code to which reference can be made making such an application as this one which has no legal foundation, and in both cases the Judges were careful to point out that it was for the execution Court below to consider, with all the parties before it, the respective rights of each. These are the two cases to which the Chief Justice of the Punjab referred in *Mohkam Chand* v. *Ganga Ram* (4) without suggesting, although he was deciding against the applicant that there was any doubt as to the soundness of the decisions.

On this very point a Full Bench of the Madras High Court held as follows in *Muthiah Chettiar* v. *Govinddoss Krishnadoss* (8).

Section 146, Civil P. C., recognizes the validity of a transfer of a part of a decree and execution thereof by the transferee. O. 21, R. 16 is no bar to the application of the section. Such transferee is like a joint decree-holder and can, under O. 21, R. 15, protect his rights either by executing the decree himself or by joining or intervening in the execution by his transferor.

Thus there is an overwhelming weight of authority against the view taken in *Mohkam Chand* v. *Ganga Ram* (4), and after a careful consideration of all the rulings I come to the conclusion that the transferee of a part of decree is competent to apply for execution thereof. I,

(1) [1896] 23 Cal. 450.
(2) [1913] 35 All. 524=21 I. C. 462=11 A. L. J. 815.
(3) [1902] 94 P. R. 902.
(4) [1917] 15 P. R. 1917=39 I. C. 654.
(5) [1910] 33 Mad. 80=3 I. C. 444=6 M. L. J. 242.
(6) [1890] 17 Cal. 341.
(7) A. I. R. 1926 All 346=48 All. 432.
(8) A.I.R. 1921 Mad. 599=44 Mad. 919 (F.B.).

therefore, accept the appeal, set aside the order of the Court below and remand the case to be proceeded with in accordance with law.

S.D. *Case remanded.*

A. I. R. 1928 Lahore 72

FFORDE AND ADDISON, JJ.

Muhammad Ismail—Petitioner.

v.

The Crown—Respondent.

Cri. Revn. No. 917 of 1926, Decided on 3rd March 1927 from the order of the Sess. J. Hissar, D/- 12th May 1926.

Criminal P. C., S. 197 — Complaint against Municipal Commissioner alleging undue influence by him on a sub-overseer stopping him to purchase bricks from certain person and compelling him to assent for purchasing bricks from accused—Sanction is not necessary.

Where a complaint was filed against a person, a member of the Municipal Committee, alleging that he had, by reason of his position as Municipal Commissioner and member of the Public Works Sub-Committee, exercised undue influence upon a sub-overseer, a servant of the Committee, and had stopped that sub-overseer from purchasing bricks from a certain person and compelled him to give his assent to the purchase of the accused's bricks:

Held: that as the complaint did not allege that the accused obtained this advantage to himself by acting or purporting to act in the discharge of his official duty as a Municipal Commissioner or a member of the Sub-Committee, the case did not fall within the provisions of S. 197 and that therefore sanction was not required for his prosecution. [P 73 C 1]

Zafarullah Khan—for Petitioner.

Ram Lal and *R. C. Soni*—for Respdt.

Referring Order.

Campbell, J.—The point which arises in this revision petition is one which, I think, should be decided by a Division Bench. The question concerns the interpretation of S. 197, Criminal P. C., which in its present form is different from the previous section under which the Punjab rulings *Bakshi Ram* v. *Ganpat Rai* (1), *Nur Bakhsh* v. *Emperor* (2) and *Amir Singh* v. *Empress* (3) were delivered. S. 197 prohibits a Court from taking cognizance of any offence which a person is alleged, in a complaint, to have committed while acting or purporting to act in the discharge of his official duties. In the present instance a certain person Kanshi Ram filed a complaint against Muhammad Ismail, a member of the Municipal Committee, Sirsa, alleging that he had by reason of his position as Municipal Commissioner and member of the Public Works Sub-Committee exercised undue influence upon a sub-overseer, a servant of the Committee, and had compelled him to give him, the accused, a contract for bricks to be supplied to the Municipal Committee. The Magistrate to whom this complaint was presented did not record the statement of the complainant but issued process to the accused under S. 168, I. P. C., and S. 48, Punjab Municipal Act. Subsequently the Magistrate framed a charge against the accused under these sections. Objection to the want of sanction under S. 197 was taken as soon as the accused came into Court. Later on, after the charge had been framed, the objection was repeated in a petition to the Sessions Judge who in repelling it treated the matter as if the solution lay in the contents of the charge. It seems to me, however, that the point is, what was alleged in the complaint, since S. 197 prohibits a Court not from framing a charge but from taking cognizance of an offence alleged.

Under the former section the offence excluded from cognizance was one of which a public servant was accused as a "public servant" and under that section it would seem that no complaint against a Municipal Commissioner under S. 168, I. P. C., could have been proceeded with unless the sanction of the Local Government had been obtained. It is argued that the same is the spirit of the new section, but the actual words of that section now are:

> any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties.

It is desirable to have an authoritative interpretation of these words and I therefore refer the case to a Division Bench.

Judgment.—The only question in this revision is whether the complaint alleges that the petitioner has committed an offence while acting or purporting to act in the discharge of his official duty as a member of the Municipal Committee and of a Building Sub-Committee. This is a pure question of fact. According to the complaint itself the petitioner is alleged, by exercising undue influence on a sub-overseer, to have stopped that sub-overseer from purchasing bricks from a certain Din Mohammad, and to have com-

(1) [1890] 14 P. R. Cr. 1890.
(2) [1902] 17 P. R. Cr. 1902.
(3) [1904] 29 P. R. Cr. 1904.

pelled him to give his assent to the purchase of the petitioner's bricks. The complaint does not allege that the petitioner obtained this advantage to himself by acting or purporting to act in the discharge of his official duty as a Municipal Commissioner or a member of the Sub-Committee. In fact the suggestion in the complaint is that taking advantage of the fact that he was a member of the Municipal Committee and of the Sub-Committee, he went outside his official duty altogether to obtain this contract himself. We are of opinion that on the particular facts of this case it does not fall within the provisions of S. 197, Criminal P. C., and that, therefore, sanction is not required for a prosecution. Had it been alleged that the petitioner in obtaining this contract held himself out to be acting as a member of the Sub-Committee or of the Municipal Committee, then the question would arise whether or not sanction to prosecute would be necessary. Upon the facts of this case in our judgment no sanction is required and the petition must accordingly be rejected, and the orders for stay discharged.

R.D. *Petition rejected.*

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* A. I. R. 1928 Lahore 73

FFORDE AND ZAFAR ALI, JJ.

Lal Chand and *others*—Defendants—Appellants.

v.

Thakar Das—Plaintiff—Respondent.

F. A. No. 3119 of 1925, Decided on 20th October 1927, from the decree of the Senior Sub-Judge, Amritsar, D/- 15th October 1925.

* *Civil P. C., S. 97—Appeal against preliminary decree only after final decree has been passed is incompetent.*

An appeal against preliminary decree only presented, after both the preliminary and final decrees are made, is not competent: *A. I. R.* 1921 *Lah.* 265; 36 *Cal.* 762; 32 *All.* 225; 18 *C. L. J.* 321 and *A. I. R.* 1921 *Cal.* 109, *Foll*; 37 *Mad.* 455; 37 *Mad.* 29; 36 *All.* 532 *(F. B.)* and *A. I. R.* 1926 *Lah.* 534, *Dist.*

[P 74 C 2]

Sundar Das—for Appellants.

Jai Gopal Sethi—for Respondent.

Fforde, J.—This was a mortgagee's suit to realize the capital and interest secured by certain mortgages by sale of the mortgaged property. Judgment was given for the plaintiff on 15th October 1925, and a preliminary decree made on the same date. On 24th November 1925 the final decree was made and on 5th December 1925, the present appeal was brought against the judgment and decree of 15th October 1925, but no appeal was brought against the final decree of 24th November 1925.

Mr. Jai Gopal Sethi for the plaintiff respondent has raised the preliminary objection that the appeal is not competent, as there is no appeal against the final decree and the period of limitation has long passed for the presentation of such an appeal. Mr. Sethi has referred to *Ganga Ram.* v. *Sundar Lal* (1), in which Broadway J., following *Mackenzie* v. *Narsing Sahai* (2), *Kuria Mal* v. *Bishambar Das*, (3), and *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (4), held that, where a final decree had been passed, an appeal against the preliminary decree only was incompetent.

Mr. Sethi cited another decision of the Calcutta High Court in *Kulada Prosad* v. *Ramananda* (5), which as is the case here, was an appeal by the defendant in a mortgage suit. In that case a preliminary decree was made on 15th January 1920, and the appeal lodged in the High Court on 21st April 1920. In the interval, namely, on 16th March, 1920, the final decree had been made. The appeal to the High Court, however, was directed only against the preliminary decree and not against the final decree. On an objection being taken that the appeal in those circumstances was incompetent, the Court held the objection was "manifestly well founded on principle" for the reason that if the preliminary decree were to be reversed against the appellant the final decree would still remain unaffected, as no attempt had been made to challenge its propriety. The Court distinguished the case of *Abdul Jalil* v. *Amar Chand Paul* (6), [erroneously referred to in the report as *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (4),] where the final decree was made after the appeal had been preferred against the preliminary decree. In those circumstances

(1) A. I. R 1921 Lah. 265.
(2) [1909] 36 Cal. 762=1 I. C. 413=10 C. L. J. 113.
(3) [1910] 32 All. 225=5 I. C. 276=7 A. L. J. 210.
(4) [1913] 18 C. L. J. 321=21 I. C. 516.
(5) A. I. R. 1921 Cal. 109=48 Cal. 1036.
(6) [1913] 18 C. L. J. 223= 1 I. C. 510.

it was held that the final decree must be deemed to have been made on the assumption that if the preliminary decree should be modified or set aside in the appeal, the final decree also would be similarly modified or set aside.

In *Mackenzie* v. *Narsing Sahai* (2), a decision by a Division Bench, it was held that, where in a partition suit a final decree had been made and an appeal preferred against the preliminary decree only, it was not open to the appellant to challenge the correctness of the preliminary decree without preferring an appeal against the final decree.

Mr. Sundar Das for the appellants has relied upon *Ramuvien* v. *Veerappudayan* (7), in which it was held that it is competent to a party to prefer an appeal against the preliminary decree in a redemption suit though before the appeal was presented the final decree had been passed. The Court followed the decision in *Lakshmi* v. *Maru Devi* (8), where it was held that the right of a party to appeal against a preliminary decree was not affected by the subsequent passing of the final decree.

Kanhaiya Lal v. *Tirbani Sahai* (9), is to the same effect. It was held that when an appeal had once been filed and was pending against the preliminary decree in a suit for partition, the passing of a final decree did not render the appeal nugatory, the Court holding that the final decree depended upon the preliminary decree, and if, as the result of an appeal, the latter was set aside, the former must fall with it.

To the same effect is the decision of LeRossignol, J. in *Ramditta* v. *Maru and others*: *A. I. R.* 1926 *Lah.* 534, namely that it is not necessary to appeal against a final decree when the preliminary decree on which it is based has been set aside on appeal. In that case the final decree was made during the pendency of the appeal from the preliminary decree.

In *Chandulal Maganlal* v. *Motilal Harilal* : *A. I. R.* 1926 *Bom.* 43, a Division Bench held that :

> when an appeal is filed against a preliminary decree, but no stay of proceedings is asked for, and a final decree is passed in the lower Court, without any appeal being filed therefrom the proper course for the appellant in such a case is to put an appeal against the decree absolute, or in any event to inform the Court, when the appeal agaist the preliminary decree comes on for hearing, that a decree absolute has been made.

Macleod, C. J. dealt with the question as follows :

> The actual legal position, when an appeal is filed against a preliminary decree, but no stay of proceedings is asked for, and a final decree is passed in the lower Court without any appeal being filed therefrom, is somewhat obscure. It seems to me that the proper course for the appellant in such a case is to put an appeal on the file against the decree absolute, or in any event to inform the Court, when the appeal against the preliminary decree comes on for hearing, that a decree absolute has been made. It may not be that the appeal Court is debarred from hearing the appeal from the preliminary decree merely on account of the Court below having passed a final decree. But to avoid the difficulties which may arise when no application has been made for stay of proceedings, it would certainly be desirable that, in any case where a preliminary decree is passed and a party appeals against that decree, when the Court below has passed a final decree he should file an appeal against that decree.

A Full Bench of the Patna High Court in *Mt. Wahidunnissa* v. *Dip Narain Pershad* (10), held that, where an appeal had been filed against the preliminary decree and a final decree was made thereafter, despite the objection of the appellant that the final decree should not have been made until the appeal had been disposed of, the appeal against the preliminary decree was competent. Chamier, C. J. distinguished the decisions in *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (4), and *Sadhu Charan Datta* v. *Hara Nath Datta* (11), on the ground that in these latter cases the final decree had been passed before an appeal against the preliminary decree was filed.

I have been referred to no authority in which the Court has permitted an appeal against the preliminary decree filed after the final decree has been passed, following what appears to me to be the trend of judicial opinion, I am of opinion that the present appeal, having been presented after both the preliminary and final decrees were made, against the preliminary decree only, is not competent, and I would accordingly, accepting the respondent's objection dismiss this appeal with costs.

Zafar Ali, J.—I agree.

S.D. *Appeal dismissed.*

(7) [1912] 37 Mad. 455=22 M. L. J. 217=14 I. C. 394=(1912) M. W. N. 117.

(8) [1911] 37 Mad. 29=12 I. C. 664=21 M. L. J. 1063.

(9) [1914] 36 All. 532=24 I. C. 827=12 A. L. J. 876 (F. B.).

(10) [1916] 1 Pat. L. J. 406=21 C. W. N. 1174 =35 I. C. 873=1 Pat. L. W. 13 (F. B.).

(11) [1915] 20 C. W. N. 231=27 I. C. 135.

A. I. R. 1928 Lahore 75

TEK CHAND, J.

Megh Raj—Accused—Petitioner.

v.

Baz Khan—Complainant—Respondent.

Misc. Criminal Case No. 13 of 1927, Decided on 7th March 1927, for quashing the proceedings and alternately to transfer the case from the Court of Mag., 2nd Cl., Chakwal.

Criminal P. C., S. 528—Pleader of accused communicating to him that Magistrate had told him that he would convict the accused—Warrant issed in summons case—Case was transferred.

Where one of the accused was informed by his pleader that the Magistrate had told him that he would convict the persons accused unless they compromised a certain civil suit with the complainant,

Held: that this communication by the pleader whether the message was in fact given by the Magistrate or not coupled with the fact that a warrant was issued in a summons case in the first instance was sufficient to deprive the accused of all confidence in the impartiality of the Magistrate and that the case should be transferred. [P 76 C 1]

G. C. Narang—for Petitioner.

Order.—Megh Raj and Beli Ram, petitioners, obtained a decree for possession of certain land against Baz Khan, respondent, on 3rd May 1926, from the Court of the Senior Subordinate Judge, Jhelum. They took out execution of this decree, and, on 10th July 1926, the process server and the patwari reported that possession of the land decreed had been made over to the decree-holders. It was stated in the report that Ghulam Hussain, servant of the decree-holders, was present at the time of delivery of possession.

On 28th July 1928 Baz Khan, the judgment-debtor, instituted a complaint under S. 447, I. P. C., against Megh Raj and Beli Ram, decree-holders, and Malak, son of Ghulam Hussain, their servant, alleging that the accused persons had taken possession of certain land which had not been awarded to them by the decree of the Senior Subordinate Judge. This complaint was dismissed by Malik Ahmad Khan, Naib Tahsildar, on 4th August 1926, under S. 203, Criminal P. C., the learned Magistrate remarking that the dispute between the parties appeared to be of a civil nature.

On 11th August 1926, Baz Khan instituted another complaint under S. 447 against Megh Raj, Beli Ram, decree-holders, and Malak. This complaint was originally instituted in the Court of the Assistant Commissioner, Chakwal, and was transferred by him to the Tahsildar Magistrate at Chakwal, for disposal. In this complaint the same facts were alleged as in the former complaint and it was specifically stated that the previous complaint had been rejected by the Naib Tahsildar without proper enquiry. The Tahsildar, after recording the statement of the complainant and two of his witnesses issued a bailable warrant against the accused persons. The case proceeded before the Tahsildar for a number of hearings, when on 10th December 1926 the accused filed an application under S. 528, Criminal P. C., before the District Magistrate, Jhelum, for transfer of the case. This application was rejected the same day.

On 6th January 1927, Megh Raj accused presented an application to this Court through Dr. Narang praying (a) that as the prosecution was malicious and frivolous the proceedings be quashed; (b) or, in any event, the case may be transferred from the Court of the Tahsildar Magistrate to that of any other Court of competent jurisdiction. This application was admitted by Harrison, J., on 14th January 1927, and has come up for final disposal before me to-day.

After hearing Dr. Narang at length I am of opinion that it will not be proper for me, sitting as a Court of revision to quash the proceedings at this stage. From the record it is clear that the case is nearly complete. Under the circumstances I think it is in the interests of justice that a Magistrate should form his own opinion on the facts that have been disclosed on the record. I, therefore, reject the first prayer in the application.

But, I am of opinion, that sufficient grounds have been made out for the transfer of the case from the Court of the Tahsildar. The complaint itself made reference to the previous orders of the Naib Tahsildar Malik Ahmad Khan who had a week before dismissed the complaint remarking that the matter was one for decision by a civil Court. The offence charged was one under S. 447, I. P. C., in which ordinarily a summons is to issue in the first instance. In spite of this the Tahsildar Magistrate issued a bailable warrant against all the accused two of whom are, as disclosed from the

affidavit, respectable persons paying Rs. 1,000 as income-tax and are kursi nashins. I see no justification for the issue of a warrant in a case like this and especially in view of the fact that the Naib Tahsildar had dismissed the complaint on the same or similar facts a week before. In addition to this there is an affidavit by Megh Raj, petitioner, to the effect that he was informed by B. Nanak Chand, pleader, that the Tahsildar Magistrate had told him that he would convict the persons accused unless they compromised the civil appeal against the decree for possession of land passed by the Senior Subordinate Judge in their favour against Baz Khan, complainant. This allegation of Megh Raj is supported by an affidavit filed and duly sworn to by B. Nanak Chand, pleader. No counter-affidavit has been put in by Baz Khan.

It is unfortunate that the explanation of the Tahsildar Magistrate with regard to this matter was not called by the learned Judge who admitted the petition. However, I do not think it necessary to make an enquiry into this point, nor to definitely hold whether the Tahsildar Magistrate actually told B. Nanak Chand, pleader, what the latter alleges he told him. The affidavits disclose the fact that B. Nanak Chand did communicate to the petitioner that the Magistrate had given this warning to him. In view of this communication by B. Nanak Chand (whether the message was in fact given by the Tahsildar or not) I think there is a reasonable apprehension in the minds of the accused persons that they will not have justice in the Court of this Magistrate. This circumstance, coupled with the fact that a warrant was issued in a summons case in the first instance, is sufficient to deprive the petitioners of all confidence in the impartiality of the Magistrate. Without therefore casting any aspersions on the Magistrate and following the judgment of the learned Chief Justice in *Dhera Singh* v. *Ram Singh* (1) I think that this case should be tried by another Magistrate. Dr. Narang has stated before me that he does not want to have a de novo trial of the case.

For the aforesaid reasons I refuse to grant the prayer for quashing the proceedings in the criminal case against the petitioners, but I withdraw the case from the Court of the Tahsildar Magistrate at Chakwal and direct the District Magistrate to make it over to another Magistrate competent to try the same at the headquarters of the district. Further hearing of the case will commence from the stage at which it was before the Tahsildar.

(1) A. I. R. 1921 Lah. 331.

R.D. *Case transferred.*

✻ A. I. R. 1928 Lahore 76

JAI LAL, J.

Sikandar—Accused—Appellant.

v.

Emperor—Opposite Party.

Cri. A. No. 295 of 1927, Decided on 22nd November 1927, from the order of the First Class Magistrate, Multan, D/- 31st January 1927.

✻ *Criminal P. C., S.* 503 (3)—*Summons for examination of witness in a Native State—Political Officer cannot return it unserved on the ground of want of convenience.*

A Magistrate issued a commission for examination of witnesses living in a Native State under S. 503 to the Agent to the Governor-General. He returned the commission unserved, regretting his inability to comply with the request on the ground that there was no Resident Political Officer in State, who could execute the commission.

Held : that the Criminal Procedure Code nowhere speaks of a Resident Political Officer in the territories of any Prince or Chief in India, but of a Political Officer representing the British Indian Government in such territories irrespective of the actual place of residence of the officer concerned and it is the duty of the latter either to proceed where the witness is or to summon such witness before him and to take down his evidence, or to delegate his functions to any officer subordinate to him. But neither the Criminal Procedure Code nor any other law leaves it to the option of such officer to decline to execute the commission on the ground of inconvenience or some other similar reason. The provisions of sub-S. (3), S. 503, Criminal P. C. are mandatory in this respect. [P 77 C 2]

Des Raj Sawhney—for the Crown.

Order.—Sikandar, appellant, having been convicted and sentenced to six years rigorous imprisonment under S. 379/75, I. P. C., appealed to this Court through the jail. His appeal was heard by Skemp, J., who by his order of 20th May 1927, remanded the case to the Magistrate directing him to record the statements of the witnesses named by the appellant. The Magistrate was directed to send for the appellant and ask whether he wishes a commission to issue to the Political

Agent or other officer at Bahawalpur to examine the appellant's witnesses or have them examined under sub-S. (4), S. 503, in Bahawalpur State.

It appears that originally the witnesses, who are residents of the Bahawalpur State, were summoned by the Magistrate, but in spite of the service of the summonses on them they did not appear and consequently the Magistrate proceeded to judgment, holding that he

could not coerce the witnesses to appear against their will and could not issue warrants against them in Bahawalpur State.

After the order of remand had been received by the Magistrate he ascertained the names and addresses of the witnesses from the accused and issued a commission for their examination under S. 503, Criminal P. C. to the Agent to the Governor-General, Punjab States, who is the officer representing the British Indian Government in the Bahawalpur State. The Agent to the Governor-General, however, has returned the commission unserved with an intimation conveyed to the District Magistrate of Multan in his letter No. 4-J5616/5-9/22 dated 18th August 1927, regretting his inability to comply with the request with regard to the examination of the defence witnesses on the ground that there is no Resident Political Officer in Bahawalpur State, who can execute the commission. In this letter reference is made to a previous letter of 18th September 1922, to the District Magistrate of Multan in which for the same reasons a similar commission was returned unexecuted by the Agent to the Governor-General, Punjab States.

After a careful consideration of the grounds mentioned by the Agent to the Governor-General, Punjab States, for his inability to execute the commission, I have arrived at the conclusion that such grounds cannot be supported by any provision of law.

Section 503 (1), Criminal P. C., confers the power inter alia on a District Magistrate, on being satisfied that such a course is necessary for the ends of justice to issue a commission to a District Magistrate of the 1st class, within the local limits of whose jurisdiction the witness resides, to take evidence of such witness.

Section 503 (2) authorizes the issue of a commission to the officer representing the British Indian Government in the territories of any Prince or Chief in India when the witness resides in such territory.

Section 503 (3) provides that such officer shall proceed to the place where the witness is or shall summon the witness before him and shall take down his evidence in the same manner as in the trial of warrant cases under the Criminal Procedure Code.

Sub-Section (4) of the section further authorizes the officer representing the British Indian Government to delegate his powers and duties under the commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the 1st class, in British India.

It will thus be observed that the Criminal Procedure Code nowhere speaks of a Resident Political Officer in the territories of any Prince or Chief in India, but of a Political Officer representing the British Indian Government in such territories irrespective of the actual place of residence of the officer concerned and also that once a commission has been issued by the District Magistrate or the other Courts mentioned in S. 503 to an officer representing the British Indian Government in such territory, it is the duty of the latter either to proceed where the witness is or to summon such witness before him and to take down his evidence, or to delegate his functions under the commission to any officer subordinate to him and competent to execute the commission and in that case such officer must proceed to the place where the witness is or summon the witness before him and take down his evidence. But neither the Criminal Procedure Code nor any other law that I am aware of, leaves it to the option of such officer to decline to execute the commission on the ground of inconvenience or some other similar reason. The provisions of sub-S. (3), S. 503, Criminal P. C., are mandatory in this respect.

It is no doubt true, as remarked by the Secretary to the Agent to the Governor-General in his letter of 18th August 1927, that the powers to execute the commission cannot be delegated to a Magistrate subordinate to a Darbar, but that does not absolve the Agent from the duty of executing the commission or of procuring its execution in accordance with law.

In the previous letter to which reference has already been made the attention of the District Magistrate was invited to certain rules of this Court under which a letter or a precept of the nature of a summons may be sent to witnesses residing in the territories of the Princes or Chiefs in India through the officers representing the British Indian Government. Presumably it is on account of this last suggestion that attention was invited to this previous letter. But, in this case, as I have already stated above the Magistrate did send summonses to the witnesses, all of whom were served but did not appear and, therefore, the issue of a letter or precept of the nature of a summons through the Agent to the Governor-General, Punjab States, would have been of no use. In any case it is for the Magistrate to decide whether he would summon the witnesses in his Court to record their statements or whether he would issue a commission and if the Magistrate has decided upon the latter course it is not within the discretion of the Agent to the Governor-General to decline to execute the commission on the ground that there exist other possible means for examining the witnesses. It is of course assumed that Magistrates do not and will not issue such commissions unnecessarily. In the present case the Magistrate in persuance of the order of this Court decided to issue a commission to the Agent to the Governor-General, Punjab States, and I hold that that officer was not entitled to refuse to execute the commission on the grounds stated by him.

I am under these circumstances constrained to send the case back to the District Magistrate with direction to return the commission to the Agent to the Governor-General, Punjab States, inviting his attention to the law on the subject as explained in this order and requesting him to execute the commission. When the witnesses have been examined, the Magistrate will comply with the order of remand dated 20th May 1927.

N.D. *Case remanded.*

A. I. R. 1928 Lahore 78

ADDISON AND SKEMP, JJ.

Prag Narain—Petitioner.

v.

The Crown—Opposite Party.

Cri. Revn. No. 1807 of 1926, Decided on 12th April 1927, from the order of the Sess. J., Delhi, D/- 7th September 1926.

(*a*) *Factories Act* (12 *of* 1911), *S.* 2 (3) (*a*)—*Word "factory" explained.*

By a factory is meant premises where anything is done towards the making or finishing of an article up to the stage when it is ready to be sold or is in a suitable condition to be put on the market. [P 79 C 1]

(*b*) *Factories Act, S.* 2 (2)—"*Employed*"—*Persons merely employed for selling manufactured articles are not "employed".*

Persons employed merely for selling the manufactured articles do not come within the definition of "employed," even though they happen to occupy a room at the factory for the sake of convenience. [P 79 C 1]

Kishen Dayal—for Petitioner.

Mackay—for Respondent.

Addison, J.—Prag Narain, occupier of the Prag Distilled Water Ice Factory, Delhi, was convicted by a Magistrate with 1st class powers under S. 41 (j), Indian Factories Act, for failing to furnish notice of occupation as required by S. 33 of the Act. He was sentenced to pay a fine of Rs. 100. His appeal in the Sessions Court was dismissed, and he has now moved this Court to set aside his conviction and sentence.

The facts are not in dispute. The Additional Inspector of Factories found on 16th April 1925 that eighteen persons were being employed in the manufacturing department, while six persons, including the manager, were being employed in the sales department. If 20 persons are employed in a factory of this kind it becomes a factory within the meaning of the Act, and it is the duty of the occupier under S. 33 to give notice to the Inspector. This was not done in the present case, as it was contended that only 18 persons were employed in the factory and that the six persons, who were in the sales department, were not employed in the factory. The only point to be decided is whether 20 persons were employed in the factory.

"Factory" is defined in S. 2 (3) (a) of the Act as

any premises wherein, and within the precincts of which, on any one day in the year not less than twenty persons are simultaneously employed and steam, water or other mechanical

power or chemical power is used in aid of any process for, or incidental to, making, altering, repairing, ornamenting, finishing or otherwise adapting for use, for transport or for sale any article or part of an article.

The words used show that by a factory is meant premises where anything is done towards the making or finishing of an article up to the stage when it is ready to be sold or is in a suitable condition to be put on the market.

Further, the word "employed" is defined in S. 2 (2) of the Act as follows :

A person who works in a factory, whether for wages or not,

(a) in a manufacturing process or handicraft, or

(b) in cleaning any part of the factory used for any manufacturing process or handicraft, or

(c) in cleaning or oiling any part of the machinery, or

(d) in any other kind of work whatsoever, incidental to, or connected with, the manufacturing process or handicraft, or connected with the article made or otherwise the subject of the manufacturing process or handicraft therein,

shall be deemed to be employed therein.

Clearly persons employed merely for selling the manufactured articles do not come within the above definition, for they have nothing to do with work incidental to, or connected with, the manufacturing process, unless it can be said that they are engaged in some kind of work "connected with the article made." It was argued on behalf of the Crown that the selling of the article was work connected with the article made. This contention in my judgment cannot be accepted. A factory means premises where articles are manufactured and a person who does anything directly or indirectly towards the making thereof up to the stage that they are ready to be delivered and put on the market is employed in the factory. A person, who sells the manufactured article, though he happens to occupy a room at the factory, cannot be said to be doing any kind of work incidental to or connected with the manufacturing process or "connected with the article made." That would put too wide a construction upon the last words which obviously mean "connected with the article in the process of being made." That is, any kind of work upon the article up to the stage where the article is packed and ready for delivery in the market is what is intended. In my judgment that is the only possible meaning the words can bear when the definition of the term "factory" is considered.

In England by "factory" is intended a place where an article is produced while its supply to customers is an operation distinct from its manufacture, though both operations may be undertaken by the producer. This was held in *Spacey* v. *Dowlais Gas & Coke Co. Ltd.* (1). In the English Act (64 Vic. Ch. 22, 1901), "factory" and "employment and working for hire" are defined in Ss. 149 and 152 respectively and there is little difference between the definitions in the English and Indian Acts. In the English Act, however, S. 149 (4) runs as follows :

Where a place situate within the close, curtilage, or precincts forming a factory is solely used for some purpose other than the manufacturing process carried on in the factory, that place shall not be deemed to form part of the factory, for the purposes of this Act.

It follows that in England the room in which salesmen sit would not form part of the factory. There is nothing corresponding to this sub-section in the Indian Act, but in my opinion the same result follows from the definition of the term "factory." In the present case it was more convenient for the occupier to have his salesmen in a room in the same building as the factory, but it cannot be said that by having them there they are employed in the factory. They might be in an office, a mile away. Could it be said in that case that they were employed in the factory? It was admitted by the learned counsel who appeared for the Crown that it could not. It follows that the mere fact that for convenience these salesmen occupy a room in the factory building does not make them persons employed in the factory. They still remain persons engaged in the sale of the manufactured article. On the date in question, therefore, only 18 persons were employed in the factory or perhaps 19, as the manager, who is in charge both of the factory and the sales department, might possibly be held to be employed in the factory. Even in that case the number of persons employed in the factory was only 19, so that the provisions of the Act did not apply. There was, therefore, no offence committed by the occupier.

I would accept the petition and setting aside the conviction and sentence, would acquit the petitioner. The fine, if paid, will be refunded.

Skemp, J.—I concur.

R.D. ——— *Conviction set aside.*

(1) [1905] 2 K. B. 879=75 L. J. K. B. 5=93 L. T. 685=54 W. R. 138=22 T. L. R. 29.

* A. I. R. 1928 Lahore 80

HARRISON, J.

Lal Badshah — Complainant — Petitioner.

v.

Emperor—Opposite Party.

Cri. Revn. Petn. No. 1160 of 1927, Decided on 21st October 1927, from the order of the Sess. J., Rawalpindi, D/- 8th November 1926.

* (a) *Forest Act (7 of 1878), S. 41—Confiscation made in order to test the wrong interpretation of the words "timber" and "forest produce" in S. 41 put by the High Court though vexatious was held necessary.*

A person though convicted for breach of rule (4) made under S. 41, (c) Forest Act, by trial and lower appellate Courts, was acquitted in revision on the wrong interpretation of the words "timber" and "forest produce" in S. 41. He was again prosecuted and acquitted for repetition of the same offence, but no appeal against acquittal was preferred. Again the same person's timber was confiscated for the third time in order to test the prior decision of the High Court. [P 81 C 1]

Held: that the confiscation though vexatious was necessary.

* (b) *Forest Act, S. 41—Words "timber" and "forest produce" in S. 41 are used in widest sense.*

The words "timber" and "forest produce" in S. 41 are used in the widest sense as given in the definitions to be found in S. 2 and not in the narrow and restricted sense especially introduced to define and limit the powers described in Ch. 7. [P 81 C 1]

Parkash Chand for *B. A. Cooper*—for Petitioner.

Ram Lal—for the Crown.

Judgment.—One Lalbadshah is the owner of a private forest and is in the habit of importing his wood into Rawalpindi city and has not provided himself with a pass of the nature contemplated in S. 41 (c), Indian Forest Act, and the rules made thereunder. He was prosecuted for breach of R. (4), was convicted by a Magistrate and his conviction was upheld on appeal by the District Magistrate of Rawalpindi. On an application for revision being presented I took the view that the words "timber" and "forest produce" should be read as meaning the same thing both in S. 41 and S. 39 and that the restrictive definition contained in S. 39 governed also S. 41. At the hearing of the application for revision the Crown was not represented as is too often the case where a point of any importance or difficulty is involved. After this decision Lal Badshah proceeded to import more timber into Rawalpindi city without a pass, and in order, I am informed, to obtain a ruling of a Division Bench he was again prosecuted and acquitted. Unfortunately the period of limitation for the presentation of an appeal was allowed to elapse and naturally enough Lal Badshah continued to behave as before. His timber was confiscated on a third occasion and he thereupon lodged a complaint under S. 61, Indian Forest Act. This was dismissed under S. 203, Criminal P. C., and his application for a further enquiry was dismissed by the Sessions Judge of Rawalpindi. He now applies for revision of that order.

Whatever view may be taken of the meaning of the words "timber" and "forest produce" in S. 41, the first point to be decided is whether there has been vexatious and unnecessery action on the part of the forest officer, who confiscated the wood. Mr. Ram Lal points out that in order to test the previous decision given by me ex parte it was considered advisable to get a further pronouncement and it was thought that this could only be done, short of actual legislation, by engineering another test case and, if possible, an appeal from an acquittal. By an oversight the chance was lost, and it was, therefore, considered necessary to take further action. On the other side it is urged that whatever necessity there may have been for taking action the second time when the man had been acquitted the second time and no appeal from the acquittal had been presented, he should not have been harassed yet again. In my opinion there is no force in the further contention put forward by Mr. Ram Lal that because the officer taking action was a subordinate and the action was decided upon by his superior officer, the head of his department, he is absolved from all liability. He is absolved from all moral blame of course, but the section still applies if he has acted vexatiously and unnecessarily. Vexatiously he had acted in accordance with the meaning given by Webster to the word. Necessity is rather more difficult to determine. The initial mistake having been made of not taking advantage of the acquittal, I do not think it is going too far to say that in the interest of all involved legislation would not be justified until there had been two

decisions or a decision of a Division Bench or at least a decision after a full hearing. It appears to me, therefore, looking at it from this point of view, that the action was necessary. The wood, which was confiscated, Mr. Ram Lal tells me, will be returned at once to Lal Badshah and, therefore, I do not think any further action should be taken in the matter of his complaint..

I now come to the merits and on reconsidering the matter I think there can be no doubt that my previous decision was wrong. The view there taken was that the power of the Local Government to levy duty having been restricted in Ch. 7, to duty on timber produced in British India in which they have rights, and all timber brought from any place beyond the frontier, the same restriction must be held to govern their powers to control transit. The further restriction, which is to be found in Ch. 7, making the levy of duty subject to the control of the Governor-General in Council is not to be found in Ch. 8. The reason is obvious, namely, that duty is levied both in home grown and foreign timber and the matter is not wholly provincial. Ch. 8, on the other hand, gives power to the Local Government, without any control whatever, to regulate transit ; and, if the illustrations giving the matters, regarding which such rules can be made, be read carefully, I think it is clear from the internal evidence of these explanations themselves that such control must apply to all forest produce whatever its source of origin and to whomsoever it may belong.

It would obviously be futile to make rules applying to rivers or roads, which could be ignored by private individuals using such roads and rivers. After the words " forest produce " in Ch. 8, S. 41, there is a full stop and the illustrations and explanations then follow. In Ch. 7, S. 39, after the words " forest produce " there is no full stop and the words are qualified by the subsequent sub-clauses. This points clearly in my opinion to the conclusion that the words " timber " and " forest produce " in S. 41 are used in the widest sense as given in the definitions to be found in S. 2 and not in the narrow and restricted sense specially introduced to define and limit the powers described in Ch. 7. It is not a question of the impossibility of working the rules on any other interpretation of the words " timber " and " forest produce " rather of the meaning of the actual words used in the two sections when read together. Duty in the nature of things is only levied on a very limited section of the timber, whereas the rules, as indeed the section clearly says, have to be made regarding the control and transit of all timber whether privately owned and wheresoever it may have been grown. I dismiss this petition.

N.D. *Petition dismissed.*

A. I. R. 1928 Lahore 81

BROADWAY AND SKEMP, JJ.

Mehlu Mal and *others*— Defendants— Appellants.

v.

Bholu and *another*— Plaintiffs — Respondents.

F. A. No. 3007 of 1922, Decided on 8th April 1927, from the decree of the Sr. Sub-Judge, Simla, D/- 23rd October 1922.

Hindu Law—Joint family—Pro-note by manager in his sole name—Debt borrowed for family business—All members are bound.

Where the manager of a joint family borrows money on a promissory note for a joint family business, the other members of the joint family are liable on the note, though the note was executed by the manager in his sole name: *Authorities on P. 249, Mulla's Hindu Law, Foll.*

[P 82 C 2]

Ralli for *Mehr Chand Mahajan*, *Jagan Nath Bhandari* and *Hem Raj*—for Appellants.

Jagan Nath Aggarwal and *Anant Ram* —for Respondents.

Broadway, J.—This appeal has arisen out of a suit brought by one Bholu Mal of Simla against Kirpa Ram and his nephews Mahlu, Phallu and Balak Ram, sons of Narain. The suit was based on a promissory note dated 7th September 1915, securing a sum of Rs. 3,832 payable on demand with interest at the rate of Re. 1 per cent per mensem. The suit was contested by the defendants separately, Kirpa Kam raising one set of pleas and his nephews contesting the suit on the ground that they were neither members of a joint Hindu family of which Kirpa Ram was the manager, nor concerned in any joint family business. They also alleged that if the moneys had been advanced they had not been advanced for the benefit of any family business. The trial Court granted the plaintiff a decree

against all the defendants for the entire amount claimed. Kirpa Ram was satisfied with the decree apparently, but his three nephews have preferred this appeal, alleging that they are not liable.

The points for determination are :

(1). Whether the three appellants were members with Kirpa Ram of a joint Hindu family;

(2). Whether there was a joint family business carried on by the joint family, and

(3). Whether the money advanced by the plaintiff to this joint concern was for the benefit of the concern.

It has been urged that there is no presumption that a business carried on by one who is a member of a joint Hindu family is a joint family business. In this case there can be no doubt that Kirpa Ram and his brother Narain, father of the three appellants, at one time were joint in family and joint in business. The appellants themselves set up disruption of this joint family. We have been taken through the evidence relating to the disruption, and we have no hesitation in coming to the conclusion arrived at by the learned Senior Sub-Judge that the appellants have failed to establish their contention. It is, therefore, clear that it has been rightly held that the appellants with Kirpa Ram continued to be members of a joint family. It is also in evidence that the three appellants, who are all majors, after the death of their father Narain continued to deal with the plaintiff firm. The plaintiff has gone into the witness-box and has definitely stated that all the three defendants (now appellants) operated on the joint account, an account opened and carried on in the name of the firm Kirpa Ram Narain. In these circumstances it seems to me that there can be no doubt that the three appellants were aware of the dealings of their joint family business with the plaintiff. It is in evidence that they paid sums to the plaintiff and also took moneys from him, although Mahlu says that he used to take the money from the plaintiff for his uncle Kirpa. In these circumstances I am of opinion that the evidence on the record clearly establishes the fact that the appellants, along with Kirpa Ram, were dealing with the plaintiff, and that they were aware of these dealings, and, to my mind, there is no doubt that the moneys advanced were actually advanced for the family business. It has been held in various authorities cited at p. 249 of Mulla's Principles of Hindu Law, 5th Edition, that where the manager of a joint family borrows money on a promissory note for a joint family business, the other members of the joint family are liable on the note, though the note was executed by the manager in his sole name. In my judgment this comment, supported as it is by authority, is applicable to the facts of the present case. Kirpa Ram, as manager of this joint family business executed a promissory note the consideration for which was the past dealings with the plaintiff, and I, therefore, am of opinion that all the members of the family are liable under this promissory note. In this view of the case the appeal must fail and I would, therefore, dismiss it with costs.

Skemp, J.—I concur.

D.D. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 82

HARRISON AND TEK CHAND, JJ.

Rup Singh—Debtor-Insolvent—Appellant.

v.

Official Receiver, Jhang and *another*—Respondents.

Misc. First Appeal No. 2922 of 1926, Decided on 1st November 1927, from the order of the Dist. Judge, Jhang, D/- 27th May 1926.

* *Provincial Insolvency Act* (5 *of* 1920), *S.* 27 (2)—*Period of discharge—Creditor can apply for extension—Court can extend suo motu.*

It is open to an insolvency Court to extend the period specified in the order of adjudication within which the debtor should apply for his discharge on the application of the creditors, or suo motu : *A. I. R.* 1927 *Rang.* 135, *Foll.*

[P 83 C 2]

D. C. Ralli and *Lala Jagan Nath*—for Appellant.

M. L. Puri and *S. L. Puri*—for Respondents.

Harrison, J.—The following question has been referred to this Division Bench by Jai Lal, J.

Whether it is open to an insolvency Court to extend the period specified in the order of adjudication within which the debtor is to apply for his discharge, either on the application of the creditors or suo motu, or whether the power of extension given by S. 27(2), Provincial Insolvency Act, can be exercised only on an application by the debtor.

Since this order of reference was written a judgment of the Division Bench of the Rangoon High Court has been pub-

lished in *K. K. S. A. R. A. Chettiar* v. *Mg. Mayat Tha* (1), and this lays down very clearly that there is nothing incompatible with the extension of the period, within which a debtor must apply for his discharge, at the instance of and on cause shown by the petitioning creditor. With this decision we agree and are also of opinion that there is no reason why a Court should not extend the time suo motu.

The facts of the particular case, in which this question has arisen, are given in the earlier part of the referring order and those facts show that the creditors applied for extension of time in very peculiar circumstances. Mr. Ralli has addressed us on behalf of the insolvent and has urged that it is only logical that the right to apply for an extension of time should be confined to the person who has the sole right to apply for discharge, namely, the insolvent himself. It is, in our opinion, no more illogical to allow the creditors to apply for an extension of time than it is to allow them, as the Act expressly does, to apply for the original adjudication with all consequences which flow from that adjudication. There is, however, no question of the logical amplification or restriction of any rule. We have to consider the plain meaning of the words used in the two sections of the Act. S. 43 lays down that the Court shall annul the order of adjudication if the debtor does not appear to apply for an order of discharge within the period specified by the Court. This is mandatory and the Court has no option in the matter. Counsel, however, would have us read the words "the period specified by the Court" as meaning "specified in the first instance" and not as subsequently extended, if action has been taken under S. 27 (2). This sub-section runs as follows :

> The Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge, and in that case shall publish notice of the order in such manner as it thinks fit.

Mr. Ralli then qualified the position taken up by him to this extent : that he reads the words "the period specified by the Court" as meaning the period so specified in the first instance or extended on application made by the insolvent but not as including "extended on application made by the creditors or by the Court on its own motion." Were there any ambiguity it would be for us to decide between the two rival interpretations, but so far from there being any ambiguity it appears to us that the words are absolutely clear. The Court has the power to extend on sufficient cause being shown, and that sufficient cause may be patent on the face of the record or may be established by any interested party. It is for the Court to decide whether the cause is sufficient and, if it extends the period, the later date to which it is extended becomes the last date of the period specified by the Court as described in S 43 of the Act.

We answer the reference by saying that we are in agreement with the view taken by the Division Bench of the High Court of Rangoon in *K. K. S. A. R. A. Chettiar* v. *Mg. Mayat Tha* (1), and we hold that it is open to an insolvency Court to extend the period on the application of the insolvent himself, or on the application of the creditors, or suo motu. It follows that the appeal is dismissed with costs.

S.D. *Appeal dismissed.*

(1) A. I. R. 1927 Rang. 136.

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*A. I. R. 1928 Lahore 83

FFORDE AND CAMPBELL, JJ.

Ulfat Rai—Defendant—Appellant.

v.

Tej Narain and *another*—Plaintiff and Defendant—Respondents.

F. A. No 718 of 1922, Decided on 25th February 1927, from the decree of the 1st Cl. Sub-Judge, Delhi, D/- 28th February 1922.

(a) Hindu Law—Joint family—Antecedent debts of father—To prove immorality of debts direct connexion between the debt and immorality must be established.

An independent debt, neither illegal nor immoral, contracted by a Hindu father on the security of the joint family estate, antecedent to the transaction impeached, is an antecedent debt. To prove the immorality of the debt direct connexion between the debt and immorality must be shown: *A.I.R.* 1924 *P. C.* 50, *Foll.* [P 85 C 2]

**(b) Hindu Law—Joint family—Sale of joint family property by father for necessity challenged by son—Vendee not aware of father's immoral character and acting in good faith—Vendee is not bound to prove how surplus proceeds, not required for necessity, were applied.*

Where it has been established that the alienation by father was made for a necessary purpose, e. g., in order to pay off an antecedent debt which was binding upon the sons and recoverable from the joint family property and it is not shown that the vendees knew the father to

be an immoral man or that his immorality was so gross and so notorious that they must be presumed to have known of it, the vendees are only bound to show that they acted in good faith and that the sales were made for a necessary purpose and for a fair price. Having done this, they are under no obligation to enquire into the application of any surplus over the sum required to carry out the necessary purpose: *A. I. R.* 1927 *P. C.* 37, *Foll.* [P 87 C 2]

Moti Sagar and *Mehr Chand Mahajan* —for Appellant.

Kishan Dayal, *Sheo Narain* and *Shiv Narain* —for Respondents.

Campbell, J.—This litigation involves four buildings which may conveniently be termed A, B, C and D once the property of Maharaj Narain. On 11th February 1905, A, B, and C were mortgaged to one Mul Chand for Rs. 3,000 and on 25th February 1907, A, B, C and D were mortgaged to Ishri Prasad for Rs. 6,000 of which Rs. 3,000 was the redemption price of Mul Chand's mortgage.

On 11th February 1911 Maharaj Narain sold B to Lal Muhammad for Rs. 3,500 out of which Rs. 2,610 were left wi h the purchaser for payment to Ishri Parshad the mortgagee and the balance Rs. 890 was paid in cash. Lal Muhammad subsequently resold B to Ulfat Rai in 1917.

On the same date 11th February 1911, Maharaj Narain sold to Lal Muhammad C for Rs. 1,500 (left with purchaser for Ishri Parshad Rs. 790 and cash Rs. 710) and D for Rs. 2,000 the whole of which price was left with the purchaser for payment to Ishri Parshad.

On 21st March 1911 Maharaj Narain sold A to Joti Parshad for Rs. 3,000 cash.

In 1918 Tej Narain, son of Maharaj Narain, brought three suits, based on the three sales, for possession in each case of the property sold, on the ground that the property was ancestral Hindu family property and that its alienation was a nullity as regards him. The trial Court has decreed all three suits with the condition that before obtaining possession the plaintiff must pay Rs. 2,000 to Lal Muhammad and Rs. 500 to Joti Parshad. These sums apparently represent the estimated value of improvements carried out by the vendees.

The result has been three appeals: one by Lal Muhammad, one by Ulfat Rai and Lal Muhammad and one by Joti Parshad. Since the suits were consolidated by the trial Court and a single argument on all three has been addressed to us, I shall deal with all three appeals in one judgment.

There is now no dispute on the following points:

1. All the property was ancestral in the eye of Hindu law.

2 Unless the mortgage debt to Ishri Parshad was incurred by Maharaj Narain for immoral purposes as understood by Hindu law, the ancestral family estate in the hands of the son is liable for it.

3. The onus of proving that the debt was immoral is on the plaintiff and is not discharged by merely proving that Maharaj Narain was a man of immoral character. Direct connexion between the debt and the immorality must be shown.

4. No proof has been given by the appellants-defendants that the cash portions of the sale prices were required for or applied to family necessities, beyond the statement of Ishri Parshad that after the sale of Joti Parshad, the deed of which he attested, he received Rs. 2,000 out of the price towards his mortgage charge.

5. The antecedent debt due to Ishri Parshad on the mortgage of 1907 amounted to Rs. 7,400 principal and interest at the time of the sales to Lal Muhammad.

The issues drawn up by the trial Court were as follows:

1. Whether the property in the three suits was ancestral or joint family property in the hands of Maharaj Narain ?

2. Whether the properties in question being ancestral in the hands of Maharaj Narain, their alienations to the respective vendees in the three suits was for consideration and necessity ;

3. Whether the vendees have effected any improvements in the properties, and if so of what value ?

4. Whether the vendees are entitled to any compensation for improvements if the sales are held invalid ? If so what ?

5. Whether the consideration of the alienations was used for or applied to immoral purposes and consequently the sales are invalid ?

6. Whether the plaintiff is entitled to any mesne profits realized by the vendees alienees ? If so what ?

The findings of the trial Court are not very lucidly expressed. but they appear to have been as follows:

Issue 1.—The properties were ancestral. This is not now contested.

Issue 2. There was no necessity for the sales. Maharaj Narain had ample income for all legitimate purposes and the mortgage debt was not an antecedent debt in the light of what was ruled by the Privy Council in *Sahu Ram* v. *Bhup Singh* (1), because it was not incurred irrespective of the credit obtainable from immovable assets not belonging personally to the vendor alienor, but being joint family property. Consideration was paid in full.

Issue 3.—Rs. 2,000 and Rs. 500 were the amounts spent on improvements to the properties.

Issue 4.—The vendees are entitled to these amounts, because had it not been for the decision in *Sahu Ram* v. *Bhup Singh* (1), the debt due to Ishri Parshad would have been an antecedent debt and the vendees would have only been bound to see that the debt was due. At the time of the mortgage to Mul Chand in 1905 Maharaj Narain's immorality was not notorious and Mul Chand could have had no suspicion that Maharaj Narain was a man of this character. Lal Muhammad, when he bought the property, had reason to believe that up to the limit of the previous mortgage debt the transfer would be valid. In equity, therefore, he is entitled to receive the value of his improvements. This is the best that I can make out of the cryptic language used by the learned Subordinate Judge in recording his decision on issue 4. It may not be a correct interpretation of what he has written and there is much to be said in favour of regarding this part of his judgment as absolutely meaningless.

Issue 5.—When Maharaj Narain contracted the debts in question he had given himself up to a life of luxury and licentiousness and was wasting money in entertaining prostitutes and in riotous living:

> There is no clear evidence on the record that any portion of these debts was intended to be spent or was as a matter of fact expended on litigation or in meeting the legitimate expenses of any domestic ceremonies. The alienees were neighbours and were aware of the mode of deceased's life. The plaintiff is, therefore, under no obligation to discharge the debts.

I confess I am not clear whether the learned Subordinate Judge when speaking of debts meant the antecedent mortgage debts or the prices paid by the subsequent vendees at the sales which are now in dispute. The obscurity of the finding on issue 4 deepens the mystery.

Issue 6. There is a confused and involved decision about mesne profits which in view of my conclusions on the other points in issue, it is unnecessary to attempt to disentangle.

Sahu Ram's case (1) was subsequently considered by their Lordships of the Privy Council in *Brij Narain* v. *Mangal Parsad* (2), and it was there made clear that any debt is an antecedent debt if it is antecedent in fact as well as in time, i. e., truly independent and not a part of the transaction impeached. This decision affirmed the view taken by the Full Bench in *Arumugam Chetti* v. *Muthu Koundan* (3), that an independent debt, neither illegal nor immoral, contracted by a Hindu father on the security of the joint family estate, antecedent to a mortgage sued on, is an antecedent debt so as to support a charge on the son's share to the extent of the sums secured on the prior mortgagee. There are passages in the learned Subordinate Judge's judgment which indicate the possibility that had the later pronouncement of their Lordships of the Judicial Committee been before him he might have held that the plaintiff was liable for either part or perhaps for the whole of the antecedent mortgage debts to Ishri Parshad, but I cannot be sure.

The two main questions for our decisions are:

1. Whether at the time when the mortgage debt to Ishri Parshad was incurred Maharaj Narain was leading an immoral life ?
2. If so whether the plaintiff has succeeded in proving direct connexion between the debt and the immorality.

If the plaintiff succeeds on these two points it is obvious that the decision by the trial Court that he is entitled to decrees for possession of the properties in dispute is correct. If the plaintiff fails on these two points a third question arises whether the plaintiff is still entitled to avoid the sale by reason of there being no necessity established for the balance of the prices over and above the amount due on the former mortgage debt ?

(1) A. I. R. 1917 P. C. 61=39 All. 487=44 I.A. 126 (P. C.).

(2) A. I. R. 1924 P. C. 50=46 All. 95=51 I. A 129 (P. C.).

(3) [1919] 42 Mad. 711=37 M. L. J. 166=9 M. L. W. 565=52 I. C. 525=(1919) M. W N. 409 (F. B.).

Several witnesses have described the debauchery of Maharaj Narain in violently extravagant terms. The learned Subordinate Judge appears to have been influenced by a decision of the Chief Court in a similar suit between the present plaintiff and another alienee from Maharaj Narain, which is reported as *Jaswanti* v. *Tej Narain* (4), and more fully as 41 *I. C.* 192. In that case the learned Judges of the Chief Court found apparently that Maharaj Narain was a man of most conspicuously dissolute mode of life, but the finding is not evidence in this case and cannot be allowed to influence its decision. On the evidence of the present record I consider it to be established that Maharaj Narain neglected his wife for women of ill fame, that he kept a succession of mistresses and that he drank heavily. The most reliable witness on the point is Mt. Maharaj Rani his own wife, and, allowing for exaggeration this is the purport of what she deposed. This lady must naturally wish to support her son in the present case and I do not look upon her account of the late Maharaj Narain's daily life as altogether unprejudiced. At the same time she is the person who was in the best position of knowing his habits and conduct. But numerous other witnesses who declare that day and night all the year round Maharaj Narain was engaged in one ceaseless round of drunken and disreputable orgies I do not believe.

There has been a tendency in this case to confuse immorality with ordinary extravagance. Mr. Bose who was for some time acting as Maharaj Narain's legal adviser has stated that Maharaj Narain was extravagant in an innocent manner by living beyond his means in the matter of food, servants, furniture, etc. It is also clear that he gave frequent and expensive musical parties, and the money expended upon them, although the performers may have been persons of loose morals, could not with certainty on the evidence before us be brought within the category of debts contracted "under the influence of lust or wrath or of debts repugnant to good morals." It is proved that Maharaj Narain was maintaining a house in which he kept his wife and son. The evidence as regards his ordinary income is very vague. The learned Subordinate Judge, after considering a mass of conflicting evidence, has estimated it at about Rs. 7,900 a year or a little over Rs. 650 a month. He had house property which brought him Rs. 60 or Rs. 70 per mensem and had two villages in the Gurgaon District one Gopalpura which he owned and the other Bopas which he held in mortgage. The Patwari of Gopalpura witness for the plaintiff stated that the net amount which Maharaj Narain took annually from Gopalpura was not more that Rs. 1,300 or Rs. 1,400, and if this be accepted the annual income was not as much as Rs. 7,900. However that may be, it is clear that Maharaj Narain was not a rich man. It has been established that he was engaged from time to time in expensive litigation. One of the cases was against one Kailash Narain, a suit for Rs. 1,11,750. The learned Subordinate Judge mentioned this case in his judgment and thought that about Rs. 1,500 may have been spent on it by Maharaj Narain. At the request of the parties we have referred to the paper book of that suit, which came to Chief Court on appeal, and this makes it clear that the litigation must have cost Maharaj Narain, who was unsuccessful throughout, a sum not less than Rs. 6,500, and probably more. The suit was instituted in 1904, was dismissed by the trial Court in December 1904, and Maharaj Narain's appeal was dismissed with costs by the Chief Court in 1911. The Court-fee alone was Rs. 1,500 in each Court, the amount which the learned Subordinate Judge thinks might have been spent on the whole litigation. There was another case with one Mt. Banoji the ultimate result of which is reported as *Narain* v. *Banoji* (5), and it must have cost more than the learned Subordidate Judge has estimated.

Bopas village was redeemed from Maharaj Narain and he received Rs. 7,000 on 24th April 1904, Rs. 1,000 some time before 16th November 1905 and Rs. 21,000 in 1908. It has been suggested that Maharaj Narain's ordinary expenditure and his expenses on litigation up to the time of the mortgage to Ishri Parshad in 1907 could have been defrayed from his annual income of Rs. 7,900, and the redemption money of Rs. 8,000, and that the money raised by the mortgage must

(4) [1918] 10 P. R, 1918=41 I. C. 192=120 P. W. R. 1917.

(5) [1907] 34 P. R. 1907.

inevitably be presumed to have been spent on dissipation. This is as far as the plaintiff has been able to go to connect the mortgage debt with Maharaj Narain's immorality, and, in my opinion, he has not been successful in discharging the onus upon him. The facts are that Maharaj Narain was not a rich man, that his ordinary income cannot be estimated with any attempt at certainty, that he involved himself in expensive litigation, that he lived beyond his means, and that he was given to drink and prostitutes. It is possible that the mortgage money may have been spent on immoral pursuits; it is equally possible that the redemption money and an undue proportion of the ordinary annual income was expended on dissipation and it became necessary to mortgage the house property in order to obtain money for the support of Maharaj Narain's wife and child and for carrying on litigation. It is not the law that a Hindu son can escape liability to pay any debt which is contracted by an immoral father. The mortgage debt due to Ishri Parshad was an antecedent debt binding upon the plaintiff and he has not succeeded in proving that it was incurred for immoral purposes.

I hold that the mortgage of Rs. 7,400 was an antecedent debt not proved to have been tainted with immorality, for the discharge of which the joint family property including the plaintiff's share was liable. It remains to consider whether the plaintiff can have the sales set aside by reason of the properties in suit having been alienated for prices which left a surplus over the amount of that debt.

What the situation was, I think, is perfectly clear. There was a mortgage charge upon the four properties and they were sold primarily in order to clear off this charge on which interest was accumulating. Three of the properties were first disposed of to Lal Muhammad. Rs. 5,400 was taken to be the proportion of the mortgage charge due on them. Lal Muhammad was aware of this charge, took the precaution of retaining in his own hands the sum of Rs. 5,400 and paid off the mortgagee. The vendor succeeded in obtaining a higher price than the mortgage charge and the balance Rs. 1,600 was paid over to him. There is no evidence of what he did with the money. I see no reason why Lal Muhammad should not be believed when he deposed that he did not know Maharaj Narain before he entered into negotiations for the sales, and that he made enquiries and was told that Maharaj Narain was engaged in litigation and required money for prosecuting his cases. Lal Muhammad is a Christian and it is not proved that he had any previous acquaintance with Maharaj Narain or any reason for having it. He came to Delhi in 1908.

When the fourth house was sold two months later to Joti Parshad Rs. 2,000 remained due on the mortgage. Joti Parshad paid the whole of Rs. 3,000 to Maharaj Narain, but he has proved that Rs. 2,000 were immediately paid to Ishri Prashad, the mortgagee.

Thus it has been established that the sales were made for a necessary purpose, i. e., in order to pay off an antecedent debt which was binding upon the plaintiff and recoverable from the joint family property, and there is no evidence of how the vendor has applied Rs. 2,600 out of the total proceeds of Rs. 10,000. I consider that there is no reliable evidence either that the vendees knew Maharaj Narain to be an immoral man or that his immorality was so gross and so notorious that they must be presumed to have known of it.

In these circumstances the vendees were only bound to show that they acted in good faith and that the sales were made for a necessary purpose and for a fair price. Having done this, they were under no obligation to enquire into the application of any surplus over the sum required to carry out the necessary purpose.

This is how the law has been interpreted by their Lordships of the Judicial Committee in a very recent case, *Shri Krishen Das* v. *Nathu Ram* (6). The suit was by sons to recover from the vendee ancestral property purchased from their father for Rs. 3,500. The facts found were that the vendor had incurred debt in setting aside the auction sale of the same property, and in celebrating his sister's marriage, that in order to meet part of his indebtedness he had borrowed from a money-lender Rs. 2,600 which had been increased by interest to

(6) A. I. R. 1927 P. C. 37=49 All. 149=54 I. A. 79 (P. C.).

Rs. 3,000. that this amount was discharged out of the consideration paid by the vendee, that before purchasing the property the vendee had ascertained these facts, and that there was no evidence of how the vendor had applied the balance of Rs. 500. The High Court of Allahabad on second appeal had reversed the District Judge's order dismissing the suit and had given the plaintiffs decree seting aside the sale on condition of the plaintiffs paying the vendee Rs. 3,000 within six months. Their Lordships of the Privy Council referred to a number of their previous decisions and delivered their final conclusions as follows :

Applying the principles laid down in the above series of cases by this Board, and consistently followed in other Courts in India except in Allahabad, their Lordships have reached the conclusion that the judgment of the High Cou t cannot be sustained. On the facts found by the District Judge it must be taken that the sale challenged was made after due enquiry as to the legal necessity by the vendee ; that such necessity has been proved by him to the extent of Rs. 3,000 out of a total price of Rs. 3,500 ; that the sale was for an adequate consideration and that the mere fact that after a long interval of time the appellants have not been able to establish how the surplus of Rs. 500 was applied is not a sufficient ground in law for setting aside the sale. They will, therefore, humbly advise His Majesty that the judgment and decree of the High Court should be set aside, and the plaintiffs' suit dismissed with costs in all the Courts, including the costs of the present appeal.

The proper manner in which such cases are to be treated by the Courts was stated in an earlier passage in the judgment which runs as follows:

In their decision the learned Judges of the High Court rely on the authority of the case of *Girdharee Lal* v. *Kanta Lall* (7) especially on the head-note which contains the passage:

" Where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds is accounted for, the fact that a small part is not accounted for will not invalidate the sale."

Whether this is in itself a correct statement of the law so far as it goes, it does not by any means follow, as the learned High Court Judges seem to have thought, that it is a complete statement of the law or that sale will be invalidated wherever the part of the consideration not accounted for cannot be described as small. If this were sound, the question would in each case be a matter of arithmetical calculation, and opinions would necessarily vary as to what constituted the " bulk of the proceeds " or " a small part " of the same in each particular case. The learned Judges seem to have lost sight of the true question which falls to be answered in such cases, viz., whether the sale itself was one which was justified by legal necessity.

The following previous decisions of the Allahabad High Court in which conditional decrees had been passed setting aside similar sales or directing the surplus not covered by legal necessity to be returned, were overruled. *Gobind Singh* v. *Baldeo Singh* (8), *Ram Devi Kunwar* v. *Abu Jafar* (9), *Dwarka Ram* v. *Jhulai Pande* (10) and *Daulat* v. *Sankaiha Prasad* (11).

For these reasons I would accept all the three appeals and in each case would enter judgment for the defendants dismissing the plaintiff's suit with costs throughout.

Fforde.—I agree.

G.B. *Appeal allowed.*

(7) [1874] 1 I. A. 321=22 W. R. 56=3 Sar. 380 (P. C.).

(8) [1903] 25 All. 330=(1903) A. W. N. 57.
(9) [1905] 27 All. 494=(1905) A. W. N. 68.
(10) A. I. R. 1923 All. 248=45 All. 429.
(11) A. I. R. 1925 All. 324=47 All. 355.

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FFORDE, J.

Jagindar Singh—Complainant—Petitioner.

v.

Agha Safdar Ali Khan—Respondent.

Cri. Revn. Petn. No. 1563 of 1926, Decided on 14th January 1927, from the order of the Addl. Sess. J. Lyallpur, D/- 6th September 1926.

(a) *Criminal P. C, S. 202—Investigation partly by Magistrate himself and partly by police—Procedure is not in accordance with S. 202.*

Where a Magistrate instead of either disposing of the case himself or referring it for investigation, partly investigated the matter himself and had it partly investigated by a police officer and did not state in writing his reasons for referring the matter to the police officer:

Held ; that the procedure adopted was not in accordance with the provisions of S. 202. [P 89 C 1]

(b) *Criminal P. C., S. 202—No prima facie case made out—Accused should not be examined.*

A Magistrate acts beyond the scope of S. 202 in examining the accused before a prima facie case is made out. [P 89 C 1]

(c) *Criminal P. C., S. 202—Accused a member of police—Case should not be sent for police investigation.*

Sending a case to police for investigation is not desirable where a member of the police themselves is accused. [P 89 C 2]

Moti Sagar—for Petitioner.

C. H. Carden Noad—for Respondent.

Judgment.—On 22nd January 1926 the petitioner filed a written complaint

in the Court of the District Magistrate. Lyallpur, accusing Agha Safdar Ali Khan, Inspector of Police, Lyallpur, of having wrongfully confined, beaten and tortured him for the purpose of making him give false evidence in a certain criminal case. The learned District Magistrate proceeded to hear 17 witnesses produced by the complainant in support of his allegations. After the last of these 17 witnesses had been called and given evidence, counsel for the complainant stated that he wished to produce no further "preliminary" witnesses The learned Magistrate thereupon referred the matter to the Superintendent of Police, Lyallpur to have it investigated. In so doing the learned District Magistrate purported to act in accordance with the provisions of S. 202 (1), Criminal P. C. The Superintendent of Police in turn referred the proceedings to a Deputy Superintendent of Police to conduct the necessary inquiry. The Deputy Superintendent of Police having recorded the statements of a number of witnesses, other than those who had been examined by the District Magistrate, submitted a written report to the District Magistrate on 22nd March 1926. The District Magistrate then examined the accused person Agha Safdar Ali Khan, and having done so he dismissed the complaint.

There can be no doubt that the procedure adopted by the learned District Magistrate is not in accordance with the provisions of S. 202, Criminal P. C.A Magistrate dealing with a complaint under that section should either dispose of it himself or if he thinks fit, for reasons which he must record in writing, direct an enquiry or investigation to be made by a Magistrate subordinate to him, or by a police officer or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsity of the complaint. In the present case the Magistrate instead of either disposing of the case himself or referring it for investigation partly investigated the matter himself and had it partly investigated by a police officer. He, moreover, did not state in writing his reasons for referring the matter to the police officer. The learned Magistrate was also acting beyond the scope of 202, Criminal P. C., in examining the accused at that stage. Another objection taken by Mr. Moti Sagar, which in my opinion is a substantial objection is that the proceedings were sent for investigation to the police, a procedure which is not desirable where a member of the police themselves is accused.

Mr. Moti Sagar, in support of his contention that the irrgularities in procedure to which I have briefly referred are such as must be held to vitiate the whole of the proceedings in question, has cited a number of authorities amongst which may be mentioned *Chandi Charan Mitra* v. *Manindra Chandra* : *A. I. R.* 1923 *Cal.* 198; *Baidya Nath Singh* v. *Muspratt* (1); *Emperor* v. *Durga Parsad* (2) *Queen Empress* v. *Kanappa Pillai* (3); *King Emperor* v. *Alagirisami Pathan* (4); and *Balalal Mookerjee* v. *Pasupati Chatterjee* (5).

The question remains whether or not in view of these precedents in favour of so doing I should set aside these findings and refer the matter to the District Magistrate to deal with it in proper conformity with S. 202, Criminal P. C. I have however, examined the evidence which was before the learned District Magistrate in the first instance. I have also read the complainant's written complaint and examined the evidence which he gave in the District Magistrate's Court, and I cannot find on an examination of all this testimony, produced by the complainant himself, that the learned District Magistrate was not perfectly right in dismissing the case. In my view he could have done so on the material before him without referring it to the police at all. He obviously adopted the latter course solely for the purpose of having a thorough investigation made. The learned Sessions Judge have, in my opinion, given, perfectly satisfactory reasons in his careful and well-considered judgment for refusing to interfere with the order of the District Magistrate. I find myself upon the merits in agreement both with the District Magistrate and with the learned Sessions Judge, and I accordingly refuse to exercise the discretion vested in me to send this case back for a re-hearing. In adopting this course I am fortified by the decision of a Division Bench of the Cal-

(1) [1887] 14 Cal. 141.
(2) A. I. R. 1922 All. 211=44 All. 550.
(3) [1897] 20 Mad. 387=2 Weir. 240.
(4) [1902] 25 Mad. 545=2 Weir. 245.
(5) [1917] 25 C. L. J. 606=35 I. C. 828=21 C. W. N. 127.

cutta High Court, consisting of Sanderson, C. J., and Chotzner, J. in *Chandi Charan* v. *Manindra Chandra*. (*A. I .R.* 1923 *Cal.* 198.) This petition must, therefore, be rejected.

D.D. *Petition rejected.*

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BROADWAY AND AGHA HAIDAR, JJ.

Thakar Das—Defendant—Appellant.

v.

Narainu—Plaintiff—Respondent.

S. A. No. 2681 of 1923, Decided on 10th October 1927, from the decree of the Dist. J., Hoshiarpur, D/- 30th July 1923.

Guardians and Wards Act, S. 28—The guardian has no power to fritter away the minor's property in his charge.

The defendant who held the appointment of a guardian during the minority of the plaintiff by the will of the latter's adopted mother built two houses on the plaintiff's land with money taken out of the minor's funds and the rest was borrowed on the security of this very property. The plaintiff on attaining majority brought the suit against the defendant praying for a decree for settlement of accounts and possession of the land after demolition of the house. The trial Court while partly decreeing the plaintiff's suit ordered that the defendant should remain in possession of the houses and the site on which they stand for a period of 45 years and that he should pay a certain ground rent to the plaintiff.

Held: that the order of the trial Court which practically amounts to an enforced sale of the plaintiff's land to the defendant on the latter's paying to the former a small premium, is not equitable and therefore can not stand.

[P 91 C 1, 2]

Dev Raj Sawhney and *J. N. Aggarwal*—for Appellant.

Fakir Chand—for Respondent.

Agha Haidar, J.—It is unfortunate that, in spite of the pourparlers that were going on during the course of hearing of this appeal about a compromise, the parties did not see their way to arrive at an amicable settlement. That is, however, a matter for the parties and not for the Court. The case was fully argued and both parties displayed an unbending spirit throughout.

The facts are briefly these: The plaintiff, who is the adopted son of one Dal Singh, was a child of very tender years when his mother Mt. Indar Devi died, his adoptive father having died previously. This lady executed a will on the 9th June 1905, appointing the defendant Thakar Das guardian of the person and property of the plaintiff. The property consisted of some agricultural lands and a plot of land measuring 1 kanal 14 marlas situated in Dharamsala. In the year 1907 the defendant, while acting as the guardian of the plaintiff, built a house on the plaintiff's land at a cost of about Rs. 2,000. In 1910-11 he built another house which is valued at Rs. 4,000. The money spent over these two houses was partly taken out of the minor's funds and the rest was borrowed on the security of this very property. On attaining majority the plaintiff brought the present suit against the defendant praying for a decree for settlement of accounts and possession of the land after demolition of the house and for possession of such other property of the plaintiff as may be found in the possession of the defendant. The trial Court partly decreed the plaintiff's claim. It gave him a decree for a certain sum of money in respect of the claim for rendition of accounts, etc., and it further ordered that the defendant should remain in possession of the houses and the site on which they stand for a period of 45 years on condition that he should pay as ground rent tc the plaintiff, a sum equivalent to 17 per cent of the rent realized from the houses. The plaintiff was dissatisfied with this decree and preferred an appeal to the learned District Judge, Hoshiarpur. In the lower appellate Court, the defendant alleged that he had filed cross-objections against the decree of the learned Subordinate Judge. The learned District Judge in appeal decreed the plaintiff's suit for possession of the land and ordered that the defendant should dismantle the house which he had built and remove the materials within the period of one year from the date of the decree. He also allowed to the plaintiff some further items in his claim for account and ratified an arithmetical error which had crept into the decree of the Subordinate Judge. The defendant has come up in second appeal to this Court.

One matter may be disposed of at the very outset. The learned counsel, Mr. Dev Raj Sawhney, who addressed the Court on behalf of the appellant, urged that the learned District Judge should have considered the objections which had been filed by the defendant in the Court below. These objections are not forthcoming, and the learned Judge of the lower appellate Court found that

there was in fact nothing to show that the cross-objections were ever filed and that under the circumstances he would not be justified in entertaining any such objection.

In view of this finding the Court is not prepared to hear the defendant about the objections which the learned counsel alleges were filed by his client in the lower appellate Court.

Mr. Dev Raj Sawhney challenged the finding of the lower appellate Court as regards the authority of the defendant Thakar Das to build the house in dispute. His argument was that under the terms of the will, and having regard to the provisions of S. 28, Guardians and Wards Act, his client, the defendant Thakar Das, was justified in building these houses. The will was read out to us and there can be no doubt that it gave full powers of managing the minor's property to the proposed guardian. Under the terms of the will, he could sell the property in order to invest the proceeds more profitably. But there was no justification for the guardian under the powers conferred upon him by the will to fritter away the funds belonging to the minor in building the houses in dispute and further to borrow money on their security thus rendering the minor's property responsible for the payment of the mortgage money. There is a letter Ex. P. 10, dated 13th November 1910, which the defendant wrote to the Arya Prati Nidhi Sabha wherein he admits that he committed an indiscretion in building the house on the minor's land. He further goes on to say in that letter that he built the house with the idea of paying off its price. If he was acting in good faith and in the interests of the minor it is inconceivable that he should build another and more expensive house in the year 1910-11 after he had had occasion to realize his mistake. Under the circumstances the learned Judge of the lower appellate Court was right when he observed:

It seems probable that the defendant built the houses with the idea of taking them over himself and nothing else.

Mr. Dev Raj Sawhney further contended that the Court below was not justified in allowing a further sum of Rs. 360 to the plaintiff by way of ground rent, since the defendant had been paying a sum of about Rs. 15 a month on the money borrowed by him on the security of the houses. There is nothing to show on the printed record that the defendant paid this sum of money. The account is given at p. 13 of the printed paper-book, and the learned counsel for the appellant has not been able to trace these monthly payments into any one of the items which constitute the said account. The learned Judge of the lower appellate Court further reduced the sum of Rs. 251-12-9 by Rs. 40 which, according to the defendant, had been spent by him on account of litigation. The reasons adduced by the learned Judge are sufficient, and I agree that the defendant had no justification in incurring this expenditure. In his rejoinder Mr. Jagan Nath Aggarwal for the first time attacked the finding of the learned District Judge wherein he ordered the removal of the house which the defendant had built on the plaintiff's land. It was at once pointed out to Mr. Jagan Nath Aggarwal by the Court that in his rejoinder he could only answer the points raised in the arguments of the respondent and that he should not open a fresh attack upon the judgment of the Court below for the first time. He, however, persisted in his argument and sought to justify the order of the trial Court which practically amounted to an enforced sale of the plaintiff's land to the defendant on the latter's paying to the former a small premium. He further referred to the equities of the case in order to justify the order of the trial Court. In fact the equities are all against him. He cannot complain of any hardship when he has been undoubtedly guilty of gross dereliction of duty in safeguarding the interest of his ward. He built the house with the sinister object of ultimately taking them over for himself and now that the matter has come up before a Court of justice he is only to thank himself if the result of the case is unfavourable to him.

In my opinion the judgment of the lower appellate Court is correct, and I would accordingly dismiss the appeal with costs. The cross-objections were not pressed and they are accordingly dismissed with costs.

Broadway, J.—I agree in dismissing both appeal and cross objections with costs.

N.D. *Appeal and cross-objections dismissed.*

A. I. R. 1928 Lahore 92

FFORDE AND TEK CHAND, JJ.

Emperor—Appellant.

v.

Des Raj—Respondent.

Cri. A. No. 146 of 1927, Decided on 6th April 1927, from the acquittal order of the Mag., 1st Cl., Sialkot, D/- 29th November 1926.

Post Office Act (6 of 1898), S. 52—Post-master opening a V. P. article addressed to himself and extracting a railway receipt from it without paying for it for six days and making false entries in the P. O. books—He is guilty under S. 52 as his act amounts to criminal misappropriation under Penal Code, S. 403.

A branch postmaster who was also a shop-keeper ordered a consignment of flour in order to meet the requirements of his shop and a value-payable envelope containing the railway receipt for the floor arrived at the branch post office. The postmaster opened it extracted the railway receipt, went down the station where the goods had by that time arrived, and took delivery. After six days he paid the price of the goods into the post office. In the meantime he made in the books of the post office entries and repeated daily "on account of the absence of the addressee".

Held: that, although the offence was a technical one in the sense that no loss was incurred by the post office and the money involved was voluntarily returned, it amounted to criminal misappropriation within the meaning of S. 403, Penal Code, and the postmaster was guilty under S. 52, Post Office Act: 39 *P. L. R.* 102, *Dist.*

[P 92 C 2, P 93 C 1]

Carden Noad—for Appellant.

Jagan Nath—for Respondent.

Fforde, J.—This is an appeal by the Crown from an acquittal. The facts are very simple and may be stated shortly. The respondent was at the time of the matter complained of a branch postmaster of the village Throh in the Sialkot District. For his services as such he received a salary of about Rs. 5 a month. He was also a shop-keeper trading under the name of Gouri Shankar-Des Raj, Gauri Shanker being his father. Some time in August 1925, the respondent had ordered a consignment of flour from the Pioneer Flour Mills at Shandara in order to meet the requirements of his shop for the cattle fair which was due to take place at the end of that month. On the 13th August 1925, a value-payable envelope arrived at the branch post office in question. This envelope contained a railway receipt for the consignment of flour. On the 16th August the respondent opened the envelope, extracted the railway receipt, went down to the station, where the goods had by this time arrived, and took delivery. On the 22nd August he paid the price of the goods into the post office. In the meantime, that is, between the 15th and 21st August, the respondent made certain entries in the books of the post office in the branch office daily account form in which under the column headed "Explanation of non-delivery of registered articles and parcels and value-payable articles in deposit" he entered the words "on account of the absence of the addressee." This explanation was repeated daily from the 15th to 21st. On the 22nd, as I have already stated, the money for the goods was paid into the post office.

It is clear upon these facts, which have been conclusively proved, that the respondent has been guilty of an offence under S. 52, Post Office Act (Act 6 of 1898). The respondent himself admitted that he had taken possession of the value payable letter, that he extracted the railway receipt, that he had got the goods on the strength of this document and that he failed to pay the amount due until the 21st August. Mr. Jagan Nath has urged that these circumstances do not show that there was any intent on the part of the respondent to misappropriate the value-payable letter and that no offence has been committed under S. 52, Post Office Act. This argument obviously cannot succeed. The fact that the respondent made a series of false entries for the purpose of selling stores which had been consigned to his firm under the value-payable post office arrangement, shows that he was perfectly aware that he was doing a wrong act. Moreover, every shop-keeper knows that the whole object of consigning goods on the value-payable system is to prevent the goods being delivered until the money has been paid, and a person who has for some time been occupying the duty of a postmaster must be perfectly aware of the importance of strictly observing the rules in connexion with this class of transactions.

The trial Magistrate in acquitting the respondent has at the conclusion of his judgment said:

His offence would, therefore, only be a technical one and it might amount to misappropriation but it was not criminal misappropriation.

The offence no doubt is a technical one in the sense that no loss was incurred by

the post office and the money involved was voluntarily returned, but the offence undoubtedly does amount to criminal misappropriation within the meaning of S. 403, I. P. C. The trial Magistrate has relied upon the case *Imam Din* v. *Emperor* (1). That case, however, has obviously no bearing upon the facts before us and I do not consider it necessary to discuss it.

The question remains what punishment should be imposed for this offence. The respondent is a young man and is apparently a respectable one. The offence took place as long ago as August 1925. It was known to Nazir Ahmad (P. W. 2), of the Daska post office, at the time. It was also investigated by Ram Lal (D. W. 2), Inspector of Post Offices, Pasrur Sub-Division, in the month of December 1925, and this official satisfied himself with censuring the respondent. Under these circumstances, although the offence under S. 52, Post Office Act, cannot be regarded as anything but serious, I think that the interests of justice would be met in the present case by a nominal imprisonment coupled with fine.

I would accordingly accept the appeal, set aside the acquittal and convict the respondent under S. 52, Post Office Act 6 of 1898, and would sentence him to be imprisoned till the rising of the Court and to pay a fine of Rs. 100, or in default, to undergo three months rigorous imprisonment.

Tek Chand, J.—I agree.

R.D. *Appeal accepted.*

(1) [1902] 39 P. L. R. 1902.

A. I. R. 1928 Lahore 93

SHADI LAL, C. J., AND ADDISON, J.

Preman and *another*—Appellants.

v.

Emperor—Opposite Party.

Cri. A. No. 226 of 1925, Decided on 29th May 1925, from an order of the Sess. J., Ferozepore, D/- 12th January 1925.

(a) *Penal Code, S. 300, Excep. 4—Fatal attack not premeditated but on the other facts, case not coming under Excep. 4—Offence is murder but death sentence is not called for.*

Where the fatal attack was not a premeditated one and the victims were injured in the heat of passion upon a sudden quarrel and the offenders did neither take undue advantage nor acted in a cruel or unusual manner, but from the other facts of the case the case would not come under Excep. 4 to S. 300.

Held: that the offence was one of murder, but that the extreme penalty of the law should not be exacted in the case. [P 94 C 1, 2]

(b) *Penal Code, S. 300—Violent blow by dang on vulnerable part of body such as head—Offender is guilty of murder.*

A person delivering a violent blow with a lethal weapon like a dang on a vulnerable part of the body such as the head must be deemed to have intended to cause such bodily injury as he knew was likely to cause the death of the person to whom the injury was caused. [P 94 C 2]

Sagar Chand and *Ganpat Rai*—for Appellants.

Judgment.—On the afternoon of the 5th July 1924, a quarrel took place between two sweepers, Duman and Khushala, of the village Daroli Bhai in the Ferozepur District and this quarrel developed into a serious transaction in which two men, namely, Phaggu and his father Maghi lost their lives, and a few others sustained more or less severe injuries. The prisoner Kheman has been convicted of the murder of Phaggu, and his brother Preman has been found guilty of the murder of Maghi; and both of them have been sentenced under S. 302, I. P. C., to suffer the penalty of death.

There is ample evidence on the record that Duman owed Rs. 60 to two Jats, Bachint Singh and Sunder Singh who are cousins and carry on money-lending business jointly. On the afternoon in question Bachint Singh came to Duman while he was sitting in his house near the village dharmsala, and asked him to repay the loan of Rs. 60. The debtor said that he had paid Rs. 30 to Khushala who had stood surety for the loan, but Bachint Singh replied that he had not received any money from Khushala. The two then went to Khushala to enquire from him about the money. The latter denied having received Rs 30 from Duman, whereupon Duman and Khushala began to abuse each other. While they were quarrelling, Phaggu came up from a neighbouring well and suggested to them that they should settle the matter amicably. His intervention was, however, resented by Khushala who told him to mind his business and not to interfere with him.

The story for the prosecution is that the noise of the altercation attracted the attention of Khushala's sons, Kheman and Preman, and his nephews, Bishna

and Kishna, who came up armed with dangs from the house of Preman. Kheman struck Phaggu a blow with his dang on the back of the neck and Kishna followed suit with a dang blow which hit Phaggu just below the site of the first injury. The victim then ran for his life, but he was pursued by the four accused, and after he had gone about 40 karams, he was given a severe blow on the head by Kheman which felled him to the ground. All the four persons then began to belabour him as he lay on the ground. His brother, Binna, who had witnessed the whole affair from the beginning, ran to his assistance but he was struck by Bishna. When he fell down he was beaten by Bishna and his three comrades. At this stage, Binna's father Maghi came up to interfere, but Preman struck him on the top of the head with his dang and knocked him down, and Bishna hit him while he was lying on the ground.

The injuries received by Phaggu resulted in his death almost at once, but Maghi survived for a few hours and he died on the morning of the 6th July, while he was on his way to the hospital. The medical witness, who examined the body of Phaggu, found that he had sustained, besides simple injuries, a contused wound on the head which had fractured the right parietal bone. Maghi had received one simple injury on the right chest and a contused wound on the head which had caused a fracture of the skull.

Now, there are a large number of witnessess who have deposed to the effect that the fatal injury on the head of Phaggu was caused by Kheman, and that his brother Preman was responsible for the contused wound on the head of Maghi which led to his death. It appears that the fatal attack was not a premeditated one and that both the victims were injured in the heat of passion upon a sudden quarrel, and that the offenders did neither take undue advantage nor acted in a cruel or unusual manner. The facts of the case, however, make it clear that there was no fight between the offenders on the one side and their victims on the other; and we cannot, therefore, hold that the requirements of Excep. 4 to S. 300, I. P. C., have been established. There can be no doubt that a person delivering a violent blow with a lethal weapon like a dang on a vulnerable part of the body, such as the head, must be deemed to have intended to cause such bodily injury as he knew was likely to cause the death of the person to whom the injury was caused.

We accordingly hold that both Kheman and Preman have been rightly convicted under S. 302, but we do not think that the extreme penalty of the law should be exacted in their case. We accordingly accept the appeal so far as to reduce the sentence of death in each case to that of transportation for life.

R.D. *Appeal accepted.*

A. I. R. 1928 Lahore 94

HARRISON AND TEK CHAND, JJ.

Mt. Harcharan Kaur — Defendant — Appellant.

v.

Lachhman Singh—Plaintiff—Respondent.

S. A. No. 2699 of 1923, Decided on 31st October 1927, from the decree of the Dist. Judge, Ferozepore, D/- 20th October 1923.

Evidence Act, S. 114, Ill. (e)—Point raised in the grounds of appeal—No mention made in the judgment—Court is presumed to have acted properly.

Where a point is definitely raised in the grounds of appeal and the Court makes no mention thereof in its judgment, it must still be presumed to have performed the judicial act of writing a judgment regularly and properly.

[P 95 C 1]

Moti Sagar—for Appellant.

Badri Das—for Respondent.

Harrison, J.—In this case the plaintiff sued the widow of his dead brother, claiming the land, which would have fallen to that brother's share had he survived his father. The suit has been decreed both in the trial and in the appellate Courts and the only point raised on second appeal is that the question of the right of the widow to inherit the share in the family property, which would have fallen to her husband, had he lived, has not been decided by the District Judge, although the point was put in issue and decided by the trial Court and specifically raised in the grounds of appeal. The grounds of appeal in this Court have been drafted and presented by the same counsel who argued the appeal before the District Judge. In these grounds he does state that the point was

not decided, though raised in the grounds of appeal, but he does not say that he pressed or argued the point before the District Judge, nor is there up to date an affidavit from him on the point although four years have elapsed since the judgment was pronounced.

The question to be decided, therefore, is whether it is to be presumed that a District Judge who makes no mention whatsoever of a point definitely raised in the grounds of appeal is to be presumed, in the words of S. 114 (e), Evidence Act, to have performed, the judicial act of writing a judgment regularly and properly, or on the contrary to be presumed to have failed in his duty and to have ignored the point definitely presented and argued before him by counsel. I am of opinion that the presumption as laid down in the Evidence Act must be made and that inasmuch as it is one of the Judge's duties to deal with all the points raised before him for determination, if his judgment deals with one only, it must be presumed that that is the only point put before him by counsel and that he has performed his judicial duties regularly. It is contended that the failure to say in so many words that no other point was argued is tantamount to a sort of admission by the Judge that other points were argued and that he failed to decide them. It is also contended that even if the point was not argued, it was still the duty of the Judge to decide it if entered in the memorandum of appeal. I can see no force in these contentions and in the absence of any assertion in the grounds of appeal or affidavit by counsel that the point was argued, I am of opinion that the presumption must be made. The presumption is that judicial acts have been regularly performed and not merely, as counsel would have us read it, that judicial officers who say so are telling that truth. I would find that the appeal must fail and be dismissed with costs.

Tekchand, J.—I agree with the order proposed by my learned brother. This appeal should be dismissed.

N.D. *Appeal dismissed.*

A. I. R. 1928 Lahore 95

SHADI LAL, C. J.

Brahman Water Mills Co., Damodarpura of Jassian — Complainant—Petitioner.

v.

Mangladha Mal and *others*—Accused—Respondents.

Cri. Revn. No. 1286 of 1927, Decided on 26th October 1927, reported by the Sess. J., Attock, on 21st August 1927.

Criminal P. C., S. 133—Proceedings under S. 133—Magistrate must proceed in conformity with provisions of Ch. 10.

When a Magistrate commences proceedings under S. 133, he is not at liberty to proceed otherwise then in conformity with the rule laid down in Ch. 10: 8 *W. R.* 37 *Cr. Foll.* [P 96 C 1]

Order of Reference.—Damodar Lal, the Manager of the Brahman Water Mills Company, alleged that one Mangladha Mal and four other men had obstructed an old public path and thus caused great inconvenience to the public and the complainant as well as damage to the complainant's water mills. A prayer was made that action be taken against the accused under S. 133 and 147, Criminal P.C.

The Magistrate took the evidence of four witnesses produced by the complainant and then issused the following order :

Accused may be called to show cause why action under S. 133, Criminal P.C., be not taken against them.

The accused appeared and put in a written statement. The Magistrate then framed the following four issues :

1 Whether the lands in which Mills are situated remained in possession of the complainant.

2 Whether action under Ss. 133-147, Criminal P. C., is desirable and whether any danger of breach of peace exists.

3 What effect has the previous litigation on the case on hand ?

4 To what relief is the complainant entitled ?

He then fixed a date for evidence. After hearing the evidence of both parties and holding that S. 133, Criminal P. C., is not applicable, Sardar Uttam Singh, exercising the powers of a Magistrate of the 1st Class in the District of Attock, dismissed on 27th July 1927 the complaint made under under Ss. 133/147, Criminal P. C., and directed the complainant to have recourse to civil Courts regarding his alleged grievance if so advised.

The proceedings are forwarded for revision on the following grounds :

The Magistrate appears to have overlooked the provisions of Ss. 133 and 139-A and omitted to issue conditional order under S. 133 (1), Criminal P. C., and also to proceed in the manner laid down in S. 139-A, Criminal P. C. On the one hand, after issuing notice, he commenced to try the case as a civil suit but omitted to frame the only necessary issue, namely, one as to its being a public thoroughfare. When the Magistrate found that the respondents denied the existence of a public right in respect of the way and that there was reliable evidence in support of such denial it was incumbent on him in compliance with the provisions of S. 139-A to stay the proceedings until the matter of the existence of such right had been decided by a competent civil Court without directing any particular party to have recourse to the civil Courts. On the other hand the lower Court appears to have eventually treated the matter as if it were a complaint of an ordinary offence and to have totally ignored the special provisions made by the Legislature in Ch. 8, Criminal P. C. for dealing with applications for the removal of nuisances.

The Magistrate's initial mistake lay in not issuing a conditional order under S. 133 (1), Criminal P. C., after recording the statements of the applicant's witnesses. He lost sight of the fact that proceedings under S. 133 are ex parte.

When a Magistrate commences proceedings under S. 133, he is not at liberty to proceed otherwise than in conformity with the rules laid down in Ch. 10, [*Queen* v. *Pitti Singh* (1)].

The applicant has no doubt been prejudiced by the order passed referring him to a civil Court.

I accordingly accept the application for revision and submit the proceedings to the High Court with the recommendation that the Magistrate's order be set aside.

Order

Shadi Lal, C. J.—For the reasons recorded by the learned Sessions Judge I set aside the order of the Magistrate and direct him to decide the case under S. 133, Criminal P. C. in accordance with the procedure prescribed by law.

N.D. *Order set aside.*

(1) 8 W. R. 37 Cr.

* A. I. R 1928 Lahore 96

BROADWAY AND JAI LAL, JJ.

Bishen Chand and *others*—Defendants—Appellants.

v.

Mt. Bishen Devi and *others*—Plaintiffs and Defendants—Respondents.

F. A. No. 2091 of 1923, Decided on 1st December 1927, from the decree of the Senior Sub-Judge, Lahore, D/- 15th June 1923.

* *Civil P. C., O. 34, R. 7—Rule is mandatory.*

Mortgagors on redemption of the mortgaged property should be directed to pay the mortgagees interest up to the date fixed for redemption by the Court. R. 7, O. 34 is mandatory on this point. [P 96 C 2]

Tirath Ram—for Appellants.

Broadway, J.—The only point for determination in this appeal is whether the mortgagors on redemption of the mortgaged property should be directed to pay the mortgagees interest up to the date fixed for redemption by the Court. The Court has only allowed interest up to the institution of the suit, as it considered that the interest already allowed, was sufficient. In doing so the learned Senior Subordinate Judge, Mr. Ghulam Yazdani, appears to have lost sight of R 7, O. 34, Civil P. C., which is mandatory on this point.

The respondents filed cross-objections urging that costs should not have been allowed to the appellants on the ground that the appellants had raised various pleas which ought not to have been raised by them. On the other hand it appears that the plaintiffs-respondents claimed to redeem the property for a far less sum than was due, and in these circumstances I do not think that the order of the Court as to costs should be interfered with. The cross-objections are, therefore, dismissed.

The appeal is accepted and the appellants are allowed the sum of Rs. 864, the interest claimed. No order as to costs in this Court. This sum of Rs. 864 must be paid by the 1st February 1928.

Jai Lal, J.—I agree.

S.D. *Appeal accepted*

* A. I. R. 1928 Lahore 97

BROADWAY, J.

Moti Lal and *others*—Accused — Petitioners

v.

Emperor—Opposite Party

Criminal Revn. Petition No. 868 of 1927, Decided on 14th November 1927, from the order of Additional Sess-Judge., Delhi, D/-29th April 1927.

* (a) *Criminal P. C., S.* 202—*Issuing notice to person complained against for showing cause for not issuing process against him is unusual.*

It is a little incongruous to call on a person accused of an offence to show cause against process being issued against him when proceedings under S.202, Criminal P.C. are in contemplation. The procedure is unusual but does not justify interference in revision unless there is reason to believe that it has occasioned a miscarriage of justice : 6 *Bom. L. R.* 91, *Rel. on* : *A. I. R.* 1923 *Cal.* 198 and *A. I. R.* 1928 *Lah.* 88, *Dist.* [P 97 C 2]

(b) *Criminal P. C. S.* 436—*Inquiry after discharge.*

Further inquiry after discharge is "improper unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete: 10 *P. R.* 1911 (*F. B.*).; *A. I. R.* 1921 *Lah.* 214; 1 *Lah.* 216; and *A. I. R.* 1923 *Lah.* 329. *Foll.*, *A. I. R.* 1927 *All.* 38, *Dist.* [P 97 C 2]

Nand Lal—for Petitioners.

Moti Sagar and *Nawal Kishore*—for the Crown.

Judgment.— A complaint under Ss. 392, 347/348 and 477, I. P. C., was instituted by certain persons against the petitioners. The Magistrate decided to make an enquiry before issuing process and took action under S. 202, Criminal P. C. At the same time notice was issued to the petitioners to be present although it does not appear they were allowed to do more than act as spectators of the proceedings. After examining the witnesses produced by the complainants the Magistrate recorded a detailed and reasoned order holding that no prima facie case had been made out against the petitioners and so dismissed the complaint. The complainants then moved the Sessions Court on the revision side and the Additional Sessions Judge ordered a further enquiry, as after a review of the evidence he came to a conclusion different from that arrived at by the learned Magistrate.

Against this order the petitioners have come up to this Court under S. 439, Criminal P. C., and on their behalf I have heard counsel at length while the complainant's addvocates have adressed me in support of the order for further enquiry.

Most of the authorities cited afford no assistance and need not be discussed. It has been strongly urged that the Magistrate acted against law in issuing notice to the petitioners and allowing them to be present at the enquiry. This procedure is certainly unusual. *In re Tukaram Udaram* (1) the Bombay High Court held it was not illegal to call on the person complained against to show cause. The Calcutta High Court has, however, taken a different view in *Chandi Charan Mitra* v. *Manindra Chandra*, *A. I. R* 1923 *Cal.* 198, a view that found favour with Fforde, J., in *Jagindar Singh* v. *Agha Safdar Ali Khan* (2). And it appears to me a little incongruous to call on a person accused of an offence to show cause against process being issued against him when proceedings under S. 202, Criminal P.C., are in contemplation. At the same time this alone would not induce me to interfere in revision unless there was reason to believe that it had occasioned a miscarriage of justice.

In the present case I am unable to see that the mere presence of the petitioners could have affected the evidence led by the complainants. The Magistrate recorded a detailed order showing that he had considered and weighed all the evidence recorded by him and giving reasons for his being unable to accept it as correct or true. The learned Additional Sessions Judge has also examined the evidence and, as he thought the evidence worthy of credence, ordered a further enquiry. It has been urged that the Additional Sessions Judge acted legally, and reliance was placed on *Piare Lal* v. *Sagar Mal* (3), which no doubt is to the point. At the same time it was laid down in *Emperor* v. *Kesri* (4), by a Full Bench of the Chief Court that generally speaking further enquiry after discharge is improper unless the order of discharge was manifestly perverse or was based upon a record of evidence which was obviously incomplete.

This has been followed consistently by this Court: see for instance *Dani* v. *Emperor* (5), *Nabi Bakhsh* v. *Crown* (6) and

(1) [1901] 6 Bom. L. R. 91.
(2) A. I. R. 1928 Lah. 88
(3) A. I. R. 1927 All. 38=49 All. 230.
(4) [1911] 10 P. R. 1911 Cr.=24 P. W. R. 1911 Cr.=11 I. C. 132=205 P. L. R. 1911.
(5) A. I. R. 1921 Lah. 214.
(6) [1920] 1 Lah. 216=56 I. C. 777=109 P. L. R. 1920.

Karam Chand v. *Mathra Das* (7), and I am unable to see any reason for refusing to accept, that as laying down the rule to be followed by this Court. The order of the Magistrate is not, and has not been called, perverse or foolish, and it was not suggested that the record of the evidence was incomplete. The mere fact that the Additional Sessions Judge was prepared to place a different value on the testimony of the witnesses would not warrant the order passed by him. I therefore accept this petition, and setting aside the order of the Additional Sessions Judge restore that of the Magistrate, dismissing the complaint.

N.K. *Petition accepted.*

(7) A. I. R. 1923 Lah. 329.

A. I. R. 1928 Lahore 98 (1)

SHADILAL, C. J., AND ZAFAR ALI, J.

Diwanchand—Defendant—Appellant.

v.

Doda Shah—Plaintiff—Respondent.

Second Appeal No. 3108 of 1924, Decided on 10th November 1927, from decree of Dist. Judge, Rawalpindi, D/- 17th October 1924.

Registration Act, S. 76(b)—Registrar refusing to register a document without giving reasons to do so—Order passed is one under S. 76(b).

Where a Registrar, without making an enquiry into the allegations of the executant that the date of execution had been altered, refused to register a document, but gave no reasons in support of that order :

Held : that his order amounted to a refusal to register on the ground of denial of execution and a suit lay under S. 77. [P 98 C 2]

Gobind Ram Khanna—for Appellant.

Bhagat Govind Das—for Respondent.

Shadi Lal, C. J.—This appeal arises out of an action brought under S. 77, Indian Registration Act, for a decree directing that a mortgage-deed should be registered. The facts relevant to the question of law are briefly these :

The plaintiff Doda Shah presented to the Sub-Registrar for registration a mortgage-deed alleged to have been executed by the defendant Dewan Chand. The Sub-Registrar thereupon issued a summons to the defendant to appear before him, but the defendant made no appearance in answer to the summons. The Sub-Registrar then passed a cryptic order refusing to register the document, apparently on the ground that the execution thereof had been denied by the defendant.

The plaintiff, thereupon, moved the registrar by a petition for the compulsory registration of the deed, and this application was resisted by the defendant on the plea that the date of the execution of the deed had been changed, without his consent, from 20th March 1922 to the 17th March 1922. The Registrar, without making any enquiry, passed an order refusing to register the document, but gave no reasons in support of that order.

Now, the learned District Judge holds that the order of the Registrar was passed under S. 76(b), Registration Act and we concur in that conclusion. It is clear that the alleged alteration in the date was made by the defendant himself, as he affixed his own signature to the altered date. The Registrar was entirely wrong in not making any enquiry into the matter, and his order amounted to a refusal to register the document on the ground of the denial of execution.

For the aforesaid reasons we hold that the suit was rightly brought under S. 77, Registration Act. We accordingly dismiss the appeal with costs.

S.J. *Appeal dismissed.*

A. I. R. 1928 Lahore 98 (2)

HARRISON AND DALIP SINGH, JJ.

Daim and *others*—Plaintiffs—Appellants.

v.

Khanu and *others*—Defendants—Respondents.

First Appeal No. 1028 of 1922, Decided on 31st March 1927, from decree of Senior Sub-Judge, Shahpur, D/- 20th March 1922.

Limitation Act, Art. 142—Suit for possession—Proof of possession within 12 years and dispossession by defendant is sufficient—Actual date of dispossession need not be proved.

In a suit for possession under Art. 142 what has to be shown is possession and dispossession within twelve years, and to do so it is sufficient to prove possession within twelve years, which can usually be done by the revenue records, if unrebutted, and further, the absence of possession or rather the possession of the defendant on date of suit. The actual date of dispossession need not be proved. [P 100 C 2]

Nanak Chand and *Obedulla*—for Appellants.

M. A. Ghani, Sleem and *J. L. Kapur*—for Respondents.

Harrison, J.—The plaintiff, descendants of one Haku, from one branch of a

family, while the defendants, descendants of Gullu, form the other, the common ancestor being one Smail. Mt. Begman, defendant 6, is the widow of Jahana of the plaintiff's branch and she has been impleaded as a pro forma defendent only as a separate area of the family property has been given to her for her lifetime. The revenue records show that Smail owned one-half of a holding No. 64 and was joint in this holding with one Nabu and subsequently in the year 1892 his descendants effected a partition and received the larger portion of this holding. Haku, the ancestor of the plaintiff-branch is shown as having subsequently purchased a small plot of land. At the settlement of 1891-92 this plot was included in the joint holding of the family though no mutation order was passed and it is not known how the entry came to be made. The two branches of the family held definite areas throughout the period 1891 to 1918 as shown in the various jamabandis, the branch of Haku always holding considerably larger share. In the column of ownership the entries continued as made in the year 1891-92 and showed both the property of Smail and the area purchased by Haku as jointly owned by the whole family.

In 1917 the family presented a petition to the patwari stating that they had partitioned the whole of the land held by them including a large area of shamilat, which had been allotted in the year 1904, and that they wished to make a formal and regular partition by observing the existing possession of both branches and this independent of the question of title. On this the patwari sent a report to the Tahsildar, in which he showed the actual possession of the two branches as approximately equal. The Tahsildar recorded that the members of the family. who were present, asserted that the existing possession had continued for eleven years, that they wished that the existing possession be respected and continued ; he therefore ordered partition to be effected in accordance with their wishes and in accordance with the actual existing possession. This could only mean actual cultivating possession more especially as the partition was to be irrespective of title. In spite of this perfectly clear order, partition was effected by making an entry in the record showing the two branches as in possession of one-half each. The plaintiffs have come to Court relying on the past history of the family, have stated that their cause of action arose on the date of the mutation entry, that the defendants have seized an area of 211 kanals since the date of that mutation order, and that they are entitled to this area and wish the status quo restored.

The suit has been dismissed and the plaintiffs appeal, and after taking us through all the revenue records and explaining the position, counsel has ultimately rested his case on the failure of the revenue authorities to carry out their own orders with the result that the defendants are now in the possession of 211 kanals more than they held in the jamabandi of 1916-17. There can be no doubt that the orders as passed have not been carried into effect. Not only the jamabandi of 1916-17 but also the two previous jamabandis, establish that the area now claimed by the plaintiffs was throughout held by them in excess of their strict half-share as shown in the column of ownership. In the year of 1916-17 or thereabouts the area, which they had been holding jointly was apparently brought into hotchpot and the result of the division gave the same disproportion between the shares as is to be found throughout the entries and as is explained by the additional holding acquired by Haku.

Counsel for the respondent has urged that the plaintiffs should be confined to their pleadings and unless and until they can show the actual date and circumstances of the dispossession as alleged in their plaint, the present entry being in favour of the defendants, it must be assumed that all the previous entries are wrong ; that it must be held that the plaintiffs have failed to show that throughout the whole of this period they have actually held knowingly or unknowingly the precise area purchased by their ancestor, and that they are therefore not entitled to the area, which they claim. If the pleadings are to be enforced strictly, it will be found at p. 30 of the paper-book that the defendants confessed judgment by stating that para. 8 of the plaint was correct. This is an obvious mistake and must be treated as such, but it hardly lies in the mouth of defendants to insist on strict pleading when they themselves have been so careless. It appears to us that the plaintiffs

having put their grievance before the Court and having roughly described their cause of action, though that cause of action did not arise from the making of the entry but from the conduct of defendants which followed thereon, we are of opinion that relief should be given to them if they succeed in showing that they are entitled to it.

Without going into the question of the identity of the land throughout the twenty-seven years or more the salient fact is established that the parties did agree to observe existing possession and that the revenue records bear strong internal evidence establishing that the excess held by the plaintiffs' branch is approximately the same throughout this period, and the amount now claimed has been correctly calculated. The fact that they were in possession of the excess area being established the fact that they are now not in possession thereof gives them a cause of action. They made their agreement, orders were passed that it should be carried into effect, and, so far from the order being carried out, precisely the contrary was done, and on some unknown date defendants entered upon the excess portion, which they now hold. We find that in accordance with the agreement the plaintiff-branch is entitled to receive this excess portion which it claims, namely, 211 kanals 15 marlas out of khata khewat No. 10, Khatauni 45-64 as shown in the jamabandi papers for the year 1916-17.

The article which governs the case is 142, which gives rise to much misunderstanding although the wording is perfectly clear. In a suit governed by this article the plaintiff has to establish possession and dispossession within 12 years. He proves his possession say 10 years ago and it is immaterial whether it was he himself or his tenant who actually occupied or cultivated the land. He proves that he is not in possession at the time of suit and that defendant is. It follows therefore as the night the day that defendant has dispossessed him at some time known or unknown and it equally follows that the dispossession took place less than ten years ago. All the necessary ingredients are established and the suit is good and sound. Now, what is the usual procedure? The plaintiff thinking it wise or necessary to give the exact date of his cause of action and not knowing what it is, selects a date more or less at random and says he was dispossessed some three years ago, or more or less as the case may be. The defendant denies this. The point is put in issue and the plaintiff fails to prove the date on which the dispossession took place. Although he owns the land, although he was in possession within twelve years and has been admittedly robbed by the defendant, the Court dismisses the suit and gives the plaintiff's property to the defendant. In doing so the Court appears to think, and counsel in arguing the matter often appear to approve of the position, that the Court is exercising some curious disciplinary powers, punishing the plaintiff for being untruthful or ignorant, and rewarding the defendant for exposing the deplorable conduct of the plaintiff—the prize taking the form of the plaintiff's land.

To take another instance : a man goes away leaving his land in possession of a tenant and returns some years later to find a stranger in possession. He institutes a suit and is called upon to prove possession and dispossession within twelve years. Possession presents no difficulty ; he proves that his tenant held the land under him less than twelve years ago. In order to prove dispossession he enquires from his tenant what has happened, that tenant being in collusive alliance with the stranger. An untrue story is told him in consequence, and in the fullness of time the inaccuracies are exposed in open Court. Filled with righteous indignation the Court dismisses the suit because the unfortunate plaintiff is so unpopular or so ignorant that he has wrongly described the date of dispossession. This is happening every day. In *bana shikni* cases, where as a matter of fact neither side knows the exact date of dispossession and it is not a question of ignorance or untruthfulness or an inaccurate watch or a time-expired calender, the same, disciplinary action is taken. The plaintiff is forced to name a date. He does so at random and on its being shown that he cannot prove his guess he is punished by losing his land because the date of his cause of action is wrongly described. What has to be shown is possession and dispossession within twelve years and to do so it is sufficient to prove possession within twelve years, which can usually be done by the revenue records, if unrebutted, and, further, the absence of pos-

session or rather the possession of the defendant on date of suit. It follows that dispossession has been proved. We accept the appeal and give the plaintiffs a decree with costs in both Courts.

R.D. *Appeal accepted.*

A. I. R. 1923 Lahore 101

BROADWAY AND JAI LAL, JJ.

Abdul Ghani—Defendant—Appellant.

v.

Sansar Chand and *another*—Plaintiffs and Defendant—Respondents.

Second Appeal No. 1210 of 1923, Decided 23rd November 1927, from decree of Dist. Judge, Hoshiarpur, D/- 6th February 1923.

Hindu Law—Joint family—Alienation by managing co-parcener or father—Conditions for valid transfer explained—Subsequent immoral character of father does not affect debt contracted for paying antecedent debt.

The managing coparcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity : if he is the father and the reversionaries are the sons he may, by incurring debt so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt. If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate. An antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached : *A. I. R.* 1924 *P. C.* 50, *Foll.* [P 102 C 1]

The fact that managing coparcener or father was found extravagant, vicious and generally of an immoral character after the date of borrowing money for paying antecedent debt does not affect the validity of debt contracted by him : 10 *P. R.* 1918 ; *A. I. R.* 1921 *Lah.* 205, *Ref.* [P 102 C 1]

Niaz Muhammad—for Appellant.

Fakir Chand and *Chandar Gupta*—for Respondents.

Broadway, J.—This and the connected second appeal arise out of two cases instituted by the sons of one Hukam Chand for a declaration that certain alienations made by their father Hukam Chand would not affect their reversionary rights on his demise. The defendant in one case was Abdul Ghani who had purchased 64 kanals 5 marlas of land from Hukam Chand on 9th June 1905 for a sum of Rs. 2,500. In the second case the defendant was one Sardar Ali who had purchased certain property from Hukam Chand for a sum of Rs. 4,700 on 13th January 1917. The learned District Judge recorded one judgment in both cases although the trials were separate and found necessity established for Rs. 1,000 in the case against Abdul Ghani, and in the case against Sardar Ali decreed the plaintiffs' suit in full. Abdul Ghani and Sardar Ali have preferred two separate appeals to this Court and we have heard Mr. Niaz Muhammad on behalf of Abdul Ghani, and Mr. Badri Das on behalf of Sardar Ali, while Mr. Fakir Chand and Chandar Gupat appeared for the plaintiff-respondents.

The case of Abdul Ghani need not detain us long. The findings are clear that Hukam Chand and his sons were members of a Joint Hindu family and that the property alienated was ancestral. These are pure findings of fact. Similarly, it was found that no necessity whatever had been proved for Rs. 1,500 out of the Rs. 2,500 alleged to have been paid by the appellant Abdul Ghani. Mr. Niaz Muhammad was constrained to admit that there was no evidence whatever on the record as to necessity *qua* this sum of Rs. 1,500, and I would, therefore, dismiss this appeal with costs.

The matter is not quite so clear in the second appeal, namely, the one by Sardar Ali. The learned District Judge finds that the sum of Rs. 4,700 was made up of four items :

	Rs.
(a) Paid to Saif-ud-Din, previous mortgagee	2,500
(b) Deposited with the vendee for payment to Saif-ud-Din in case any excess was found to be due to the mortgagee in (a) ...	200
(c) Cash paid before the sub-Registrar ...	1,900
(d) Registration expenses ...	100
Total ...	4,700

qua the Rs. 1,900, there is no evidence of necessity whetever and the view taken by the learned District Judge must, therefore, prevail.

As to the item payable to Saif-ud-Din the position is this. In 1915, Saif-ud-Din advanced this sum of Rs. 2,500 on a mortgage to Hukam Chand, and in 1917 Sardar Ali was to pay off this item together with any further sum that might be found due for which purpose he retained Rs. 200 of the sale price. As a matter of fact Saif-ud-Din was paid a sum of Rs. 2,631-12-6. The learned

District Judge, apparently following *Sahu Ram Chandra* v. *Bhup Singh* (1), came to the conclusion that although the debt to Saif-ud-Din was "antecedent" it was the duty of the vendee Sardar Ali to establish that the debt for which the mortgage had been executed in 1915 was for necessity. Their Lordships of the Judicial Committee considered *Sahu Ram Chandra* v. *Bhup Singh* (1), in *Brij Narain* v. *Mangal Prasad* (2), and in order to make the position clear formulated at p 104 of the report, the propositions which they desired to lay down as a result of their examination of the authorities. It was there held that :

(1) The managing coparcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity :

(2) If he is the father and the reversioners are the sons he may, by incurring debt, so long as it is not for an immoral purpose lay the estate open to be taken in execution proceedings upon a decree for payment of that debt.

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate and.

(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

Now, the transaction impeached in this litigation is the sale to Sardar Ali, and therefore, the debt paid off by Sardar Ali to Saif-ud-Din was clearly an independent one and, therefore, "antecedent" within the meaning of that expression as used by their Lordships of the Judicial Committee. It was contended, however, that the fact that this debt was an antecedent one merely shifted the onus on to the plaintiffs-respondents to prove that the debts were immoral and that, therefore, on the findings in this case the learned District Judge's decision should be upheld.

Now, it is true that the learned District Judge has found that Hukam Chand was extravagant, vicious and generally of an immoral character, but this finding relates to his character as established in 1917. Admittedly there is nothing on the record to connect the debt incurred by Hukam Chand under this mortgage with any of his vicious propensities or activities It was urged however that it was sufficient to discharge the onus to prove that he was generally of immoral character without any business in which he could have invested the money raised by him under the mortgages. In support of that contention reliance was placed on *Jaswanti* v. *Tej Narain* (3), in which it was remarked that there is a presumption that a loan has been raised for an "immoral purpose" if it is proved that at the time of raising the loan the borrower was living a licentious life, beyond his means, indulging in drink, riot and debauchery and that at the same time he was without any business or occupation upon which the money might legitimately have been spent. *Ram Rattan* v. *Basant Rai* (4), is an authority which appears, to some extent,—at any rate, to conflict with this view, for it was held in that as well as in certain other cases that the burden is not discharged by showing that the father lived an extravagant or immoral life and that there must be a direct connexion between the debt and immorality set up by the son. I do not think it necessary to examine these two authorities in order to ascertain whether they are reconcilable, for, it seems to me that in this case it has not been proved that when the debt in question was incurred, that is to say, the mortgage was executed, Hukam Chand was leading such a licentious life as is contemplated by *Mt. Jaswanti* v. *Tej Narain* (3).

I would, therefore, accept the appeal of Sardar Ali and modify the decree by granting the plaintiffs-respondents a declaration to the effect that this alienation would not affect their reversionary rights to the extent of Rs. 1,968-3-6; I would leave the parties in this appeal to bear their own costs in this Court.

Jailal, J.—I agree.

N. K. *Appeal accepted.*

(1) A. I. R. 1917 P. C. 61=39 All. 437=44 I. A. 126 (P. C.).

(2) A. I. R. 1924 P. C. 50=46 All. 95=51 I. A. 129 (P. C.).

(3) [1918] 10 P. R. 1918=41 I. C. 192=120 P. W. R. 1917.

(4) A. I. R. 1921 Lah. 205=2 Lah. 263.

A. I. R. 1928 Lahore 102

DALIP SINGH, J.

Allah Ditta and *another*—Plaintiffs—Petitioners.

v.

Secretary of State—Defendants--Respondents.

Civil Revn. Petn. No. 197 of 1927, Decided on 7th November 1927, from decree of Senior Sub-J., Gujrat, D/- 19th Feb. 1927.

(a) Civil P. C., S. 115—Revision—Error of law is no ground for revision.

The mere fact that the lower Court errs in applying the proper test to decide a question of fact would not make the point a question of law or a ground of revision ; at best this could only be held to be an error of law. [P 103 C 1]

(b) Railways Act, Sch. 2, Cl. (a)—Niara (sweeping of goldsmith's shop) does not come within the meaning of Sch. 2, Cl. (a).

Niara, i. e., sweepings and gatherings of a goldsmith's shop from which gold is separated by Niarias who make a profession of this kind of things does not come within the meaning of Sch. 2, Cl. (a). [P 103 C 2]

Azim Ullah—for Petitioners.

C. H. Carden Noad—for the Crown.

Judgment.—The plaintiffs consigned three bags of niara at Ludhiana for Gujrat. Two bags were duly delivered ; the third is alleged to be lost through the negligence of the defendant, the North Western Railway. The plaintiffs claimed the price of the bag. The only plea of the railway that need concern us in this revision is the question whether niara comes within the excepted articles given in Sch. 2, Cl. (a), Railways Act. If it does then the plaintiffs' suit must fail as held by the learned Senior Subordinate Judge in appeal. If it does not the plaintiffs' claim succeeds as held by the learned trial Court originally. Niara has been stated by both Courts to be sweepings and gatherings from a goldsmith's shop from which gold is separated by Niarias who make a profession of this kind of thing. There can be no doubt that niara ordinarily contains some gold mixed with a good deal of rubbish such as dust, etc. The question is whether it can be said to be gold manufactured or unmanufactured. The rulings cited by the learned Senior Subordinate Judge have admittedly no bearing on the point. *Kidarnath Raj Narain* v. *E. I. Ry. Co.* (1), *Saminadha Mudali* v. *S. I. Ry. Co.* (2) and *Lakhmidas Hirachand* v. *G. I. P. Ry. Co.* (3) have been cited before me to show that whether niara is or is not gold, etc., depends upon the proportionate value of the gold and silver in it. The argument is that as all the rest of the rubbish is of no value and the only value of the niara is due to the presence of the gold and silver in it the mere fact that gold and silver is mixed with a lot of rubbish does not mean that the article ceases to be gold and silver. The form of S. 75, Railways Act is also referred to in this connexion. *E. I. Ry. Co.* v. *Changai Khan* (4) at p. 895 is cited by way of preliminary objection that the finding is a finding of fact and therefore is not open to revision.

I have given much thought to the matter which does not seems to me to be free from difficulty. One way of looking at it is that the mere concealment or placing of pieces of gold and silver in a mass of rubbish does not take the complete parcel out of the provisions of S. 75. The other way of looking at it is that when a mass of material is collected which may contain some gold and silver which could only be extracted by an elaborate precess, whether physical or chemical, it can hardly be said that the complete parcel is gold and silver. As regards the preliminary objection as to whether this is a question of fact or not, no doubt if the proper test is applied then the mere fact that the Court errs in applying the proper test would not make the point a question of law or a ground of revision but the difficulty comes in deciding whether the Court has or has not applied the proper test. It is not very clear what test the learned Senior Subordinate Judge applied, but, as far as can be made out, he seems to have accepted the first view that I have put forward. Each case, however, has to be judged on its own circumstances and on the whole I am of opinion that niara does not come within the meaning of Sch. 2, Cl. (a). At the same time at best this could only be held to be an error of law on the part of the learned Senior Subordinate Judge and I do not see that I can interfere in revision on this ground. I, therefore, dismiss the revision, but I make no order as to costs which parties will bear themselves throughout.

N.K. *Revision dismissed.*

(1) A. I. R. 1923 All. 538=45 All. 453.
(2) [1883] 6 Mad. 420.
(3) 4 B. H. C. O. C. 129.
(4) [1915] 42 Cal. 883.

A. I. R. 1928 Lahore 103

ADDISON AND AGHA HAIDAR, JJ.

Sotam Ram and *others*—Defendants—Appellants.

v.

Pardhuman Ram and *others* — Plaintiffs—Respondents.

Second Appeal No. 2828 of 1924, Decided on 28th April 1927, from decree of Dist. Judge, Kulu, D/- 25th July 1924.

Hindu Law — Joint family — There is no presumption that a debt when contracted is contracted for the benefit of the family.

There is no presumption that a debt contracted by a manager of a joint Hindu family is contracted for the benefit of the family. The creditor must prove that it was incurred for the benefit of the whole family : *A. I. R.* 1922 *Lah.* 200 ; *A. I. R.* 1924 *Lah.* 44 and *A. I. R.* 1925 *Lah.* 141; *Foll.*

Mukand Lal Puri and *Shambhu Lal Puri*—for Appellants.

Mehr Chand Mahajan and *Nawal Kishore*—for Respondents.

Addison, J.—On the 15th January 1922 Rhikhi Ram executed an agreement to the effect that he would supply Ram Saran, now deceased, with 500 maunds of Indian corn at Rs. 2-6-0 per maund and he further agreed that he would pay Rs. 500, if he committed breach of the contract. In order to carry out the contract he was given Rs. 1,000 as an advance by Ram Saran. After the death of Ram Saran, the joint Hindu family firm, of which he was a member, sued Rhikhi Ram, his father, and two brothers for Rs. 1,500 namely the sum of Rs. 1,000 given as an advance and the sum of Rs. 500 on account of the breach on the ground that all the defendants were joint and were thus liable under the contract which had not been carried out.

The trial Court held that 61½ maunds, valued at Rs. 146-1-0 had been supplied. It found the other issues in favour of the plaintiffs and decreed the suit to the extent of Rs. 1,292-7-0 with future interest and with proportionate cost. This sum is made up as follows, namely, Rs. 1,000 minus Rs. 146-1-0 i. e., Rs. 853-15-0 out of the original advance plus Rs. 438-8-0 the proportionate part of the penalty on account of the Indian corn not supplied.

The defendants appealed to the District Judge but their appeal was dismissed by him. They then presented a second appeal in this Court.

The first point argued on behalf of the appellants was that on the findings of the Courts below the father and two brothers of Rhikhi Ram were clearly not liable. There is evidence on the record that the defendants own land jointly, but there is no evidence that they or any one of them carries on any commercial business or has a shop. The lower appellate Court, however, has held that Rhikhi Ram was looking after all the affairs of the family which was a joint Hindu family and that therefore the debt which he incurred must have been intended to be for their benefit. This finding means that the defendants constituted a joint Hindu family and that Rhikhi Ram was the manager of that family. Accepting that to be the case, it remained for the plaintiffs to establish that the contract was entered into for the benefit of the joint family seeing that there is no evidence that there exists a joint family business in which case the state of affairs might be different. In *Mela Mal* v. *Gouri* (1), *Khazana Mal* v. *Jagan Nath* (2), *Baru* v. *Balla* (3), it was held that there is no presumption that a debt contracted by a manager of joint Hindu family is contracted for the benefit of the family. The plaintiffs, therefore, further had to prove that the contract entered into by Rhikhi Ram was for the benefit of the whole family, and this they have not done.

The learned counsel for the respondents argued that the suit should be remanded for further evidence on this point as the matter was not clearly put in issue. This is not the case. Issue No. 2 runs as follows :

> Are defendants 1, 3 and 4 joint with defendant 2 and jointly responsible with him for the money claimed in this suit.

This shows that the plaintiffs were put on their guard not only to prove that it was a joint Hindu family but that the joint Hindu family was responsible for payment of the debt. Further, it is clear from the judgments of both the Courts that this point was argued. It necessarily follows that the parties knew of it.

The appeal must, therefore, be accepted so far as defendants 1, 3 and 4 are concerned and the suit against them dismissed but without costs.

Another point taken by the learned counsel for the appellants was that the Courts below should not have allowed the full proportion of the penalty of Rs. 500. This part of the judgment, however, must stand. There is upon the record no evidence to show what loss was incurred by the plaintiffs and if defendant 2 desired to show that the sum of Rs. 500 agreed upon was excessive he ought to have produced evidence to prove that no loss or less loss had been incurred by the plaintiffs. In the absence of this

(1) A. I. R. 1922 Lah. 200=3 Lah. 288.
(2) A. I. R. 1924 Lah. 44=4 Lah. 200.
(3) A. I. R. 1925 Lah. 141.

evidence I do not think that I can interfere with the finding of the lower appellate Court on this point.

The result is that the appeal so far as Rhikhi Ram, defendant 2, is concerned is dismissed, but it is accepted as regards defendants 1, 3 and 4 and the suit dismissed so far as they are concerned. Parties will bear their own costs in this Court and in the lower appellate Court but Rhikhi Ram, defendant 2, will pay the plaintiff's costs in the trial Court upon the sum of Rs. 1,299-7-0.

Agha Haidar, J.—I agree.

D.D. *Appeal partly allowed.*

A. I. R. 1928 Lahore 105 (1)

HARRISON AND TEK CHAND, JJ.

Ashaq Ali Khan and *others*—Defendants—Appellants.

v.

Mohd. Shafi Ali Khan and *others*—Plaintiffs—Respondents.

Second Appeal No. 1980 of 1923, Decided on 22nd September 1927, from decree of Dist. J., Karnal, D/- 4th August 1923.

Transfer of Property Act, S. 60 — Right redemption — Subsisting at the time decree—Subsequent loss of right does not make decree ineffective.

Where a person had a right to redeem on the date of suit and also when the decree was passed by the trial Court in his favour, his subsequently losing the right cannot deprive him of the result of his victory. [P 105 C 1]

Balwant Rai for *Abdul Ghani*—for Appellants.

Shamair Chand—for Respondents.

Harrison, J.—The first point raised in this second appeal is that the plaintiff, who is the assignee of one-half of the equity of redemption of certain land mortgaged to the defendants was not entitled to redeem the whole. Counsel cannot seriously support this contention. The second point is that inasmuch as the plaintiff in consequence of other litigation lost his right to redeem at all after the conclusion of the case in the trial Court, this should now be dismissed, the change in his position being somehow treated as having retrospective effect. He was entitled to bring the suit when he did so. He was entitled to redeem when the decree was passed by the trial Court and this subsequent disability cannot deprive him of the result of his victory. He has, moreover, as the record shows, executed his decree and obtained possession and it appears quite clear that this settles the matter so far as the present litigation is concerned.

The third and the only remaining point is the question of costs. In accordance with the terms of the mortgage the plaintiff undertook to redeem in one or two months. He admittedly made a demand, but the demand was not made in either of these months, nor did he offer to redeem when the proper time should arrive. The suit was contested on many grounds by the defendant, and the trial Court and also the appellate Court have penalized them not only by depriving them of their own costs, which such mortgagees ordinarily receive, but have also compelled them to pay the costs to the plaintiff whose carelessness has been condoned and in a sense rewarded. While agreeing that the defendants' conduct debars them from realizing their own costs, we can see no reason for allowing the plaintiff to recover his costs, inasmuch as he has admittedly not performed his duties in their entirety.

We, therefore, accept the appeal in so far only as to order that the parties shall bear their own costs throughout the litigation. For the rest the appeal is dismissed.

S.J. *Appeal partly accepted.*

A. I. R. 1928 Lahore 105 (2)

FFORDE AND AGHA HAIDAR, JJ.

Firm Ghasi Ram Rampat — Plaintiffs—Appellants.

v.

Shimbu Dayal and *others*—Defendants—Respondents.

First Appeal No. 2775 of 1923, Decided on 13th October 1927, from decree of Sr. Sub-J., Rohtak, D/- 27th August 1923.

Evidence Act, S. 11—Suit by a person against firm on foot of a transaction by one member—Plaintiff must prove that the member was acting as authorized agent.

Where a plaintiff sues a firm on foot of a transaction made by one member of the firm, it is for the plaintiff to show that either by the course of dealings between him and the defendants or by some overt acts of the defendant firm, that member was acting as their authorized agent in those transactions in such a manner as to bind the firm. [P 107 C 1]

D. C. Ralli and *Jaggan Nath Aggarwal*—for Appellants.

Shamair Chand, Sham Lal and *Qabul Chand*—for Respondents.

Jammu & Kashmir High Court Advocate

Fforde, J.—The plaintiff, who is proprietor of a firm of commission agents dealing in grain and carrying on business at Moga, brought this suit for recovery of a sum of Rs. 7,750 on foot of certain contracts which he alleges he made with the defendant firm in the months of December 1919 and January 1920. He alleges that he was employed by the defendant firm as commission agent for the purchase of grain ; that he purchased the grain from various brokers ; that he incurred liability with these brokers on the defendants' behalf and, finally had to make payments on foot of the transactions in question. The total result was a loss to the plaintiff of a sum which in all, including commission and other charges, amounts to the sum sued for.

The four defendants who are brothers have put in separate statements of defence, but their principal defence is that this suit is a purely fictitious one. They plead that they had no transactions of any kind with the plaintiff but that the defendant Shambu Dayal, their younger brother, had entered into certain transactions with the firm known as Pat Ram Das Panna Lal. that this firm on foot of those transactions owed Shambu Dayal a considerable sum of money, that they were afraid of disputing this liability, as Shambu Dayal had documents containing admissions and accordingly they had entered into a conspiracy with the plaintiff whereby the plaintiff firm was induced to bring an entirely false suit against the defendants in order to benefit this dishonest firm. In the alternative the defendants have pleaded that the transactions, if proved, were wagering transactions, and that in any event three of the four brothers could not be held liable but only the individual namely, Shambu Dayal, who had made the bargains. The three brothers other than Shambu Dayal allege that Shambu Dayal was a somewhat unsatisfactory member of the family and had parted company with his relatives.

The plaintiff Ghasi Ram has gone into the witness-box and he has sworn that he entered into transactions in question as agent of Shambu Dayal, that he incurred liability with those whose names he has given and that on the due date, namely, the 16th June 1920, the defendants' liability was in excess of the sum claimed. He explains that the liability on foot of the contract in question had been adjusted through the intermediary of Dr. Mathra Das and that he was found to be entitled to the sum sued for. In support of his testimony he has produced a number of witnesses including all the persons with whom he entered into the bargains in question. These persons have produced their accounts which show that these transactions were in fact entered into between them and the plaintiff. The plaintiff has also produced his account which contains corresponding entries. In addition, the plaintiff has produced a letter purporting to be written by Shambu Dayal in which Shambu Dayal gives them instructions for the purchase of five kothas of wheat. The learned trial Judge regards this letter as a forgery, but I am not satisfied with the reasons which he has given for coming to this conclusion.

His principal ground for refusing to believe in the genuineness of this letter is that it does not appear in this plaintiffs' letter books, and that there is an alteration in it in a different ink. It seems to me that, had the plaintiff desired to forge a letter of this kind for the purpose of his suit, he would not have put in interpolations in a different ink and thereby risk inviting such a criticizm. It would have been perfectly simple to have rewritten the document and to have framed it in such a more convincing form. The plaintiff has also produced a postcard which is admittedly in the handwriting of Shambu Dayal. This postcard refers to the fact that the writer had been expecting communication from the plaintiff and also requests the plaintiff to keep his firm notified about the future rates of grain. The plaintiff, in my judgment, had established a very strong prima facie case in support of his claim, and it was incumbent upon the defendants to go into the witness-box and establish their defence on oath. None of the members of the defendant firm has gone into the witness-box. Although they have definitely pleaded that the whole suit was nothing but a criminal conspiracy to defraud and up to the present have not withdrawn this allegation, they have not produced a tittle of evidence in support of this charge, nor have they attempted to establish it upon oath. In these circumstances I would not be inclined to ubmit the plaintiffs' evidence to that detailed and meticulous scrutiny which

otherwise it would have received, I am satisfied that the plaintiff has satisfactorily shown that he entered into the transactions in question with Shambu Dayal, has on his behalf incurred liability with other persons and has discharged that liability and that Shambu Dayal accordingly is himself liable to the plaintiff on foot of these transactions. It has been very strongly urged by Mr. Shamair Chand that there is no evidence to show that the defendant firm as a firm can be held liable for the contracts entered into by Shambu Dayal. The defendants themselves pleaded that they did not carry on a grain business but that their firm was exclusively a money-lending concern. Here again there is nothing but their statement in the pleadings, and owing to the unfortunate policy adopted of keeping these defendants out of the witness-box the question whether they were exclusively a money-lending firm or whether they carried on business in grain or not, is a matter which we cannot decide in the absence of any evidence whatsoevor on that aspect of the case. It was, however, for the plaintiff to show that either by the course of dealings between him and the defendants or by some overt acts of the defendant firm Shambu Dayal was acting as their authorized agent in these transactions in such a manner as to bind the firm. This in my opinion the plaintiff has not succeeded in establishing.

The plaintiff (Ghasi Ram) in his evidence in the witness-box stated that the bargains in question were made with his firm by Shambu Dayal, but he nowhere says that Shambu Dayal was acting on behalf of the firm 'Moti Ram Ram Baksh.' He does not state that he ever had previous transactions with this firm from which an inference might be drawn that they were authorizing Shambu Dayal to act on their behalf. It is admitted that he did not notify the firm that Shambu Dayal was purporting to pledge their credits in these matters, and it is in my judgment not possible to hold from the evidence that the three brothers other than Shambu Dayal were aware that the latter was entering into these contracts on behalf of the firm and accordingly I would hold that the plaintiff's action must fail as against Phul Chand, Shankar Lal and Chandar.

I would accordingly accept the appeal, and while granting a decree to the plaintiff against Shambu Dayal for the sum of Rs. 7,750 dismiss the appeal as against the other three appellants. I would give the plaintiff his costs against Shambu Dayal; but in view of the defendants' conduct in this suit in pleading serious allegations of fraud which they have not attempted to substantiate, and in view of the fact that they have not gone into the witness-box, I would not allow the successful defendants costs of the appeal. I would give the plaintiff interest on the amount decreed from the date of this judgment up to realization at the rate of 6 per cent per annum.

Agha Haidar, J.—I agree.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 107

FFORDE, J.

Feroze Khan—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 876 of 1925, Decided on 20th November 1925, from order of Mag., 1st Class, Rawalpindi, D/-17th August 1925.

Penal Code, S. 75—Mode of proving previous conviction indicated.

Where an accused is charged under the provisions of S. 75, it is absolutely essential that the previous conviction in question should be clearly and legally proved. The proper way to prove such a conviction is either (1) by an extract certified under the hand of the officer in whose custody are the records of the Court which convicted; or (2) by a certificate under the hand of the officer in charge of the jail in which the punishment or any part thereof was undergone, or else by production of the actual warrant of commitment under which the punishment was suffered. In every case there must be evidence as to the identity of the accused person with the person so convicted.

[P 108 C 1]

Sagar Chand for *L. Saundars* — for Appellant.

J. M. Mackay—for the Crown.

Judgment.—Feroze Khan and Yakin Ali have been convicted, the former under S. 435, I. P. C., and the latter under that section read with S. 75, I. P. C. Feroze Khan has been sentenced to two years' rigorous imprisonment including three months' cells and a fine of Rs. 500 or in default to 1½ years' further rigorous imprisonment; and Yakin Ali has been sentenced to seven years' rigorous imprisonment including three months' solitary

confinement and a fine of Rs. 500 or in default 1½ years' additional rigorous imprisoment and to police surveillance for two years, under S. 565, Criminal P. C., after his release from jail. The evidence clearly establishes the fact that Feroze Khan deliberately set fire to a wheat crop of Nawab, Nawab having actually seized him in the very act. Yakin Ali came to Feroze Khan's assistance, rescued him from the grasp of Nawab and the two made good their escape but not before they had been recognized by several witnesses as they were running away from the scene of the crime.

The appellant Feroze Khan is represented by Mr. Sagar Chand, and Yakin Ali appeals through jail. Mr. Sagar Chand has taken me through the entire evidence on the record, and, having considered this evidence and the arguments which he has put forward, I can see no reason to differ from the conclusions arrived at by the trial Judge.

Mr. Sagar Chand has urged that even if his client be rightly found guilty the sentence is too severe. I cannot agree to this contention. For a crime of this description the sentence inflicted by no means errs on the side of severity.

As to Yakin Ali the trial Judge has applied the provisions of S. 75, I. P. C., the appellant having been properly charged under that section as well as under S. 435. It does not appear, however, that any evidence has been led to prove the previous conviction in respect of which an enhanced sentence has been imposed. Where an accused is charged under the provisions of S. 75, I. P. C., it is absolutely essential that the previous conviction in question should be clearly and legally proved. The proper way to prove such a conviction is either (1) by an extract certified under the hand of the officer in whose custody are the records of the Court which convicted, or (2) by a certificate under the hand of the officer in charge of the jail in which the punishment or any part thereof was undergone, or else by production of the actual warrant of commitment under which the punishment was suffered. In every case there must be evidence as to the identity of the accused person with the person so convicted. No such evidence has ever been attempted to be produced in the present case. In fact, no attempt has been made to prove any previous conviction. Under these circumstances it is quite apparent that the conviction under S. 75, I. P. C. cannot stand. The learned trial Judge does not state to what extent the sentence has been enhanced by applying S. 75, and accordingly I can only presume that he would not have given a higher sentence had S. 75 not been applied than that which has been imposed on Feroze Khan, and I accordingly set aside the conviction under S. 75 and reduce the sentence to one identical with that imposed upon the other appellant, namely, two years' rigorous imprisonment including three months' solitary confinement together with a fine of Rs. 500 and in default of payment of the fine a further period of 1½ years' rigorous imprisonment.

Save as aforesaid the appeals are dismissed.

R.D. *Sentence reduced.*

A. I. R. 1928 Lahore 108

ABDUL RAOOF, J.

Sajjan Singh—Applicant—Appellant.

v.

Mt. Gujri—Opposite Party—Respondent.

Misc. First Appeal No. 2315 of 1924, Decided on 5th February 1925, from order of Sr. Sub-Judge, Ludhiana, D/- 1st August 1924.

Guardians and Wards Act, S. 13—Procedure is not intended to be summary.

The procedure under S. 13, Guardians and Wards Act, is not intended to be summary, and a Court should not reject an application for the appointment of a guardian of a minor without any enquiry at all : 63 *P. L. R.* 1917, *Foll.*

[P 109 C 1]

Balkishan—for Appellant.

G. S. Salariya—for Respondent.

Judgment. — The appellant Sajjan Singh applied to be appointed guardian of the property of the minors, Bachna and Dalip, sons, and Chand Kaur, daughter, of Sundar Jat on the allegation that the mother, in whose custody the children were, was squandering the property. In support of the allegations made in the petition the petitioner also made an oral statement in Court. The Court, without investigating into the truth or otherwise of the application, by a somewhat summary order, rejected the petition. The order runs as follows :

The minors are with their mother, and are of tender age. There is no reason to suppose that

they are not well looked after. The applicant apparently wants to gain something out of the girl. Application rejected.

It is apparent on the face of the order that it is based on mere surmises and conjectures as was the case in *Jiwan* v. *Zebo* (1) in which it was held that :

> The procedure under S. 13, Guardians and Wards Act, is not intended to be summary, and a Court should not reject an application for the appointment of a guardian of a minor without any enquiry at all.

I, therefore, accept the appeal, set aside the order of the Court below and remand the case under O. 41, R. 23, Civil P. C., to be disposed of according to law. Costs to abide the result.

N.K. *Appeal accepted.*

(1) [1917] 63 P. L. R. 1917=41 I. C. 976=134 P. W. R. 1917.

A. I. R. 1928 Lahore 109

SHADI LAL, C. J.

Narain Singh—Accused—Petitioner.

v.

District Board of Ludhiana—Respondent.

Criminal Revn. No. 1052 of 1927, Decided on 25th November 1927, reported by Sess. Judge, Ludhiana, D/- 14-6-1927.

Punjab District Boards Act, 1882 (*amended by Act* 11 *of* 1922), *S.* 58 *B—Auction of right to levy toll and standing reeds—Amount due from the purchaser is recoverable by a civil suit as the sums are not due under the Act.*

Where a District Board auctions the right to levy toll and standing reeds, the sums due from the purchaser cannot properly be said to be due under the Act. They are due on contracts and should properly form the subject-matter of an ordinary civil suit. [P 109 C 2]

Nand Lal—for Petitioner.

Facts.—The District Board of Ludhiana auctioned the right to levy toll from ekkawalas using the ekka-stand of the Board to one Narain Singh for the sum of Rs. 463. Similarly, certain standing reeds were auctioned in the name of the same Narain Singh for Rs. 120. Some other reeds were sold to the same person for Rs. 23. Narain Singh consequently owed a sum of Rs. 606 to the District Board, which he did not pay. The Board consequently moved Khan Amir Nawaz Khan, Magistrate, First Class, under S. 58-B, Punjab District Boards Act. Narain Singh contended that he had only given bids but was not the final purchaser, that he had not been paid any toll by the ekkawalas as the road was very bad and that nothing was due from him to the District Board. The Magistrate found, on merits, in favour of the District Board that the said amount was due from Narain Singh and ordered its realization by issue of a warrant for attachment.

Referring order.—Narain Singh has moved this Court against the said order under S. 438, Criminal P. C. The learned counsel for the petitioner has rightly refrained from arguing the merits of the case before me. He has emphasized that in a matter of the nature of the present case, S. 58-B is not applicable and that the order of the Magistrate is ultra vires. He points out that S. 58-B, District Boards Act, is greatly analogous to S. 81, Punjab Municipal Act. He has cited *Mana Ram* v. *Emperor* (1), and *Maya Das* v. *Municipal Committee* (2), in both of which cases it has been held by the High Court that S. 81, Punjab Municipal Act has no application to a case where the demand of the Municipal Committee is based on a contract like a lease. Although there is no direct authority with respect to S. 58-B, Punjab District Boards Act, the principle of the aforesaid two rulings appears to be exactly applicable to it.

I am, therefore, of the opinion that the District Board was not competent to move the Magistrate in this behalf. The sums alleged to be due from Narain Singh cannot properly be said to be due under the Act. They are due on contracts and should properly form the subject-matter of an ordinary civil suit. It is noteworthy that the District Board has not cared to contest this petition before me, though a notice has been duly served on the Board. For the aforesaid reasons, I herewith submit the records of the case to the High Court with a recommendation that the order of the Magistrate be set aside.

Judgment. — For the reasons recorded by the learned Sessions Judge, I quash the order issued by the Magistrate for the realization of the money alleged to be due by the accused to the District Board.

S.J. *Order quashed.*

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(1) A. I. R. 1926 Lah. 518=7 Lah. 568.
(2) A. I. R. 1927 Lah. 161.

A. I. R. 1928 Lahore 110

FFORDE, J.

Abdul Wahid—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 703 of 1927, Decided on 30th September 1927, from order of 1st Class Magistrate, Kasur, D/- 26th June 1927.

(*a*) *Indian Arms Act* (11 *of* 1878), *S.* 20—*Possession of arms—Person concealing weapon while on railway platform—S.* 20 *of the Act is applicable.*

In every case it is a question of fact whether the person found in possession of a concealed weapon is carrying the weapon in such a way as to indicate an intention to hide the article from the classes of persons referred to in S. 20. But the fact that a person is concealing a weapon while he is on a railway platform must indicate an intention to conceal that weapon from inter alia railway officials who are about that platform: *A. I. R.* 1926 *Lah.* 262, *Foll.*

[P 110 C 2]

(*b*) *Indian Arms Act* (11 *of* 1878), S. 20—*Suspicion that accused was about to take part in some criminal offence is no consideration in passing sentence.*

The fact that there was a suspicion in the mind of the police that the accused was about to take part in a criminal undertaking is not a circumstance which a Court can take into consideration in arriving at an appropriate punishment for the actual offence which has been proved under S. 20. [P 111 C 1]

Nand Lal—for Appellant.

Des Raj Sahwney—for the Crown.

Judgment.—The appellant has been convicted under the provisions of S. 20, Indian Arms Act of having in his possession a chhavi in such a manner as to indicate an intention that its possession may not be known to any public servant as defined in the Indian Penal Code or to any person employed upon a railway or to the servant of a public carrier. I have not the slightest doubt that so far as the possession of the chhavi is concerned the Crown has abundantly established its case. The appellant was caught on the platform of the railway station with a chhavi blade concealed in his loin cloth. The only question is whether the circumstances of the case constitute an offence under S. 19 or S. 20, Indian Arms Act.

Section 19 (f) makes it an offence to possess such a weapon and S. 20 makes it an offence to possess such a weapon in such a manner as to indicate an intention to conceal the possession of the weapon from inter alia railway officials. There is no doubt that carrying a chhavi concealed in a loin cloth indicates an intention to prevent the fact that the chhavi is in the possession of accused being known to anyone. The question is: Does the mere fact that a person has been found carrying a chhavi (in a way which is not unusual in this province) when amongst railway officials leads to the necessary inference that the concealment is for the purpose of preventing those officials knowing that he is carrying such a weapon. Dr. Nand Lal argues that to take this view would lead to certain anomalies, for instance, if a man were carrying a chhavi in the open country concealed in a loin cloth, that would not be an offence under S. 20, but if he continued his journey and arrived ultimately amongst railway servants the offence would immediately come under S. 20. This raises questions which do not arise here. In every case it is a question of fact whether the person found in possession of a concealed weapon is carrying the weapon in such a way as to indicate an intention to hide the article from the classes of persons referred to in S. 20. I am only concerned with the facts disclosed by the evidence in the case before me, and it seems to me that the fact that a person is concealing a weapon while he is on a railway platform must indicate an intention to conceal that weapon from inter alia railway officials who are about that platform. I am in complete agreement with the view adopted by Addison, J., in *Chet Singh* v. *Emperor* (1) that S. 20 is not confined, as has been held by Scott-Smith, J., and Kensington, J., to cases where the import or export of arms is attempted. It seems reasonably clear from the Ss. 19 and 20, Indian Arms Act, that the matter is not confined as held by those two learned Judges. In my judgment upon the circumstances of this case as proved, the appellant has been rightly convicted under S. 20 of possessing a chhavi in such a manner as to indicate an intention that his possession may not be known to any person employed on a railway.

The next question which remains to be considered is whether the penalty five years' rigorous imprisonment is not too

(1) A. I. R. 1926 Lah, 262=7 Lah. 65.

severe a punishment for the present offence. As Dr. Nand Lal has pointed out the appellant is a young man of 24. There is no proof that he is a man of bad character, there is no evidence that he was engaged on any criminal undertaking at the time that he was arrested, and the learned trial Judge in imposing a penalty of five years' rigorous imprisonment was probably influenced by the fact that there was a suspicion in the mind of the police that the appellant was about to take part in a dacoity. Suspicion of this nature, however, is not a circumstance which a Court can take into consideration in arriving at an appropriate punishment for the actual offence which has been proved. The punishment for this offence, as far as the reported cases cited to me show, have varied from three months' imprisonment to three years for a first offence. I think that in the absence of any aggravating circumstance having been proved the sentence imposed in the present case is far too severe, and I think that an appropriate sentence would be one of two years' rigorous imprisonment. I would accordingly accept the appeal to the extent of reducing the sentence to two years' rigorous imprisonment otherwise the appeal must stand dismissed.

S.J. *Sentence reduced.*

A. I. R. 1928 Lahore 111

SHADI LAL, C. J. AND JAI LAL, J.

Daya Ram and *others*—Defendants—Appellants.

v.

Harcharan Das and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 834 of 1923, Decided on 28th April 1927, from decree of Addl. Dist. Judge, Hoshiarpur, D/- 18th January 1923.

Hindu Law—Alienation by father of joint ancestral property not for necessity or payment of antecedent debts — Decree setting aside alienation should not be subject to condition that the consideration money paid by the vendee should be refunded to him.

Where a member of a joint Hindu family governed by the Mitakshara law effects a sale of the coparcenary property not for legal necessity or for payment of antecedent debts, his son is entitled to get a decree setting aside the alienation of the joint family property without any condition being imposed upon him to refund the consideration paid by the alienee to the father : *A. I. R.* 1922 *Lah.* 241 ; 67 *I. C.* 89 and *A. I. R.* 1921 *Mad.* 447, *Foll* ; 11 *Cal.* 396 ; *A. I. R.* 1923 *Lah.* 255, *Diss.*

[P 111 C 2

Moti Sagar, *Mehr Chand Mahajan* and *Hargopal*—for Appellants.

Jagan Nath Aggarwal and *Badri Das*—for Respondents.

Shadi Lal, C. J.—This appeal arises out of an action brought by a member of a joint Hindu family governed by the Mitakshara law to impeach a sale of the coparcenary property made by his father. The District Judge, concurring with the Court of first instance, has held that the alienation was not for legal necessity or for payment of the antecedent debts of the father ; and while finding that the whole of the consideration passed he has granted a decree setting aside the alienation.

The vendees have preferred a second appeal to this Court, and the question debated before us is whether the plaintiff should, before recovering the property, refund the purchase money unless he shows that the money was raised by the father for immoral or illegal purposes. The contention urged by the appellants is supported by the judgment of a Division Bench of the Calcutta High Court in *Koer Hasmat Rai* v. *Sundar Das* (1), but that ruling has not been followed by other High Courts. The rule laid down by this Court is to the effect that the decree in favour of the son should not be conditional on his refunding to the vendees the amount paid by them to the father : vide *Badam* v. *Madho Ram* (2). To the same effect is another judgment of a Division Bench of this Court, vide *Kali Charan* v. *Jaggu* (3). There are no doubt observations to the contrary in the judgment of *Amir* v. *Malik Kahan Chand* (4), but it appears that the judgment in *Badam* v. *Madho Ram* (2), was not brought to the notice of the learned Judges who decided that case. The Madras High Court also has dissented from the doctrine laid down by the Calcutta High Court in *Koer Hasmat Rai* v. *Sundar Das* (1), and has affirmed the rule that a son is entitled to get a decree setting aside the alienation of the joint family property

(1) [1895] 11 Cal. 396.
(2) A. I. R. 1922 Lah. 241=2 Lah. 338.
(3) [1921] 67 I. C. 89.
(4) A. I. R. 1923 Lah. 255.

without any condition being imposed upon him to refund the consideration paid by the alienee to the father: vide *Srinivasa Aiyangar* v. *Kuppuswami Aiyengar* (5).

The balance of the authorities is opposed to the contention raised by the appellants, and we are not prepared to dissent from the rule laid down by this Court in *Badam* v. *Madho Ram* (2). We accordingly dismiss the appeal with costs.

S.J. *Appeal dismissed.*

(5) A. I. R. 1921 Mad. 447=44 Mad. 801.

A. I. R. 1928 Lahore 112

ADDISON, J.

Mukh Ram—Plaintiff—Appellant.

v.

Har Kesh and *others* — Defendants — Respondents.

Second Appeal No. 342 of 1927, Decided on 21st September 1927, from decree of Sr. Sub-Judge, Rohtak, D/- 11th December 1926.

(a) *Custom — Possession of fallen house by non-proprietor — Proprietors of the village taking its possession—Possession is illegal.*

A non-proprietor possessing a fallen house in a village must be held to have continued in possession of the house and the mere fact that the proprietors of the village placed some articles in a portion of the house which had not fallen down would not amount to possession of the house. The presumption always is in favour of the continuance of possession.

[P 112 C 2]

(b) *Civil P. C., O. 6, R. 17—Owner of house suing for perpetual injunction—Amendment praying for possession of house should be allowed.*

A prayer for a perpetual injunction restraining the defendants from preventing the plaintiff from constructing the house in dispute, should be allowed to be amended into a prayer for possession of the house without driving the plaintiffs to a separate suit: 135 *P. R.* 1905, *Ref. to.* [P 112 C 1, 2]

Shamair Chand—for Appellant.

Rama Nand—for Respondents.

Judgment. — The plaintiff, a Brahman, had a house for a long time in village Khani. This house fell down to a considerable extent about September 1925 in the rains. The plaintiff wished to rebuild it but was prevented by the defendants who are proprietors in the village, the plaintiff being a non-proprietor. The plaintiff accordingly sued for a perpetual injunction restraining the defendants from preventing him from constructing the house in dispute. The suit was decreed by the trial Court but was dismissed by the lower appellate Court on the ground that the plaintiff should have sued for possession and had been wrongly advised to sue for an injunction. Against this decision the plaintiff has preferred this second appeal.

It has been established that the plaintiff has not been living in the shop himself for some years though he never abandoned it. Nor was abandonment ever pleaded. He had been carrying on his business in a neighbouring village. The finding, however, of the lower appellate Court on this point is that the defendants took advantage of the plaintiff's absence from the village at the time when the house fell down and quietly took possession of it as it adjoined their own. It was urged before me that they could not have taken possession of the greater portion of the house as it had fallen down. Some moveable property, however, appears to have been in a room which has still a roof on it. The plaintiff's witness stated that this belonged to Amin Lal a relative of the plaintiff, but they have been disbelieved by the lower appellate Court as Amin Lal was not questioned about this when he was in the witness box. This may have been a mere oversight. In any case, I am of opinion that the plaintiff must he held to have continued in possession of the house which had fallen down and the mere fact that the defendants placed some articles in a portion of the house which had not fallen down would not amount to possession of the house. The presumption always is in favour of the continuance of possession and in my opinion it cannot be said that a tumbled down house like the one in dispute is capable of possession being taken of it. For all these reasons I would hold that the lower appellate Court was wrong in law in holding that the possession was with the defendants. I would, therefore, accept the appeal with costs throughout and setting aside the decree of the lower appellate Court, restore that of the trial Court.

In any case, on the finding that the defendants quietly took possession when most of the house fell down, the lower appellate Court should have allowed an amendment of the prayer as was done in

Harji Mal v. *Pokhar Das* (1). It was most unnecessary to compel the plaintiff to institute another suit.

S.J. *Appeal accepted.*

(1) [1903] 135 P. R. 1906=117 P.L.R. 1908.

A. I. R. 1928 Lahore 113

TEK CHAND AND AGHA HAIDAR, JJ.

Beli Ram and *others*—Plaintiffs—Appellants.

v.

Ishar Dass—Defendant—Respondent.

First Appeal No. 1021 of 1926, Decided on 5th May 1927, from decree of Senior Sub-Judge, Gujranwala, D/- 1st February 1926.

(a) *Court-fees Act* (7 *of* 1870), *Sch.* 2, *Art.* 17 (*iv*) *and S.* 7 (*iv*) (*c*)—*Civil P. C., S.* 92—*Suit under S.* 92, *Civil P. C., falls within the purview of Art.* 17 (4), *Sch.* 2, *of the Court-fees Act and not within S.* 7 (*iv*) (*c*).

Where the suit instituted was one under S. 92, Civil P. C., and the relief claimed was: (1) that the present Mahant may be removed and a new Mahant may be appointed in his place, and (2) that along with the Mahant so appointed a committee may be formed to fulfil the objects of the trust, the property of the trust may be made over to the new Mahant and the newly appointed committee and the list of the said property may be prepared:

Held: that Art. 17, Cl. (vi), Sch. 2, Court-fees Act, applied to the case as it was brought under the provisions of S. 92, Civil P. C., and there was nothing in the relief claimed which would take the case out of the purview of Art. 17, Cl. (vi) and so the Court-fee stamp of Rs. 10 was sufficient: 12 *C. L. J.* 211; 19 *All.* 60; 21 *All.* 200 and 97 *P. R.* 1918, *Foll.*; 40 *Cal.* 245 and 56 *P. R.* 1895, *Dist*; 10 *Cal.* 599, *Diss.* and *A. I. R.* 1925 *Mad.* 722, *Ref. to.* [P 113 C 2]

(b) *Court-fees Act—Interpretation.*

The Court-fees Act being a fiscal Act must be construed liberally in favour of the subject.

G. C. Narang and *Gobind Ram*—for Appellants.

Badri Das and *Amin Chand*—for Respondent.

Agha Haidar, J.—The plaintiffs have come up in appeal from an order rejecting their plaint on the ground that it was not sufficiently stamped and that the plaintiffs have not been able, within the time fixed by the Court, to supply the deficiency.

The sole point, which we have to decide is whether or not the plaint is sufficiently stamped, having regard to the nature of the suit and the relief claimed. The suit undoubtedly is one under S. 92, civil P. C., and the relief claimed is: (1) that the present Mahant may be removed and a new Mahant may be appointed in his place, and (2) that, along with the Mahant so appointed, a committee may be formed to fulfil the objects of the trust, the property of the trust may be made over to the new Mahant and the newly appointed committee and the list of the said property may be prepared. And then there is further prayer about the settling of a proper scheme. The defendant denied the existence of the trust and claimed title in himself. He further pleaded that, having regard to the nature of the suit, ad valorem Court-fee ought to have been paid.

There cannot be any doubt that Art. 17, Cl. (vi), Sch. 2, Court-fees Act, applies to cases which are brought under the provisions of S. 92, Civil P. C. If any authority were needed, the case reported as *Ramrup Das* v. *Sujaram Das* (1), clearly lays down that a suit under S. 92, Civil P. C., falls within the purview of Art. 17, Cl. (vi), Sch. 2, Court-fees Act. Now, the question is whether there is anything in the relief claimed which would take the case out of the purview of Art. 17, Cl. (vi). We have been referred to a number of cases by the learned counsel for the appellants and our attention has been invited particularly to *Thakuri* v. *Bramha Narain* (2), *Girdhari Lal* v. *Ram Lal* (3), and *Gopi Das* v. *Lal Das* (4). All these cases support the contention of the appellants and in effect lay down that where a suit is brought under the provisions of S. 92, Civil P. C., a Court-fee of Rs. 10 is, under Art. 17, Cl. (vi), Court-fees Act, payable. In *Thakuri* v. *Bramha Narain* (2), the learned Judges laid down the principle underlying this proposition very clearly. They say:

> If * * * every suit under that section (S. 539 old Code, S. 92 new Code) in which the appointment of trustees was prayed for, or the removal of a trustee was sought, had to be treated as a suit for possession of the property, the salutary provisions of that section would be seriously interfered with and in many cases defeated. A suit under that section is brought for the protection and preservation of endowed property, and it is safeguarded by the rule which requires that it must be brought by the Advocate-General himself or with the consent of the Advocate-General, or such other officer as the

(1) [1910] 14 C. W. N. 932=7 I. C. 92=12 C. L. J. 211.
(2) [1896] 19 All. 60=(1896) A. W. N. 187.
(3) [1899] 21 All. 200=(1899) A. W. N. 32.
(4) [1918] 97 P. R. 1918=47 I. C. 983=173 P. W. R. 1918.

Local Government may appoint in this behalf. Instances may often arise in which the trust property is of considerable value. If Court-fees had to be paid with reference to that value whenever it was found necessary to bring a suit to remove a trustee who had committed a breach of his trust such Court-fees might be prohibitive and might prevent the institution of the suit.

It was argued on behalf of the defendant-respondent that the allegations in para. 5 of the plaint really made the suit one for possession of the property in dispute following upon the dispossession of the defendant. This, however, is not the correct way of looking at the pleadings because in the relief, as pointed out above, there is no prayer for the possession of the property for the benefit and advantage of the plaintiffs. The plaintiffs have brought this suit in their capacity as members of the public and do not claim any beneficial interest for themselves. Under these circumstances it cannot be urged, by any stretch of reasoning, that the suit was one for possession of the property which the plaintiffs claimed for their own benefit or advantage.

On behalf of the respondent reliance was placed upon S. 7, Cl. (iv) (c), Court-fees Act. We have already mentioned that the suit was not one which is technically called a suit for a declaration in which a consequential relief was claimed and therefore any cases which might have been decided with regard to the provisions of that section would not have any application to the present case. The learned counsel for the respondent further cited *Raj Krishna Dey* v. *Bepen Behary Dey* (5). That case is clearly distinguishable as it contained a prayer for a declaration followed by a prayer for an injunction. *Bawa Mangal Das* v. *Narinjan Das* (6) was also quoted, but there is a passage at p. 289 of the report which clearly goes a long way to support the contention of the learned counsel for the appellants. The only authority which could be cited in favour of the respondent was the case reported as *Omrao Mirza* v. *M. Jones* (7). It does not, however, appear from a perusal of the report that it was a case under S. 539, old Civil P. C. Any way, this case has been considered in a number of cases, and if it lays down anything contrary to the authorities cited by the appellants all that we can say, with due respect, is that we are not prepared to follow it.

The argument put forward on behalf of the plaintiff-appellants before us receives further support from a case reported as *Sudalaimulhu Pillai* v. *P. Soma Sundaram Pillai* (8), where the case reported as *Omrao Mirza* v. *M. Jones* (7), was considered and the learned Judge remarked:

> My attention has been drawn to *Omrao Mirza* v. *Jones* (7), but that case was not one under S. 92 so far as can be gathered from the report. If it is supposed to lay down a rule which is in conflict with the ruling in *Ramrup Das* v. *Sujaram Das* (1), I think we should prefer to follow the later decision of the Calcutta High Court.

In this connexion we may invoke in aid another principle of law which is well established. The Court-fees Act is a fiscal statute and, like all such statutes, it must be interpreted in a liberal and generous spirit in favour of the subject so as to make its operation less onerous, having due regard to the language used in the enactment. We are satisfied that the judgment of the learned Judge of the Court below was erroneous and cannot be maintained. We set aside the decree of the Subordinate Judge and remand the case for trial on the merits. Costs would be costs in the cause.

S.J. *Case remanded.*

(5) [1912] 40 Cal. 245=16 C. L. J. 194=17 I. C. 162=17 C. W. N. 591.
(6) [1895] 56 P. R. 1895.
(7) [1884] 10 Cal. 599.
(8) A. I. R. 1925 Mad. 722.

A. I. R. 1928 Lahore 114

BROADWAY, J.

Hem Raj and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Misc. Criminal Appln. No. 88 of 1927, Decided on 13th June 1927.

Criminal P. C., S. 556—Prosecution by District Board—Magistrate presiding at the meeting of District Board at which it was decided to start prosecutions is debarred from trying the case—Punjab District Boards Act (1882), *S.* 58.

Where a Magistrate, as a member of a District Board, presided at a meeting of the Board at which the proposal in the Commissioner's letter to start the prosecutions was adopted, and it was resolved that the police be called in to make an enquiry and to proceed against such of the District Board officials as the result of the enquiry might warrant:

Held : that the Magistrate is debarred from trying the cases. [P 115 C 1, 2]

Nand Lal—for Petitioners.

Govt. Advocate—for the Crown.

Judgment.—This is an application under S. 526, Criminal P. C., for the transfer of a case against Hem Raj, Secretary of the District Board, Muzaffargarh, and certain other persons charged under Ss. 409 and 420, I. P. C. from the District of Muzaffargarh and the Court of the S. 30 Magistrate Ch. Iqbal Singh.

The grounds for transfer as alleged in the application were that the Deputy Commissioner Sardar Bahadur Sardar Nihal Singh, as well as the S. 30 Magistrate Ch. Iqbal Singh, were personally interested in the case, as well as certain other cases that have since been commenced, and that the Deputy Commissioner, as well as the Subdivisional Officer had a certain amount of personal grudge against Hem Raj petitioner at any rate, and against some of the others. These allegations were supported by an affidavit. The application and the affidavit were sent to the District Magistrate and the Subdivisional Magistrate who have each furnished this Court with a reply.

One of the allegations made as far as the Subdivisional Magistrate is concerned is clearly false and after hearing Dr. Nand Lal on behalf of the petitioners, in my judgment, so far as the allegations are concerned there is no ground for transfer whatever and I consider that the application has been made solely with a view to protract the proceedings.

There is, however, another feature in the case. When it was decided to start these prosecutions a letter from the Commissioner to that effect addressed to the Deputy Commissioner was laid before the District Board at a duly convened meeting. Ch. Iqbal Singh was at this meeting apparently as the presiding officer. It was at this meeting that the proposal in the Commissioner's letter was adopted and it was resolved that the police be called in to make an enquiry and to proceed against such of the District Board officials as the result of the enquiry might warrant. In these circumstances S. 58, District Boards Act, and S. 556, Criminal P. C., do not apply, and it seems to me that Ch. Iqbal Singh is debarred from trying these cases on the ground that he took part as a member of the District Board in passing the resolution adopting the Commissioner's suggestion that these persons should be proceeded against. In any event, in the circumstances I consider that it will be inadvisable to allow the cases to proceed before that officer. It appears that the only other officer with S. 30 powers at Muzaffargarh is the Senior Sub-Judge an officer who is already burdened with a considerable amount of work. In these circumstances, I think the only course to adopt is to transfer these cases to the nearest district, i. e., Multan, and I accordingly transfer them to the District Magistrate of Multan with the request that he will make them over to some Magistrate in his district competent to deal with them. It has been suggested that, having regard to the nature and possible duration of these cases, the solution out of the difficulty would be the appointment of a special Magistrate to deal with them. That is a matter within the province of the Executive Government alone. Should the Government, however, decide to adopt that course this order of transfer to the Multan District would not be given effect to.

S.J. *Case transferred.*

A. I. R. 1928 Lahore 115

SHADI LAL, C. J., AND ZAFAR ALI, J.

Khushia—Plaintiff—Appellant.

v.

Faiz Muhammad Khan and *another*—Defendants—Respondents.

Second Appeal No. 1160 of 1923, Decided on 19th May 1927, from decree of Dist. Judge, Hoshiarpur, D/- 8-2-1923.

Limitation Act, Art. 44 — Alienation by natural guardian of minor's property not for necessity—Suit to set aside is governed by Art. 44.

An alienation by a natural guardian of the minor's property is a voidable, and not a void transaction ; and the fact that it was not for necessity does not alter the nature of the transaction. It is an unauthorized transfer by an authorized guardian and the limitation to set aside such a transfer is prescribed by Art. 44 : *A. I. R.* 1925 *Lah.* 619 (2), *Foll.* [P 116 C 1]

Madan Chand—for Appellant.

Daulat Ram—for Respondents.

Judgment.—This is a second appeal preferred by one Khushia, who seeks to impeach a sale of his occupancy rights effected by his mother on 30th January 1915, when he was a minor. The suit was brought on 20th January 1921, and

the question for determination is whether it is governed by Art. 44 or Art. 144, Indian Lim. Act.

Now, it is not disputed that the mother was the guardian of the property of her minor son, but it is contended that, as the Courts below have held the alienation to be without necessity, the transaction was void and that it was not necessary to impeach it within the period of three years prescribed by Art. 44. To this contention we are unable to accede. An alienation by a natural guardian of the minor's property is a voidable, and not a void transaction ; and the fact that it was not for necessity does not alter the nature of the transaction. In other words, it was an unauthorised transfer by an authorized guardian, and the limitation to set aside such a transfer is prescribed by Art. 44 : vide, inter alia, *Labha* v. *Malak Ram* (1). (The judgment then agreeing with the finding of fact of the District Judge held the suit to be barred and dismissed the appeal).

R.D. . *Appeal dismissed.*

(1) A.I.R. 1925 Lah. 619=6 Lah. 447.

A. I. R. 1928 Lahore 116

JAI LAL, J.

Mt. Sahibji—Plaintiff—Appellant.

v.

Mohammad Sarwar Khan—Defendant—Respondent.

Second Appeal No. 859 of 1927, Decided on 10th Oct. 1927, from decree of Dist. Judge, Rawalpindi, D/- 21st Feb. 1927.

Civil P. C., S. 151 and O. 41, R. 23 — Lower appellate Court remanding case but not mentioning the law under which the remand had been issued — Remand cannot be said to have been issued necessarily under S. 151.

In the absence of an express indication by the lower appellate Court as to the law under which the remand had been made, it becomes necessary for the High Court to determine under what law it was made. There is no doubt that a remand is permissible under S. 151, but it has often been laid down that a recourse should be had to S. 151 only in very exceptional cases. Therefore, in the absence of an express indication to that effect, it cannot be construed that every remand illegally made by the lower appellate Court is one under S. 151 in the absence of an express mention of O. 41, R. 23 or R. 25. If it were so construed, the result would be that it would be impossible for the High Court to interfere, in exercise of its appellate powers, with the illegal orders of remand passed by the lower appellate Court. [P 116 C 2]

Shamair Chand—for Appellant.

N. C. Pandit—for Respondent.

Judgment.—This is an appeal by the plaintiff against an order of remand made by the District Judge of Rawalpindi on 21st February 1927. The final portion of the judgment of the learned District Judge is as follows :

> As has been remarked the question of title and dispos-ession has not been properly inquired into and I am of opinion that the case should be re-heard and decided afresh on its merits. I accordingly accept the appeal and remand the case for fresh trial and decision. Stamp on appeal to be refunded. Costs to follow event.

A preliminary objection is taken on behalf of the respondent that no appeal lies from the order mentioned above because, it is contended, that the remand is under S. 151, Civil P. C. Admittedly no appeal lies from such an order of remand but the counsel for the appellant contends that the remand is under O.41,R.23 and admittedly an appeal lies from an order of remand under that rule. It is to be noted that the learned District Judge has not mentioned the law under which the remand has been made. This should have been done but in the absence of an express indication as to the law under which the remand had been made it becomes necessary for me to determine under what law it was made. There is no doubt that a remand is permissible under S. 151, Civil P. C., but it has often been laid down that a recourse should be had to S. 151 only in very exceptional cases. The question is whether when the District Judge made this remark he intended to do so under S. 151. I am unable to hold that he did. If, as contended by the counsel for the respondent, I were to construe every remand illegally made by the lower appellate Court to be one under S. 151 in the absence of an express mention of O. 41, R. 23 or R. 25, the result would be that it would be impossible for this Court to interfere, in exercise of its appellate powers, with the illegal orders of remand passed by the lower appellate Court. There is an indication in the case before me as to the law under which the learned District Judge intended to make the remand. He has ordered the stamp on appeal to be refunded. This, under S. 13, Indian Court-fees Act could be done only in the case of a remand under O. 41, R. 23. I, hold, therefore, that the remand in this case was intended to be one under O. 41, R. 23 and therefore an appeal lies to this Court.

On the merits it is quite clear that an

order of remand under O. 41, R. 23 was incompetent under the circumstances of this case. The trial Court had not disposed of the case on a preliminary point. On the other hand it had decreed the plaintiff's suit after recording and considering the evidence produced by both the parties in support of their respective cases. I accept this appeal, set aside the order of the District Judge and remand the case to him under O. 41, R. 23 with directions to hear and decide the appeal on its merits. The lower Court may, if it considers such a course necessary, pass a proper order of remand after hearing the parties. The Court-fee paid on the memorandum of appeal in this Court shall be refunded. Other costs will abide the result.

S.J. *Appeal accepted.*

A. I. R. 1928 Lahore 117

ADDISON AND FFORDE, JJ.

Faqira and *others*—Plaintiffs—Appellants.

v.

Mt. Ghulam Maryam and *another*—Defendants—Respondents.

Appeal No. 3101 of 1922, Decided on 16th May 1927, from order of Sr. Sub-Judge, Multan, D/- 28th July 1922.

(a) Custom (Punjab) — Gift to daughter—Property reverts only where daughter's direct descendants have died out.

Property gifted to a daughter would only revert in the original owner's family where the daughters' direct descendants, male or female, have died out : [12 *P. R.* 1892, *(F. B.), Foll.*] In this respect there is no difference between the estates taken by daughters who have succeeded because they married a collateral and daughters who have succeeded because they and their husbands have helped the fathers of the daughters: 5 *P. R.* 1910, *Foll.* [P 118 C 2]

(b) Custom (Punjab) — Gift — Self-acquired property.

Self-acquired property gifted to daughter never reverts to the collaterals of the donor (obiter) : 27 *P. R.* 1914, *Foll.*

[P 118 C 2]

Moharam Ali Chishti and *Muhammad Amin*—for Appellants.

Badri Das and *Mukand Lal Puri*—for Respondents.

Addison, J.—The plaintiffs sued, as collaterals, two sisters, Mt. Ghulam Maryam and Mt. Ghulam Zainab, for possession of the suit land. They alleged that the defendants' grandmother, Mt. Jannat, succeeded to the land which had been left by her father after the death of her mother, Mt. Pairi, because she married a near collateral and the collaterals did not object. Mt. Jannat, before her death, gave the land to her grand-daughters by a deed of settlement, dated the 18th October 1918, and after her death the land was mutated in the names of the defendants on the 10th November 1918. It was claimed that this deed was complusorily registrable, that Mt. Jannat had no power to gift the land and that defendant 1, Mt. Ghulam Maryam, had married outside the family, and for this reason was not entitled to succeed to the land according to custom. The defendants denied that Mt. Jannat succeeded her mother, Mt. Pairi, upon her death and pleaded that Mt. Pairi gifted all the land which she had succeeded to upon her husband's death to her two daughters, Mt. Salamat and Mt. Jannat, in equal shares. This was before Mt. Pairi died. The collaterals have not sued Mt. Salamat as regards the share that fell to her. Mt. Jannat, it was claimed, succeeded as absolute owner, and on the 18th October 1918 executed a will (not a deed of settlement) in favour of the two defendants, her grand-daughters, as her son Kauda pre-deceased her. Then, on 19th October 1919, she gifted the land to her two grand-daughters, the defendants. This oral gift was entered in the register of mutations and was sanctioned on 10th November 1918 after Mt. Jannat's death. Lastly it was pleaded that defendant 1, Mt. Ghulam Maryam, had married inside the family and for this reason she was a lawful heir, while the other grand-daughter, being unmarried, was also a lawful heir.

The trial Judge framed various issues but found it unnecessary to deal with most of them. He held that Mt. Pairi gifted her property to her two daughters, Mt. Jannat and Mt. Salamat, and that they did not succeed upon her death. As it was a case of gift under the Customary Law the land could not revert to the collaterals, until all the direct descendants, male or female, of the donee has died out. The defendants were direct descendants of the donee. On this finding the suit was dismissed and the plaintiffs have appealed.

It is clear from the mutation, Ex. P. 1, sanctioned on 6th February 1891, that Mt. Pairi did gift the land, to which she succeeded upon the death of her husband, to her two daughters, Mt. Salamat and Mt. Jannat in her lifetime and she was present when the gift was mutated in the revenue papers. Mt. Jannat was married to a near collateral but Mt. Salamat was married outside the family. The learned counsel for the appellants who appeared before us admitted that a daughter would succeed to the estate of her father upon the death of her mother if she was married within the family and this is in accordance with Rose's Customary Law of the Multan District at p. 16. The general rule laid down except for certain castes is that daughters are excluded if there are male collaterals within three generations, but amongst Ran Jats it is stated that if the daughter has not married into another caste, i. e., if she marries within the same caste or family she takes all the property. This would mean that an unmarried daughter as well as a daughter who has married within the family or caste is entitled to succeed amongst Rans. Ex. P. 6 is a copy of the riwaj-i-am for tahsil Multan, where the village is situated. It states that the Ran tribe consists of certain persons who are named and that the custom among them is that, if a proprietor has no male issue, and his daughter is not married in another family, she succeeds to his entire property. Lower down certain persons amongst Rans stated that daughters get no share. In this case, however, it is conceded that the parties are amongst the majority of Rans who are in agreement that a daughter is entitled to succeed if she has not married in another caste, or, at least is entitled to succeed if she has married within the family.

This means that Mt. Pairi and Mt. Salamat did not accelerate the succession by gifting her husband's land to her two daughters ; for it is admitted that Mt. Salamat was not married within the family, though Mt. Jannat was. In this way Mt. Jannat would have succeeded her mother, Mt. Pairi, but Mt. Salamat would not. The gift by Mt. Pairi, therefore, which was indivisible, must be treated as a gift which took place in the year 1891 and was not objected to. It was not an acceleration of the succession. In fact Mt. Salamat's heirs are still in possession of half the land gifted by Mt. Pairi though she was not entitled to succeed in this family.

That being the case, it follows that the suit was properly dismissed ; for it has been held ever since the Full Bench decision *Sita Ram* v. *Raja Ram* (1), that property so gifted would only revert in the original owner's family where the daughters' direct descendants, male or female, have died out. This is the universal rule under Customary Law in the Punjab, see p. 53, Remark II of Rattigan's Digest of Customary Law, 10th edition.

Even if it were the case that Mt. Jannat succeeded to her mother (which she did not) because she had married within the family the land, which came to Mt. Jannat in the capacity of a daughter married within the family, would pass on to her direct heirs in the same way. In para. 23 of Rattigan's Digest a daughter who succeeds because she has married a collateral is classed along with a daughter who succeeds because she and her husband have looked after her father. There is thus no difference between the estate taken by daughters who have succeeded because they married a collateral and daughters who have succeeded because they and their husbands have helped the fathers of the daughters. The same rule, therefore, applies to them as given at p. 53 of Rattigan's Digest, namely, that the land does not revert again to the collaterals, unless the daughters' direct descendants, male and female, have died out. An authority directly in point is *Ilahi Bakhsh* v. *Mt. Budhi* (2).

Of course, if the land had been self-acquired by Mt. Jannat's father the property would never revert to the collateral as laid down in *Jot Ram* v. *Hardawari* (3). There is no finding, however, in this case as to the nature of the land as it was unnecessary for the decision of the suit.

For the above reasons I would dismiss the appeal with costs.

Fforde, J.—I agree.

R.D. *Appeal dismissed.*

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(1) [1892] 12 P. R. 1892 (F. B.).
(2) [1910] 5 P. R. 1910=159 P. L. R. 1910=5 I. C. 247=10 P. W. R. 1910.
(3) [1914] 27 P. R. 1914=23 I. C. 527=22 P. L. R. 1914.

A. I. R. 1928 Lahore 119 (1)

SHADI LAL, C. J., AND ZAFAR ALI, J.

Narain Singh and *others*—Creditors—Appellants.

v.

Gurbakhsh Singh and *others*—Respondents.

Misc. First Appeal No. 2232 of 1923, Decided on 10th November 1927, from order of Dist. Judge, Lyallpur, D/- 9th May 1923.

Provincial Insolvency Act (1920), *S.* 17—*Civil P. C., O.* 22, *R* 4—*Appeal by creditor against the order of adjudication—Debtor dying during pendency of appeal—Appeal abates.*

An appeal preferred against the adjudication of an insolvent abates on his death, as such an order is purely personal to the insolvent. The right to sue does not survive within the meaning of O. 22, R. 4, on the death of an insolvent respondent: 69 *P. R.* 1888, *Foll.* [P 119 C 1]

V. N. Sethi—for Appellants.

Mehr Chand—for Respondents.

Shadi Lal, C. J.—One Ram Singh applied to be declared insolvent, and his application was accepted by the trial Court and he was adjudicated an insolvent. Some of his creditors preferred the present appeal against the order of adjudication, but during the pendency of the appeal Ram Singh died, and the creditors seek to implead his minor son as his legal representative for the purposes of the appeal.

Now, it has been held by a Division Bench of the Punjab Chief Court, in *Hardhian Singh* v. *Sham Sundar* (1), that an appeal preferred against the adjudication of an insolvent abates on his death, as the right to sue does not survive within the meaning of S. 368, Civil P. C., (corresponding to O. 22, R. 4), on the death of an insolvent respondent in an appeal by creditors against an order adjudging him to be an insolvent. Such an order is purely personal to the insolvent. The learned counsel for the appellants has not invited our attention to any judgment which lays down the contrary rule. It is true that, as enacted in S. 17, Provincial Insolvency Act, if a debtor, by or against whom an insolvency petition has been presented, dies, the proceedings in the matter shall, unless the Court otherwise directs, be continued so far as may be necessary for the realization and distribution of his property. It must be remembered that the object of the section is that the death of the debtor should not affect the realization and distribution of his assests; but it has no bearing upon the question before us.

We must accordingly hold that the appeal has abated. The appellants must pay the costs of the appeal.

S.J. *Appeal abated.*

(1) [1888] 69 P. R. 1888.

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* A. I. R. 1928 Lahore 119 (2)

SHADI LAL, C. J.

Mausa Neki and *others* — Accused — Petitioners.

v.

Mt. Mam Kuar — Complainant—Respondent.

Criminal Revn. No. 1108 of 1927, Decided on 30th Sep. 1927, reported by Sess. Judge, Karnal, on 23rd June 1927.

* *Criminal P. C., S.* 203 — *Case cannot be dismissed on the report of zaildar.*

A Magistrate sent a case for preliminary inquiry under S. 202 to a zaildar and on his report dismissed the application under S. 203.

Held: that the Magistrate should not have dismissed the case upon the report of the zaildar. [P 119 C 2, P 120 C 1]

Shamair Chand—for Petitioners.

Hem Raj—for Respondent.

Facts. — Mam Kuar's application was under S. 107, Criminal P. C. The Magistrate (Khan Sahib Choudhry Miran Bakhsh, Magistrate, 1st Class) sent it for preliminary inquiry under S. 202 to a zaildar and on his report dismissed the application under S. 203, Criminal P. C., on 6th May 1927. Mt. Mam Kaur has applied to this Court for revision of the above order.

Grounds.—The order of the Magistrate is clearly wrong. Section 202 applies only to complaints of offences. An application under S. 107 is not a complaint. The Magistrate had, therefore, no jurisdiction to refer the case to the zarilda under S. 202, Criminal P. C. He should have recorded the evidence himself and acted upon it if it was satisfactory. For the same reason S. 436 is not applicable, and I cannot order further inquiry. The case is reported to the High Court for directing the Magistrate to make inquiry into the case according to law.

Order.—It is unnecessary to determine the question whether the provisions of S. 202, Criminal P. C., apply to a case under S. 107, Criminal P. C., because I am of opinion that the Magistrate should not have dismissed the case upon the report of the zaildar. I accordingly accept the application for revision and direct the Magistrate to decide the case on the merits after hearing the evidence of both the parties.

D.D. *Application accepted.*

A. I. R. 1928 Lahore 120

CAMPBELL, J.

Mt. Sawani—Defendant—Appellant.

v.

Jiwan and *others*—Plaintiffs—Respondents.

Second Appeal No. 2271 of 1926, Decided on 5th March 1927, from decree of Dist., Judge, Jhelum, D/- 1st July 1926.

Civil P. C., O. 41, R. 20—Person party in lower Court can be added as respondent even after limitation.

Under O. 41, R. 20, a person who was a party to the proceedings in the Court below may be added as a respondent to the appeal although the time to appeal may have expired. [P 120 C 2]

Mohsin Shah—for Appellant.

Amar Nath Chona—for Respondents.

Judgment.—Muhammad Hussain died intestate and his estate was mutuated in favour of his sister. A collateral named Jiwan then sued for possession of what he alleged to be his share in Muhammad Hussain's estate and he joined as defendants 2 and 3 Pahlwan and Nek Alam, two other collaterals. Later on these two persons applied to be made plaintiffs and they were so joined by the trial Court and eventually the learned Subordinate Judge decided that these three plaintiffs were entitled to possession of Muhammad Hussain's estate against Mt. Sawani, his sister.

The decree was, however, drawn up in favour of Jiwan alone and by the decree it was ordered that Jiwan should get possession of the land and house in suit. In the decree Pahlwan and Nek Alam were shown as defendants and in the certified copy of the judgment supplied afterwards to Mt. Sawani and presented by her in the appellate Court, Jiwan was shown as the sole plaintiff and defendants were shown Mt. Sawani, Pahlwan and Nek Alam.

Mussammat Sawani preferred an appeal and in consequence of the form of the decree and of the heading to the copy of the trial Court's judgment she showed in her memorandum of appeal herself, Pahlwan and Nek Alam as appellants and Jiwan as respondent. The learned counsel who presented the appeal on behalf of Mt. Sawani had no authority to act on behalf of Pahlwan and Nek Alam.

When the appeal came before the learned District Judge it was pointed out to him that there can be no appeal against Pahlwan and Nek Alam and he held that there was no bona fide mistake on the part of Mt. Sawani since the judgment of the lower Court mentioned the fact that Pahlwan and Nek Alam had been made plaintiffs by order dated 22nd June 1925, the suit being decided on 8th December 1925. He further held, as the time for bringing Nek Alam and Pahlwan on the record had run out, the appeal against them is time barred, and that it must be dismissed as against Jiwan also.

The learned District Judge has overlooked the provisions of O. 41, R. 20, Civil P. C., under which he could have corrected the mistake and transferred Pahlwan and Nek Alam from the list of appellants to that of respondents. It has been ruled by this Court in more than one case that under O. 41, R. 20, a person who was a party to the proceedings in the Court below may be added as a respondent to the appeal although the time to appeal may have expired. So long as the decree remained in its present form the appeal against Jiwan could not have been dismissed by the reason of nonjoinder of Pahlwan and Nek Alam.

I accept the appeal and order that Pahlwan and Nek Alam be joined as respondents to the appeal, and I return the appeal to the District Judge for disposal on the merits, pointing out to him that the decree at present is not in accordance with the trial Court's judgment. Costs in this Court will follow the result of the appeal.

D.D. *Appeal accepted.*

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* A. I. R. 1928 Lahore 121
Full Bench

SHADI LAL, C. J., FFORDE AND TEK CHAND, JJ.

Ali Muhammad—Plaintiff—Appellant.

v.

Hakim and *others*—Defendants—Respondents.

First Appeal No. 2558 of 1922, Decided on 10th February 1928, from decrees of Senior Sub-Judge, Shahpur, at Sargodha, D/- 6th July 1922.

(a) Punjab Colonization of Government Lands Act (1912), *S.* 36—*Private dispute between the parties as to land—Civil Court can try.*

A, an occupancy tenant under Government of land in an area to which the Colonization of Government Lands (Punjab) Act, 1912, had been applied, issued a notice of ejectment through a revenue Officer against *B* who was in possession of a portion of *A's* recorded tenancy. *B* sued successfully in a revenue Court to set aside the notice of ejectment on the ground that he was not a tenant under *A*. *A* then sued *B* in a civil Court for possession as against a trespasser. *B* pleaded that he was a partner in *A's* tenancy by private arrangement between himself and *A*, and that by a subsequent private arrangement *A* had transferred to him all the occupancy tenant's rights in the particular land in suit. On a question being raised as to whether, in view of the provisions of the Colonization of Government Lands (Punjab) Act, 1912, particularly Ss. 32 and 36, a civil Court had jurisdiction to hear the suit,

Held : that there was no provision in the Act warranting the contention that the Collector should intervene in a dispute between private persons and that the civil Courts should be debarred from adjudicating upon it : *Lahore Civil Appeal No.* 1994 *of* 1922, *Expl.* and *Dist.* [P 121 C 2 ; P 122 C 2]

(b) Civil P. C., S. 9—*Burden of proof—Jurisdiction.*

It is for the party who seeks to oust the jurisdiction of the ordinary civil Courts to establish his contention. [P 121 C 2]

(c) Punjab Colonization of Government Lands Act (1912), *S.* 32—*Scope.*

Section 32 is obviously intended to protect the rights of Government and embraces the cases of trespassers or squatters against Government. [P 122 C 2]

** (d) Interpretation of Statutes—Language doubtful—Court should lean against ouster of jurisdiction of ordinary tribunals — Jurisdiction.*

It is a well-established doctrine that a statute interfering with the established state of law must receive a strict construction, and when the language is doubtful, the Courts should lean against an ouster of the jurisdiction of the ordinary tribunals. [P 122 C 2]

Shuja-ud-Din and *Devi Dayal*—for Appellant.

Abdul Ghani—for Respondents.

Shadi, Lal, C. J.—The question of law formulated for the decision of the Full Bench is in the following terms :

A, an occupancy tenant under Government of land in an area to which the Colonization of Government Lands (Punjab) Act, 1912, has been applied, issued a notice of ejectment through a revenue officer against *B* who was in possession of a portion of *A's* recorded tenancy. *B* sued successfully in a revenue Court to set aside the notice of ejectment on the ground that he was not a tenant under *A*.

A then sued *B* in a civil Court for possession as against a trespasser. *B* pleaded that he was a partner in *A's* tenancy by private arrangement between himself and *A*, and that by a subsequent private arrangement *A* had transferred to him all the occupancy tenant's rights in the particular land in suit. In view of the provisions of the Colonization of Government Lands (Punjab) Act, 1912, particularly Ss. 32 and 36, has a civil Court jurisdiction to hear the suit ?

It is an indisputable proposition of law, and indeed it is expressly enacted by S. 9, Civil P. C., that the Courts have jurisdiction to entertain all suits of a civil nature except those, the cognizance of which is expressly or impliedly barred. It is, therefore, for the party, who seeks to oust the jurisdiction of the ordinary civil Courts, to establish his contention.

How does the defendant, who denies the right of the civil Court to adjudicate upon the dispute, discharge the onus which rests upon him ? In support of his contention he invokes S. 36, Colonization of Government Lands Act, which deprives the civil Court of jurisdiction in any matter of which the Collector is empowered by that Act to dispose, and forbids it to take cognizance of the manner in which the Local Government or Collector or any other revenue officer exercises any power vested in it or in him by or under this Act.

It is not suggested that the Local Government can take cognizance of the claim made by the plaintiff, and the issue is thus narrowed down to the question whether there is any provision in the statute which empowers the Collector to dispose of the dispute between the parties. In this connexion the learned counsel for the defendant has, in a half-hearted manner, referred to Ss. 19 and 24 of the Act, but neither of these sections has any application to the case before us. Section 19 forbids a tenant of Government land to alienate for more than a specified period, his rights or interests in the land except with the consent in writing of the Commissioner, and declares an unauthorized transfer to be void. The section also pro-

vides that if a person has, in pursuance of a void transfer, obtained possession of the land after the commencement of the Act, he shall be ejected under the orders of the Collector.

It is unnecessary to examine the question whether the transfer in this case was or was not void, for it is admitted that the defendant obtained possession of the land *before* the commencement of the Act, and that fact alone takes the case out of the jurisdiction conferred upon the Collector by S. 19. Out attention has been invited to an unreported judgment of a Division Bench of this Court in *Ghulam Qadar* v. *Nur* (1), where S. 19 was successfully pleaded in order to oust the jurisdiction of the civil Courts. The facts bearing upon the question of jurisdiction in that case are not free from obscurity, but it is clear that the objection to jurisdiction was raised, not by the defendant, but by the plaintiff, and no resistance was apparently offered by the opposite party to that objection. It was taken for granted that the case was governed by S. 19, and the learned Judges were not, therefore, called upon to discuss the question of jurisdiction or to express their considered opinion upon the scope of the section.

Nor do I think that S. 24 has any bearing upon the question before us. That section authorizes the Collector to impose upon a tenant, who has committed a breach of the conditions of his tenancy, a penalty or to order the resumption of the tenancy, but this authority can be exercised at the discretion of the Collector and only after giving a previous notice to the tenant. There is no suggestion by the defendant that either party has committed any breach involving a forfeiture of his tenancy, or that the Collector has exercised the discretion conferred upon him by the section.

The only argument, which has been seriously advanced before us, and which requires consideration, is that founded upon S. 32 of the Act. That section runs as follows :

> When the Collector is satisfied that any person has taken or is in possession of land in a colony to which he has no right or title, the Collector, may, in addition to any other powers he may possess, forthwith re-enter upon the land and resume possession of it and take possession of all crops, trees and buildings thereon on behalf of Government without payment of any compensation whatsoever.

(1) Civil Appeal No. 1994 of 1922 (Unreported.)

It will be observed that the Collector is empowered by the legislature to re-enter upon the land and resume possession of it on behalf of Government. The words "re-enter" and "on behalf of Government" make it clear that the section applies only to those cases in which Government is entitled to the possession of the land, but a trespasser has interfered with that possession. The matter being simple, it is not necessary for Government to bring against the trespasser an action of ejectment which is neither a cheap nor an expeditious remedy. The legislature has accordingly provided a summary remedy for recovering the land, and the Collector, acting as the agent of Government, is authorized to remove the trespasser from the land and obtain possession of it on behalf of Government. The section is obviously intended to protect the rights of Government and embrace the cases of trespassers or squartters against Government.

The Court must, no doubt, give effect to the language of the statute, which, either by express words or by plain and necessary implication, takes away the jurisdiction of the ordinary Courts. But it is a well-established doctrine that a statute interfering with the established state of law must receive a strict construction, and that, when its language is doubtful, the Courts should lean against an ouster of the jurisdiction of the ordinary tribunals. Neither the language of the section, which to my mind is not open to any ambiguity or doubt nor any principle of law can warrant the contention that the Collector should intervene in a dispute between private persons and that the civil Courts should be debarred from adjudicating upon it. My answer to the question submitted to the Full Bench is, therefore, in the affirmative.

Fforde, J.—I agree.

Tek Chand, J.—I agree.

D.D.

A. I. R. 1928 Lahore 122

BROADWAY AND AGHA HAIDAR, JJ.

Hira Singh—Plaintiff—Appellant.

v.

Mt. Manglan and *another*—Defendants—Respondents.

Second Appeal No. 2771 of 1923, Decided on 12th October 1927, from decree of Dist. Judge, Amritsar, D/- 4th June 1923.

(a) Hindu law—One member separating with his share—Remaining members though living together are separate in the eye of the law.

Where a farighkhati executed by a member of a joint Hindu family states in clear terms that the defined shares in the whole joint family property have been allotted to the coparceners and also gives them the liberty either to live together or to separate their own shares, the effect of the deed is to cause a separation in estate and interest between all the coparceners. The clause giving the parties the option of being joint or separate is not inconsistent with a separation in estate. The remaining members, though living together are, in reality holding their shares in the eye of the law separately : 30 *Cal.* 725 (*P. C.*) ; 30 *Cal.* 738 (*P. C.*) and *A. I. R.* 1922 *P. C.* 353, *Foll.* [P 124 C 1,2]

(b) Hindu law—Partition—Reunion.

According to the Mitakshara school, a member of a joint Hindu family, once separated, can reunite with his father, brother or paternal uncle, but not with any other relation. [P 124 C 2]

(c) Civil P. C., S. 100—Finding of fact.

A finding based upon an erroneous view of law is not binding in second appeal. [P 125 C 1]

Badri Das—for Appellant.

G. C. Narang and *Jai Gopal Sethi*—for Respondents.

Aga Haidar, J.—This is a plaintiff's appeal which arises out of a suit for partition. It was originally instituted by a lady named Mt. Aso. While the appeal was pending in the lower appellate Court Mt. Aso died and her son Hira Singh was brought on the record as her legal representative. In order to understand the controversy in suit it is necessary to bear in mind the following narrative of facts :

One Gulab Singh was the husband of Mt. Aso. He died many years ago leaving him surviving his widow, Mt. Aso, and three sons by her, namely, Nikka Singh, Ganesha Singh, and Hira Singh. The sons constituted a joint Hindu family governed by the law of the Mitakshara. On 1st December 1884 it appears that Hira Singh separated from the family and a one-fourth share of the family property was allotted to him. He executed a document called farighkhati. In that document the fact of his separation is mentioned and it is further recited that the family property having been divided into four equal shares, Hira Singh had separated with his one-fourth share and had no concern left with the family property, that the remaining three-fourths share of the property was left with Ganesha Singh, Nikka Singh and their mother Mt. Aso, and that it would be competent to them to keep the corpus of the property either whole or in separated shares and that they were owners of their respective shares (*aur nam burdgan apne apne hisse ke mukhtar-hain*). It appears that the family property was not divided by metes and bounds and Ganesha Singh, Nikka Singh and their mother Mt. Aso continued to live together. Nikka Singh died in 1900. In 1917 Ganesha Singh made a will in favour of defendants 1 and 2, his daughters. Soon after making this will, Ganesha Singh died. In 1918 Mt. Aso instituted the present suit in the Court of the learned Senior Subordinate Judge, Amritsar. She claimed two-thirds share in the whole of the family property: one-third as her own share, which she got as a result of the partition of 1884, and another one-third as the heir of Nikka Singh, her deceased son.

It is important to note the defence which was set up by the defendants in the present suit. Their main defence was that the suit was barred by limitation, that their father Ganesha Singh was the sole owner of the whole property, moveable and immovable, in which neither Nikka Singh nor the plaintiff had any share, that there was no property which jointly belonged to the plaintiff, Nikka Singh and Ganesha Singh and that the farighkhati of 1884 did not confer any rights upon the plaintiff. The trial Court decreed the plaintiff's claim as regards the immovable property in suit but as regards the family business it held that the suit was time barred. The defendants preferred an appeal to the learned District Judge and the plaintiff filed cross-objections. The learned District Judge dismissed the plaintiff's suit in toto on two grounds which shall be discussed later on. Hira Singh, the legal representative of Mt. Aso, has filed the present second appeal.

It may be stated at the outset that Mr. Badri Das, the learned counsel for the appellant, intimated to the Court that he was not prepared to press his claim as regards the business carried on by the firm of Ganesha Singh and Gulab Singh.

The first ground for dismissing the plaintiff's suit is contained in the following sentence which is to be found in the judgment of the learned Judge of the lower appellate Court.

The first point urged by defendants' counsel is that the farighkhati of 1884 did not affect the

joint nature of the rest of the family property. Ganesha Singh, in a previous case, stated, on 15th January 1916 that by the farighkhati of 1884 the entire property was divided into four portions, Hira Sigh's portion being separated off, while port ons of the other three, namely, Ganesha Singh, Nika Singh and Mt. Aso remained joint. This being so, I consider that defendant's counsel is right in arguing that Mt. Aso was not justified in suing for partition.

I may observe here that it is difficult to conceive a more confused and unsatisfactory finding. It appears to be a very unsatisfactory finding of fact which proceeds upon an even more unsatisfactory conception of a question of Hindu law. The farighkhati, as already stated, while recording the separation of Hira Singh from the joint family, clearly indicates the shares of Ganesha Singh, Nikka Singh and their mother, Mt. Aso. A perusal of this document brings the present case clearly within the principle of law as laid down by their Lordships of the Privy Council in *Balkishen Das* v. *Ram Narain Sahu* (1). In that case their Lordships of the Privy Council observe that where an ikrarnama executed by a member of a joint Hindu family stated in clear terms that the defined shares in the whole joint family property had been allotted to the coparceners and also gave them the liberty either to live together or to separate their own business, the effect of the deed was to cause a separation in estate and interest between all the coparceners. The clause giving the parties the option of being joint or separate was not inconsistent with a separation in estate. In this view of the law there cannot be any doubt that there was a separation among all the members of the family and their mother as a result of the farighkhati transaction. In *Balabux* v. *Rakhmabai* (2) their Lordships of the Privy Council laid down that there is no presumption when one coparcener separates from the others that the latter remain united. They further observed that an agreement amongst remaining members of a joint family to remain united or to re-unite must be proved like any other question of fact. In *Syed Kasim* v. *Jorawar Singh* (3), their Lordship of the Privy Council have summarized the law on the subject in the following words :

> It is settled law that in the case of a joint Hindu family subject to the law of Mitakshara a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place.

All the leading Privy Council cases are quoted by their Lordships in support of this proposition. In view of these authorities there cannot be any doubt that after the year 1884 and by virtue of the deed of farighkhati, already mentioned, there was a complete disruption of the joint family and after the separation of Hira Singh's share Ganesha Singh, Nikka Singh and their mother though living together, were in reality holding their shares in the eye of the law separately. The learned Judge of the lower appellate Court says that Ganesha Singh in a previous suit on 15th January 1916, stated that by the farighkhati of 1884 the entire property was divided into four portions, Hira Singh's portion being separated off while the portion of the other three, namely, Ganesha Singh, Nikka Singh and Mt. Aso remained joint. The learned Judge of the trial Court at the bottom of page 5 of the printed paper-book has observed that

> in the present case there is no evidence of it (re-union). That it is not a case of survivorship is clearly proved from the facts that it is not pleaded in the present case.

Reunion has neither been alleged nor proved by the defendants. It becomes exceedingly difficult to understand what the learned Judge meant by saying that Mt. Aso remained joint. If he meant that the property was not divided by metes and bounds he is perfectly right because this is the plaintiff's case. If the learned Judge was thinking of a reunion, and even assuming that such a line of reasoning was open to him on the pleadings, he would be confronted with the elementary principle of Hindu law of the Mitakshara school that a member of a joint Hindu family once separated can reunite only with his father, brother or paternal uncle but not with any other relation. And it is hardly necessary to solemnly lay down that a mother is not a member of the coparcenary body constituting a joint Hindu family. She is only entitled to maintenance while the joint status of the family continues and it is only when one of her sons brings a suit for partition that she is entitled to claim a share in the family property. It comes to this that the finding of the learned

(1) [1903] 30 Cal. 738=30 I. A. 139=7 C. W. N. 578=8 Sar. 489 (P. C.).
(2) [1903] 30 Cal. 725=30 I. A. 130=7 C. W. N. 642=8 Sar. 470 (P. C.).
(3) A. I. R. 1922 P. C. 353=50 Cal. 84=49 I. A. 358 (P. C.).

Judge that "Mt. Aso remained joint." If he meant to hold that the family re-united and renewed its joint status, its first status is a finding based upon an erroneous view of law and does not amount to such a finding of fact as would be binding upon this Court in second appeal.

On behalf of the respondents the attention of the Court was directed to a case reported as *Palani Ammal* v. *Muthuvenkatachala Moniagar* (4). This was a suit for partition and the defence of the defendant-appellant was that the members of the family had already separated long ago. In this case their Lordships observed at p. 259 :

> In the present case there were concurrent judgments of the District Judge and the High Court that the family descended from the propositus never separated and that the property sought to be partitioned is partible.

Their Lordships tested the findings of the Courts below by construing certain documents in order to draw legitimate inferences as to the intentions of the parties to the said documents and in the end accepted the findings of fact arrived at by the Courts in India. As a result of those findings the decree of the High Court was affirmed and the defendants' appeal was dismissed. In this view of the case the observations, at pp. 257-258 of the report are more or less in the nature of obiter dicta. It may be noted, however, that *Appovier* v. *Rama Subba Aiyan* (5) and *Balabux* v. *Ruhhmabai* (2) are quoted in the judgment of their Lordships.

The learned Judge of the lower appellate Court has further observed that the plaintiff, in para. 3 of the plaint, states in so many words that after the farighkhati, she and Nikka Singh and Ganesha Singh remained joint. I have read the original plaint very carefully and in my humble judgment the plaintiff clearly alleges partition and allotment of shares to Nikka Singh, Ganesha Singh and herself after Hira Singh had gone out of the family with his share. It is true that she speaks of the property being joint (mushtarik), but what she really meant was that though the shares had been divided and specified the corpus of the property had remained whole. I therefore find myself unable to agree with the findings of the lower appellate Court on this part of the case.

(4) A.I.R. 1925 P.C. 49=48 Mad. 254=52 I.A. 88 (P.C.).

(5) [1866] 11 M.I.A. 75=8 W.R. 1=1 Suther 657=2 Sar. 218 (P.C.).

The second ground on which the learned Judge of the lower appellate Court has found against the plaintiff is that she was estopped from putting forward her present claim. He refers to certain statements made by Mt. Aso as a witness in a previous litigation between Ganesha Singh and his brother Hira Singh. Those statements were found to be false by the appellate Court in that case. The lady was no party to that suit and the learned counsel for the respondents totally failed even to formulate his case as to how the lady could be estopped by anything which she might have said as a witnes in the previous litigation when she was, apparently, supporting Ganesha Singh, the predecessor of the defendants in his claim against his brother Hira Singh. This finding of the lower appellate Court also cannot be accepted. The suit having been disposed of by the lower appellate Court on these two points and the other questions arising in the suit not having been disposed of by that Court the case will have to be remanded for trial on the merits.

I would accordingly allow the appeal, set aside the decree of the Court below and remand the case under O. 41, R. 23, Civil P. C. Costs here and hereafter would abide the event. The appellant will be entitled to a refund of the Court-fee that he paid on the memorandum of appeal.

Broadway, J.—I agree to the order proposed.

D.D. *Case remanded.*

** A. I. R. 1928 Lahore 125

SHADI LAL, C. J.

Taj Mohammad—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 632 of 1927, Decided on 18th November 1927, from order of Dist. Magistrate, Shahpur, D/- 6th June 1927.

(a) *Penal Code, S.* 191—*Statement must be intentionally false.*

In order to sustain an indictment for perjury the prosecution must establish, inter alia, two things : (1) that the statement was false ; and (2) that it was known or believed to be false or not believed to be true. In other words, the statement must be intentionally false.

[P 127 C 2]

✲ (*b*) *Criminal P. C., S.* 357 (2) — *Court composed of more than one Judge—Signature of one is enough.*

It cannot be contended that, where a Court is composed of more than one Judge, the deposition of a witness must necessarily be signed by all the Judges of the Court before whom the witness is examined, and that, if it is signed by only one of them that irregularity alone vitiates the deposition. [P 127 C 2]

(*c*) *Evidence Act, S.* 114—*Failure to examine material witness justifies adverse inference.*

Failure of prosecution to examine a material witness justifies the inference that the witness, if examined, would have deposed against the prosecution. [P 128 C 1]

✲ (*d*) *Criminal P. C., S.* 360—*Defence of India Act* (4 *of* 1915), *S.* 5.

Section 360 applies to proceedings before Commissioners under Defence of India Act. [P 128 C 1]

✲ (*e*) *Criminal P. C., S.* 360—*Deposition not read to witness cannot be used in perjury cases —Penal Code, S.* 191.

When a deposition is not read over to witness in accordance with the requirements of the law under which it was taken, it cannot be used against him on a charge of perjury : 6 *Cal.* 762 ; 42 *Cal.* 240 ; 12 *C. W. N.* 845 ; 28 *Mad.* 308 and 12 *P. R.* 1917, *Cr. Rel. on.* [P 128 C 2]

(*f*) *Penal Code, S.* 161 — *Two depositions contradictory—They must be wholly irreconcilable to prove perjury.*

Where two depositions of a witness contradict each other, in order to establish the charge of perjury it is necessary to prove that the two statements are wholly irreconcilable [P 129 C 1]

There are cases in which a person might honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time he might be convinced that he was wrong and swear to the reverse, without meaning to swear falsely on either of the two occasions. [P 129 C 1]

✲ (*g*) *Judicial Officer — Magistrate should not invoke intervention of his superior officers when discharging judicial duties.*

The elementary principle of justice is that a person cannot simultaneously perform the functions of a prosecutor and those of a Judge in a criminal case. A Magistrate ceases to be an executive officer when he is sitting in Court to try a criminal case, and thus he cannot be allowed to invoke the intervention of his superior executive officers in a matter 'concerning the discharge of his judicial duties for which he owes responsibility only to the High Court. [P 129 C 2]

(*h*) *Judicial Officer—Duty of.*

The practice of holding private consultations by Magistrate with the prosecuting agency before commencing the hearing of the case is highly improper. [P 130 C 2]

✲ ✲ (*i*) *Judicial Officer—Magistrate should not allow his executive zeal to outrun judicial discretion.*

It is one of the most important duties of a Court of law to create and maintain confidence in the administration of justice and to conduct itself in such a manner as to produce in the minds of the parties an impression that nothing but absolute justice would be done to them. [P 130 C 2]

Where a Magistrate declined to summon all the witnesses cited on behalf of the accused and took upon himself the duty of arbitrarily selecting only a few witnesses who were to be summoned to give evidence for the defence, adjourned the case for hearing at an out of the way place and continued the hearing in spite of High Court's order directing the Magistrate to give every reasonable facility to the accused to produce his defence evidence, and to hold the trial of the case either at the headquarters of the district or at a place which is either a railway station or easily accessible from a railway station and on closure of the case, called the accused and his counsel in the middle of the night and pronounced judgment at 1 a. m. inflicting upon the convict the maximum term of imprisonment permissible.

Held : that the proceedings taken by the Magistrate show that he did not hear the case with that judicial detachment which should charactarize the trial of a criminal case, and that he allowed his executive zeal to outruu his judicial discretion. [P 131 C 1]

Mohammad Shafi, Birj Lal Puri, Mukand Lal Puri and *Abdul Ghani*—for Appellant.

J. M. Mackay—for the Crown.

Judgment.—The appellant, Mian Taj Mohammad, has been found guilty of having committed prejury in a judicial proceeding and has been sentenced under S. 193, I. P. C, to suffer rigorous imprisonment for seven years and to pay a fine of Rs 5,000.

The prosecution arose out of a transaction which took place more than nine years ago, and in order to appreciate the question of law and facts, upon which I have to pronounce my opinion, it is necessary to give a short sketch of the various events which have a bearing upon the case for the prosecution. On 28th July 1918, Sayed Nadir Hussain Shah, the Tahsildar of Bahalwal, in the Shahpur District, visited the village of Behk Lurka, in the south of the tahsil, to enlist recruits for the army. He was accompanied by the appellant Taj Mohammad, a zaildar of another village called Mela, and several other persons, and was received at the village boundary by the lambardar, the zaildar, and other inhabitants of the village. The Tahsildar went to the village daira and partook of some refreshment. Shortly afterwards, a large number of villagers, who were evidently dissatisfied with the methods adopted by the Tahsildar, in his compaign

recruiting, came armed with bludgeons and hatchets and attacked him and his companions with the weapons. The Tahsildar sustained severe wounds to which he succumbed on the spot. Of his companions, Taj Mohammad received a large number of injuries including compound fractures of the bones of an arm and escaped death by concealing himself in a mosque. From this place of safety he did not emerge until after the arrival of the police.

It appears that as a result of the panic which ensued, practically the whole of the village was deserted, but the few persons who could be found were asked to appear before a Magistrate Khan Ahmad Hassan Khan, who recorded their statements. The appellant, Taj Mohammad, also was examined by the Magistrate, first on 28th July 1918, and again on 5th August 1918, and the latter statement has been relied upon by the prosecution in support of the charge of perjury.

A few months after the tragedy, 30 persons, who were arrested for complicity in the murder, were tried by a tribunal of three Commissioners constituted under the Defence of India Act, 4 of 1915, and Taj Mohammad was one of the witnesses examined by the tribunal on behalf of the prosecution. The deposition of Taj Mohammad was recorded on 7th and 9th December 1918, and this deposition has been produced as an exhibit in the present case.

The tribunal decided the case in January 1919, but there were still some persons who were alleged to have participated in the assault on the Tahsildar and could not be tried at that time, as they were fugitives from justice. These men were arrested several years afterwards, and the question of their guilt depended upon their identification by certain persons who claimed to be the eyewitnesses of the assault on the Tahsildar. In the course of the enquiry held by a Magistrate into the case against certain accused persons, Taj Mohammad was produced as a witness for the Crown on 16th May 1925 and it is the statement made by him on that day that is alleged to be false.

The portion of the statement, which forms the subject of the indictment, is to the effect that he could not identify three accused, namely, Jallu, Amir and Salehon, and that he could not say that he had known them before. Now, a perusal of S. 191, I. P. C., which defines the offence of "giving false evidence," shows that in order to sustain an indictment for perjury the prosecution must establish inter alia, two things : (1) that the statement was false ; (2) that it was known or believed to be false or not believed to be true. In other words, the statement must be intentionally false.

Let us now examine the evidence in order to see whether these requirements of the law have been fulfilled in the present case. It must be remembered that we are not dealing here with a case where a person makes two contradictory statements and is charged, in the alternative, with giving false evidence on one or the other of the two occasions. The appellant was charged with having given false evidence on 16th May 1925, and it was only this specific charge that he was required to meet.

It may be stated at the outset that there is no oral evidence to prove the falsity of the statement, and the case for the prosecution depends entirely on the depositions made by the prisoner before the commissioners in December 1918, and before the Magistrate in August 1918. It is, however, contended on his behalf that the deposition before the commissioners is inadmissible in evidence, as it was signed by only one commissioner, and not by all the commissioners. The learned counsel for the appellant is unable to cite any authority in support of his contention, and I am not prepared to subscribe to the doctrine that, where a Court is composed of more than one Judge, the deposition of a witness must necessarily be signed by all the Judges of the Court before whom the witness is examined, and that, if it is signed by only one of them, that irregularity alone vitiates the deposition. The object of requiring the presiding officer of the Court to sign the deposition of the witness examined by him is to ensure the accuracy of the record, and it cannot reasonably be urged that that object can be achieved only if all the Judges composing the Court sign the record.

While I cannot accede to the contention that the mere circumstances that the deposition was signed by only one of the three commissioners renders it inadmissible in evidence, I observe that the deposition was not even read over to the witness, and that defect cannot, in my

opinion, be overlooked It is clear that the statement alleged to have been made by the prisoner before the commissioners does not bear a certificate that it was read over to him, and there is no oral evidence to show that it was in fact read over to the deponent. Mr. Justice Jai Lal, who was a member of the tribunal, does not remember whether the evidence was read over to Taj Mohammad ; and Nafis-ud-Din, who acted as the reader to the tribunal, is clear that he was never asked to read the statements over to the witnesses examined by the tribunal, and he adds that they were not read over to the witnesses ; otherwise there would have been the usual certificates to that effect. It is significant that, though the *ahlmad* of the tribunal was summoned as a witness for the prosecution, he was not examined at the trial ; and this failure to examine a material witness justifies the inference that the witness, if examined, would have deposed against the prosecution.

I need not, however, dilate upon this subject, because it is neither found by the trial Magistrate nor suggested by the learned counsel for the Crown that the record of tbe deposition was read over to the appellant. What is urged before me is that the commissioners were required to make only a memorandum of the substance of the evidence of each witness examined by them and that they were under no obligation to read the deposition over to the witness. Now, S 5, Defence of India Act, enacts that, subject to any rules made by the Local Government, the commissioners, in trying the accused persons shall follow the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases by Magistrates; and S. 360, Criminal P. C., which governs the trial of warrant cases, prescribes in clear terms that, as the evidence of each witness is completed, it shall be read over to him * * * * * *This section was prima facie applicable to the proceedings before the commissioners and my attention has not been invited to any rule which dispensed with the requirement of the law enacted by the section. Nor do I think that the provision authorizing the commissioners to make only a memorandum of the substance of the evidence of each witness can be viewed as containing by implication a repeal of the important and salutary rule prescribed by S. 360. The rule was enacted in order to ensure accuracy in recording the evidence given by a witness and to give him an opportunity to correct any mistake made by the writer.

There is ample authority in support of the proposition that when a deposition is not read over to a witness in accordance with the requirements of the law under which it was taken, it cannot be used against him on a charge of perjury: vide, inter alia, *Emperor* v. *Mayadeb Cossami* (1) *Emperor* v. *Jogendra Nath Ghose* (2); *Mohendra Nath Misser* v. *Emperor* (3); *Kamatchinathan Chetty* v. *Emperor* (4) and *Kartar* v. *Emperor* (5).

If the statement made by the prisoner before the commissioners is excluded, and I think it must be excluded, from consideration, the question for determination is whether there is any other material on the record to show that the evidence given by him on 16th May 1925, was intentionally false. In this connexion reliance is placed by the prosecution upon the deposition made by the prisoner on the 5th August 1918, inplicating Jalla, Amir and Salehon, among others, in the murder of the Tahsildar, and alleging that he was previously acquainted with them. I have already pointed out that this is not a case of alternative charges in respect of two contradictory statements, so that it may be argued that one of the two statements must be false and that it is not necessary to prove which of them is false. The assignation of perjury in this case is founded on the falsity of the evidence given by the appellant on 16th May 1925, and it is the duty of the prosecution to establish that charge. The mere fact that he had, on a previous occasion, made an inconsistent statement does not necessarily prove that the previous statement was true and that the latter statement is false. It is to be observed that the earliest statement made by Taj Mohammad was on 28th July 1918, shortly after the assault on the Tahsildar; and that on that occasion he did not mention the names of Jallu, Amir and Salehon, but merely stated

(1) [1861] 6 Cal. 762=8 C. L. R. 292.
(2) [1915] 42 Cal. 240=24 I. C. 571=18 C. W. N. 1242.
(3) [1908] 12 C. W. N. 845.
(4) [1905] 28 Mad. 303.
(5) [1917] 12 P. R. 1917 Cr.=39 I. C. 847=15 P. W. R. 1917 Cr.

that he would be able to identify the assailants. With respect to the statement made on 5th August 1918, the Magistrate who recorded it, deposes that Taj Mohammad, when making that statement, referred two or three times to a paper which he was holding in his hands, and it is contended that it was that paper which contained the names of Amir, Jallu and Salehon. There can be little doubt that Taj Mohammad had sustained very severe wounds on 28th July and, considering that he was practically a stranger to the inhabitants of the village there is nothing improbable in the suggestion that he was not previously acquainted with the offenders, and that on 5th August he read out their names from a piece of paper which had been given to him by the police or by some other person interested in the prosecution.

Be that as it may: there is nothing to choose between the deposition of 5th August 1918, and that recorded on 16th May 1925, and there is not a scintilla of evidence to warrant the conclusion that the former was true and the latter false.

The discussion, so far, has proceeded upon the assumption that the two depositions contradict each other. It has, however, been repeatedly, pointed out that, in order to establish the charge of perjury, it is necessary to prove that the two statements are wholly irreconcilable. Is this test statisfied in the present case? It is to be remembered that, when Taj Mohammad gave evidence in 1925, he was deposing to a transaction nearly seven years old, and that the absconders had, in the meanwhile, taken steps to disguise themselves by growing beards. In these circumstances he cannot be blamed if he failed to pick them out of a group of persons. Nor can it be held that he intentionally gave false evidence when he stated that he could not say that he had known them before. As observed already, Taj Mohammad neither belonged to village Behk Lurka nor had any official connexion with it, and it appears that he had visited it only once or twice before the murder of the Tahsildar. His acquaintance, if any, with the offenders, must, therefore, be of a very casual character, and if, after the expiry of nearly seven years he expressed his inability to say definitely whether he was previously acquainted with them, he could not be deemed to have made a statement which he knew or believed to be false. There are cases in which a person might honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time he might be convinced that he was wrong and swear to the reverse, without meaning to swear falsely on either of the two occasions.

The learned District Magistrate appears to be under the impression that proof of the falsity of the evidence is all that is required to bring the case within the purview of S. 193, I. P. C., but the rule of law is perfectly clear that, in order to establish a charge of perjury, it is necessary to prove, not only that the prisoner made a statement which was false, but also that he knew or believed it to be false or did not believe it to be true.

The result of the above discussion is that the evidence upon the record does not warrant the conclusion that the deposition made by Taj Mohammad, on 16th May 1925, was false, much less intentionally false.

Before concluding I cannot help remarking that the District Magistrate has not, in the conduct of the trial, maintained that freedom from bias which was incumbent upon him, and has committed some characteristically unjudicial acts. The proceedings taken by him betray his ignorance of the elementary principle of justice that a person cannot simultaneously perform the functions of a prosecutor and those of a Judge in a criminal case. The Magistrate does not realize that he ceases to be an executive officer when he is sitting in Court to try a criminal case. Nor does he fully understand that as District Magistrate he is directly subordinate to this Court, and that he cannot be allowed to invoke the intervention of his superior executive officers in a matter concerning the discharge of his judicial duties for which he owes responsibility only to the High Court.

The learned counsel for the appellant has strongly animadverted upon the conduct of the trial by the Magistrate and has referred to various incidents in support of his contention that the Magistrate started with a bias against the accused and did not try the case in a fair and impartial manner. He has laid stress upon the fact that his client has

repeatedly complained that the prosecution against him was instituted in pursuance of the instructions given by Mr. Macnabb in his capacity as Deputy Commissioner of the District. The complaint finds expression, inter alia, in an affidavit made by the accused in this Court on 11th January 1927, which, in Cl. (a) of para. 4, distinctly states that he, along with certain other persons, was being prosecuted under the instructions of the District Magistrate, and that the application under S. 476, Criminal P. C., for filing a complaint for perjury was made in pursuance of the directions given by the latter to the Public Prosecutor. In accordance with the practice of this Court, a copy of the affidavit was forwarded to the District Magistrate in order to give him an opportunity to submit his explanation with respect to this allegation and other allegations contained therein. The learned Magistrate, instead of submitting directly to the High Court his explanation stating in clear and unequivocal terms whether he admitted or denied the correctness of the allegations, sought the intervention of the Commissioner by writing a letter to him, from which the following extract may be transcribed here :

I have the honour to forward to you copies of letter No. 288 J, dated 14th January 1927, from the Deputy Registrar of the High Court, Punjab, to my address, together with copies of the enclosures.

The observations, which I have to make, are largely of an official and confidential nature, and in view of Ss. 123 124, and 125, Evidence Act, I do not consider that it would be proper for me to make a reply direct to the High Court without previous reference to you.

Margin.

I am, therefore, sending my observation on these paragraphs and would suggest that they may be forwarded to Government for such action as may be deemed advisible,

under that,

Consultations between a Magistrate and the police, with regard to the conduct of a case, are confidential and no Magistrate should be forced to disclose before any Court the details or results of his consultation.

Now, I fail to understand how the District Magistrate expected the Commissioner or the Government to interfere in a matter which dealt purely with the question whether the Magistrate had taken such interest in initiating the criminal proceedings as to disqualify him to adjudicate upon the guilt or otherwise of the accused. It is obvious that the Magistrate was labouring under a misconception of the duty which he, as a subordinate judical officer, owed to the High Court ; and it appears that the Commissioner did not take the action suggested by the Magistrate, and the latter then submitted a copy of his explanation to this Court. I cannot too strongly deprecate the attempt of the Magistrate to invoke the aid of the executive officers, in trying to evade the duty of submitting to this Court his explanation in respect of the allegations made by an accused person against him. Nor do I see that Ss. 123, 124. and 125, Evidence Act, have any bearing on the question. S. 123 prohibits a witness from giving evidence, derived trom unpublished official records relating to any affairs of State, without the permission of the head of the department concerned ; and S. 124 forbids the Court to compel a public officer to disclose communications made tc him in official confidence when he considers that public interests would suffer by the disclosure. Similarly, S. 125 does not allow the Court to compel a Magistrate or a police officer to say whence he got any information as to the commission of nn offence. It appears that the sections were quoted by the District Magistrate in a haphazard manner without taking the trouble of understanding their meaning, and it is clear that none of them could be invoked for the purpose of avoiding to answer the simple question as to whether he had given instructions to the Public Prosecutor to take steps to prosecute the appellant for perjury. It is futile to suggest that there was in this case any privileged communication received by the Magistrate which he could not disclose. I need not pursue the subject any further, for the learned counsel for the Crown frankly admits that he cannot defend the conduct of the Magistrate in trying to shirk his duty to the High Court by writing to the Commissioner upon a matter with which the latter had no concern whatsoever.

Nor can the answers given by the Magistrate to the allegations contained in the affidavit be regarded as satisfactory or dispel the apprehension of prejudice in the conduct of the trial. One of these allegations was in the following terms:

That generally, almost on each hearing consultations are held by the District Magistrate with the Public Prosecutor and Court inspector before the hearing commences.

Now in his reply the District Magistrate does not deny this allegation, but seeks to justify his conduct by saying that he sees

nothing objectionable in a Magistrate consulting the prosecution with regard to a case. Obviously he cannot do so in public since many of the matters, which the police would have to communicate, are of the confidential nature.

In support of his action he also refers to the fact that he is a busy officer and

it is, therefore, necessary for him to see that his time is not wasted by the tendering of unnecessary evidence or the failure to produce a witness which is really required in a case on the first possible occasion. It was, therefore, in order to save time in the long run that I had to consult the Public Prosecutor and the Prosecuting Inspector with regard to the conduct of the case in order to expedite it as much as possible.

The practice of holding private consultatious with the prosecuting agency before commencing the hearing of the case was repeated on 16th December 1926, and it is described in the affidavit in these terms :

That the climax was reached on the last hearing (16th December 1926) when the District Magistrate came to the Court-room, called the case and then went inside his retiring room where he remained closeted with the Court Inspector, Sultan Ahmad, who had been investigating the Behk Lurka case, for about an hour and a half. Khan Ahmad Hassan, Extra Assistant Commissioner, Gujrat, who was the witness to be examined on that date, was also summoned to the retiring room and some sort of consultation held with him.

Here, again, the private conference with the prosecuting officers is not denied by the Magistrate who seeks to justify it by relying upon his

previous remarks about the general conduct of the case by the prosecution,

and by pointing out that

I was not anxious to waste any unnecessary time on the case since I have many other duties to perform; but since the case was an important one, and it had not been properly worked out by the prosecution, it was my duty to see that it was properly worked out.

The learned Magistrate also admits he asked the witness Khan Ahmad Hassan Khan to come into his retiring room, but expresses his inability to remember exactly what sort of consultation "I had with the witness." He again cites Ss. 123 to 125, Evidence Act, to claim privilege for the conversation he had with the witness, and explains that the principal subject of the conversation, so far as he could remember, was waterlogging in the Gujrat District.

It is a matter for surprise that a judicial officer occupying the position of a District Magistrate does not see the impropriety of holding private conferences with the prosecuting officers in respect of a criminal case upon which he had to adjudicate. The practice followed by him offends againt the elementary principles governing the administration of criminal justice, and the learned counsel for the Crown had no alternative but to admit that it was indefensible. I trust that no Magistrate will ever be guilty of such improper conduct in the discharge of his judicial functions or forget the fundamental rule with its necessary implications that he is an impartial adjudicator between the prosecuting agency and the people.

I do not propose to deal with other instances of the unjudicial manner in which the Magistrate has acted in this case, beyond mentioning certain incidents which took place at the concluding stage of the trial and to which my attention has been specially invited. It appears that, after framing the charge against the accused, the District Magistrate declined to summon all the witnesses cited on his behalf and took upon himself the duty of arbitrarily selecting only a few witnesses who were to be summoned to give evidence for the defence. He then adjourned the case for hearing at a place called Kathwai. Now, according to the affidavit filed by the accused in the High Court on the 19th May 1927, this

place is unconnected by rail or by any vehicular traffic with the rest of the district. It is only possible to reach Kathwai on foot or on ponies.

The accused urged before the trial Court that,

apart from the inconvenience to him and his witnesses, it will be impossible for the petitioner to take any good counsel to such a far away place which should only be reached by ponies, and that he (Magistrate) should be pleased to fix any place in the district which is a railway station.

It cannot be said that the request was an unreasonable one, but the learned Magistrate took no notice of it. The accused, thereupon, moved this Court which passed on 23rd May 1927, an order directing the Magistrate to give every reasonable facility to the accused to produce his defence evidence, and to hold the trial of the case either at the headquarters of the district or at a place which is either a railway station or easily accessible from a railway station.

It appears that before the hearing of the case, on 6th June 1927, the Magistrate had moved on to another place called Sodhi, and while Kathwai is 17 miles from the nearest railway station, Sodhi is nine miles further on in the Salt Range. Before he commenced the hearing of the evidence on 6th June, a certified copy of the order of the High Court, quoted above, was placed before him, but he persisted in holding the trial at Sodhi and paid no heed to the request of the accused that the case should be heard at a place where his counsel from Lahore could appear without inconvenience. He then recorded the evidence of the witnesses present at that place and closed the case for the defence. In his judgment the District Magistrate explains that Sodhi is not an inaccessible part of the Salt Range, but this explanation is contradicted by the affidavit of the prisoner who describes in detail the difficulties of the journey, from the railway station at Khushab to Kathwai and Sodhi.

In the absence of further information, it is difficult to decide which of these divergent versions is correct, but one thing is clear, that Sodhi cannot be regarded as a place "easily accessible frnm a railway station" as contemplated by the order of this Court, and that the Magistrate should not have held the trial at such an out-of-the-way place.

The learned Magistrate, not only closed the case for the defence on 6th June 1927 but even went so far as to call the accused and his counsel in the middle of the night and pronounced judgment at 1 a.m. inflicting upon the convict the maximum term of imprisonment permissible under the law. He was then taken into custody and had to remain in jail before he was admitted by the appellate Court to bail. It is incontrovertible that one of the most important duties of a Court of law is to create and maintain confidence in the administration of justice and to conduct itself in such a manner as to produce in the minds of the parties an impression that nothing but absolute justice would be done to them. The proceedings taken by the Magistrate show that he did not hear the case with that judicial detachment which should characterize the trial of a criminal case, and that he allowed his executive zeal to outrun his judicial discretion.

For the reasons stated above I hold that the guilt of Taj Mohammed has not been established. I accordingly allow the appeal and setting aside the conviction and the sentence, I direct that he be released from his obligation under the bail bond.

D.D. *Appeal allowed.*

A. I. R. 1928 Lahore 132

JAI LAL, J.

Abdullah—Judgment-debtor, — Appellant.

v.

Anjuman Dehi — Decree-holder—Respondent.

Misc. Second Appeal No. 2474 of 1926, Decided on 14th March 1927, from order of Dist. Judge, Gurdaspur, D/-15th May 1926.

Civil P. C., S. 60 (1) (c)—*Judgment-debtor must prove his livelihood on agriculture.*

In order to enable a judgment-debtor to get the benefit of S. 60 (1) (c), Civil P. C., it must be proved that he earns his livelihood wholly or principally by agriculture or that he ordinarily engages personally in agricultural labour: *A. I. R.* 1923 *Bom.* 12, *Foll.*

[P 133 C 1, 2]

Where it was established that the judgment-debtor did not cultivate any land himself being physically unfit to do so, that he owned some land which was let out to tenants on the batai system; he did not own any cattle; the house intended to be attached was used for stabling his mare and storage of fodder for the mare.

Held: that he was rightly held not to be an agricuiturist within the meaning of S. 60 (1) (c), Civil P. C. [P 134 C 1]

S. C. Chatterji—for Appellant.

H. J. Rustomji—for Respondent.

Judgment.—In execution of a money decree passed against Abdullah, appellant, the Anjuman Dehi of mauza Bariar in the tahsil of Batala, attached a house belonging to the judgment-debtor. An objection was raised by the latter that the house could not be attached under S. 60 (1) (c), Civil P. C., as he is an agriculturist and occupies it. This objection was rejected by the Subordinate Judge and an appeal has been dismissed by the District Judge. Consequently this second appeal has been filed by the judgment-debtor.

It is contended ou behalf of the appellant that the view of the learned District Judge that S. 60, Civil P. C. is intended to afford protection to actual cultivators of land is wrong and that the expression "agriculturist" in S. 60, Civil P. C. is

synonymous with the term as it is used in certain legislative provisions which apply to this province, as for instance, the Alienation of Land Act, in other words, it is contended, that it means any person who belongs to an agricultural tribe, that it is immaterial whether he owns any land or not and further that in any case it means a person whose main income is derived from agriculture whether the land is cultivated by himself or by his tenants. This contention is clearly opposed to previous authority.

In *Gurbakhsh Singh* v. *Gulam Qadir* (1) a learned Judge of the Chief Court of the Punjab held that the word "agriculturist" is used in S. 266 (c) (which is the same as S. 60 (1) (c) of the present Code) denotes a husbandman and a person who carries on and makes his living by tillage and not a mere owner of land and that

> the object of the legislature is to provide on economic grounds against cultivators of land being hindered or obstructed from earning their livelihood or practising their calling and against land being thrown out of cultivation by such attachments at the instance of mere holders of money decrees. If the District Judge's reasoning is correct the mere possession of land by the debtor is quite sufficient to protect him from having his dwelling house sold in execution of the decree. He may be a trader or banker or a person practising one of the learned professions, but if he has some land from which he gets rent in cash or in kind, his dwelling house, though it may be a palatial one, must be exempted from attachment. This cannot be the meaning of the clause. It seems to be mainly intended for the benefit of the poorer class of husbandmen who carry on or make their living by actual cultivation.

It was found in that case that though the judgment-debtor was a large landowner he did not cultivate the land himself nor did he own any agricultural cattle. His income was derived from rents paid by tenants to whom his land was let. The learned Judge held that such a person was not entitled to the protection afforded by S. 266 (c) or 60 (1) (c), Civil P. C.

A Division Bench of the Bombay High Court held in First Appeal No. 113 of 1919 *D. Rubine* v. *Balwantrai Ramnarayan Trivide* (*A. I. R.* 1923 *Bom. p.* 12) that in order to enable a judgment-debtor to get the benefit of S. 60 (1) (c), Civil P. C. it must be proved that the judgment debtor earns his livelihood wholly or principally by agriculture or that he ordinarily engages personally in agricultural labour. It was found that

> at the most the judgment-debtor seems to have leased 150 acres of land some of which he let out again to tenants and some he tilled by the aid of servants.

One of his witnesses stated that he saw the defendant supervise the cultivation of his land. The above facts, it was held, were not sufficient to entitle the judgment-debtor to a finding that he was personally engaged in agricultural labour and was therefore an agriculturist as defined in S. 60 (1) (c), Civil P. C.

In *Mt. Bhuta* v. *Basheshar Singh* (2), the Allahabad High Court held that a person does not cease to be an agriculturist even, if he has lost his agricultural land if it is established that he was cultivating the soil for remuneration. The judgment-debtor in that case admittedly belonged to an agricultural caste and it was found that she had no other source of livelihood except cultivation of land whether her own or of others. It was also found that she has still got some shikmi land. One of the learned Judges who decided that case was of opinion that on the facts proved the judgment-debtor was an agriculturist. The other learned Judge who was a party to the judgment concurred but with considerable hesitation. He based his decision more on the admission made by the decree-holder in some previous proceedings in which he had alleged that the judgment-debtor had been given some land to live on, that her father had built some houses for her thereon and also that she owned two pairs of bullocks for cultivation. It was on this admission that the learned Judge preferred to hold that the judgment-debtor was an agriculturist.

I do not, therefore, think that this last case materially helps the appellant. On the other hand some observations made by the learned Judges appear to support the contention of the decree-holders. In any case the two other authorities that have already been referred to clearly show that the term "agriculturist" as used in S. 60 means a person whose main source of income is actual cultivation or tillage of land and that the protection afforded by S. 60 (1) (c) does not necessarily extend to persons who are merely agriculturists by virtue of notifications issued by the Local Government under

(1) [1897] 47 P. R. 1897.

(2) A. I. R. 1925 All. 432.

the special Acts applicable to this province. In the case before me it has been established that the judgment-debtor does not cultivate any land himself as he is physically unfit to do so. He owns some land which is let out to tenants on the batai system. He does not own any cattle. The house in question is used for stabling his mare and storage of fodder for the mare. Under the circumstances I hold that the judgment debtor has been rightly held not to be an agriculturist within the meaning of S. 60 (1) (c), Civil P. C., and that in any case the house is not occupied by him as such. The consequence is that this appeal is dismissed with costs.

S.J. *Appeal dismissed.*

A. I. R. 1928 Lahore 134 (1)

SHADI LAL, C. J.

Mohammad Zaman and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Ref. No. 1493 of 1927. Decided on 11th November 1927, reported by Dist. Magistrate, Attock.

Criminal P. C., S. 562—Accused released but ordered to pay compensation to complainant—Order illegal.

The order directing the convicts who were released under S. 562 to pay compensation to the complainant is illegal. [P 134 C 2]

Farrukh Hussain—for the Crown.

Report.

Facts.—Abbas Khan, complainant, was taking away the animals of the accused for the purpose of impounding them because they had trespassed into his lands. The accused interfered in the way, beat Abbas Khan and rescued the animals. One of the injuries inflicted was of a grievious nature. The complainant remained in the hospital for 20 days. The accused was challaned under S. 325, I. P. C. Rahim Ali was acquitted and two others convicted and ordered to execute bonds with sureties under S. 562, Criminal P. C, and also to pay Rs. 25 as compensation to the complainant.

Grounds.—The order of the Magistrate is obviously illegal as regards the accused who were convicted. It appears that the compensation awarded to complainant must have been intended as a fine to be recovered from the accused. If that is so then it would appear that the accused were punished by fine in addition to being bound down under S. 562, Criminal P. C. This is illegal as that section of the Criminal Procedure Code can only be applied when no punishment is inflicted.

Inasmuch as the order of the Magistrate is not legal the file is, therefore, submitted to the High Court with a view to the said order being set aside by the Hon'ble Judges in so far as it relates to the paying of compensation.

Order.—The convicts, who were released by the trial Magistrate under S. 562, Criminal P. C, could not be directed to pay compensation to the complainant. The order is obviously illegal and must be set aside.

It appears that the complainant made an application to the District Magistrate praying that the order under S. 562, Criminal P. C., be set aside and that suitable sentences be awarded to the convicts. But the District Magistrate has not dealt with that application. My order shall not preclude him from adjudicating upon that application.

S.J. *Order set aside.*

A. I. R. 1928 Lahore 134 (2)

ADDISON AND FFORDE, JJ.

Faqira and *others*—Plaintiffs—Appellants.

v.

Mt. Jindo and *others*—Defendants—Respondents.

First Appeal No. 2835 of 1922, Decided on 16th May 1927, from order of Sr. Sub-Judge, Multan, D/- 28th July 1922.

Custom (Punjab) — Succession — Rans — Daughter married to a collateral succeeds in preference to collaterals.

Among Rans, if a proprietor has no male issue and his daughter is not married in another family, she succeeds to his entire property. Thus an unmarried daughter, as well as a daughter who has married a collateral, are both entitled to succeed upon the death of their father and his widow in the presence of collaterals. [P 136 C 1]

Moharam Ali Chishti and *Mohammad Amin*—for Appellants.

Badri Das and *Mukund Lal Puri*—for Respondents.

Addison, J.—This is a suit by collaterals for a declaration to the effect

that a will, dated the 10th June 1917, executed by one Kauda, deceased, in favour of his mother, Mt. Jannat, his widow Mt. Jindo, and his daughters, Mts. Ghulam Maryam and Ghulam Zainab, in equal shares, is void and will not affect the reversionary rights of the plaintiffs and that the plaintiffs will be entitled to succeed to the land in suit upon the death of his widow, Mt. Jindo. It was alleged that parties followed custom and that Kauda was too ill to understand the contents of the will. It was further stated that the land, which has gone to Mt. Jannat, his mother, had been mutated in favour of her granddaughters, Mt. Ghulam Maryam and Mt. Ghulam Zainab, on the 10th November 1918, along with other land which Mt. Jannat had got from her father and that she had no power to gift this land to her granddaughters. The plaintiffs' case was that the widow, Mt. Jindo, should have succeeded to the whole land and that, upon her death, they should succeed. It was further stated that Mt. Ghulam Maryam had married outside the family and, therefore could not succeed to her father, Kauda, while the other daughter, Mt Ghulam Zainab, was unmarried.

The defendants pleaded that most of the property was not ancestral, that Kauda was in possession of his senses when the will was executed and that Mt. Jannat willed the property to her granddaughters on the 18th October 1918 and then orally gifted it the next day to them. This oral gift was entered in a mutation which was sanctioned on the 10th November 1918. Lastly it was pleaded that the defendants were the lawful heirs of Kauda, and that Mt. Ghulam Maryam had married inside her family and was entitled to succeed her father for that reason.

Various issues were struck, but only some of them were decided. The trial Court held that most of the land was not ancestral. He then proceeded to discuss the will, and finding that its execution, which was not denied in the pleadings, was not satisfactorily proved, went on to hold that it had not been proved that it had been executed by Kauda "with a disposing mind." He, however, did not discuss any of the evidence as to whether Kauda had a disposing mind or not. He further found that Mt. Ghulam Maryam, daughter of Kauda, had married within the family and that she was, therefore, in any case, entitled to succeed to her father upon the death of her mother, Mt. Jindo. As regards the bulk of the property which was self-acquired the plaintiffs had no locus standi to sue in the presence of daughters, and as regards the property "in clause" of the amended plaint, which was ancestral, they had also no locus standi to sue in the presence of Mt. Ghulam Maryam, Kauda's daughter. The suit was, therefore, dismissed, and the plaintiffs have appealed.

It was admitted before us by the learned counsel who appeared for the appellants that daughters who have married a collateral are entitled to succeed even in the presence of collaterals within four degrees. It was also admitted that the married daughter, Mt. Ghulam Maryam, had two sons and two daughters. If she is her father's heir it is clear that the suit was properly dismissed and a finding in her favour on this point will dispose of the appeal.

Part of the pedigree-table of this family is given at p. 309 of paper-book A. It shows the descendants of Ashaq only. Mt. Ghulam Maryam has not married a descendant of Ashaq, but it is claimed that she has married a more distant collateral who meets this branch in the common ancestor, Mohabbat, son of Bagha. The full pedigree-table is given at pp. 13 to 31 of paper-book B. Mt. Ghulam Maryam married one Waryam, the son of Allah Ditta. Allah Ditta is given in the full pedigree-table as the son of Jind, who was the son of Sau. Sau's grandfather was Akal who was the son of Mohabbat, while Ashaq was the grandson of Mohabbat. The full pedigree-table is that of the settlement before that of 1920. The settlement of 1920 was not completed when the suit was tried. That explains why the name of Waryam, the husband of Mt. Ghulam Maryam, is not written below that of his father Allah Ditta in the old pedigree produced, but there is ample evidence on the record to establish that Waryam is the son of this Allah Ditta.

One of plaintiffs' own witnesses, Saifal, P. W. 14, who is a member of this family, has stated that Waryam, son of Allah Ditta, the husband of Mt. Ghulam Maryam, is descended from Sace in this family, and that is what is recorded as regards Allah Ditta in the full pedigree-

table. Two other witnesses of the plaintiffs, namely, Wazir and Fateh Mahomed, P. Ws. 7 and 8, have also stated that Waryam, son of Allah Ditta, is a descendant of the parties as well as the witnesses' common ancestor. Further, three of the defendants' witnesses, Nur Mahomed, Allah Ditta and Waryam, D. Ws. 9, 10 and 20, who are also members of this family, have given similar evidence. There is no doubt, therefore, that Mt. Ghulam Maryam had married a collateral, not very far remote. I would so hold.

The riwaj-i-am of this Tahsil is given at p. 32 of paper-book B. The custom there laid down for Rans is that if a proprietor has no male issue and his daughter is not married in another family, she succeeds to his entire property. This would seem to mean that an unmarried daughter, as well as a daughter who has married a collateral, are both entitled to succeed upon the death of their father and his widows in the presence of collaterals within three generations. In the plaint the plaintiffs alleged that Mt. Ghulam Maryam had not married a person within the family thus indicating that this was the custom amongst them. In face of the evidence and the riwaj-i-am the learned counsel had to concede that a daughter who had married a collateral was entitled to succeed to the estate of her father as there was no possible escape from this conclusion. It does not matter, therefore, whether Kauda, who died on the 25th June 1917, after having executed a will dated the 10th June 1917, executed this will in the possession of his senses, or whether he had power to make it. So far as the collaterals are concerned they are out of Court because the only person entitled to object is Mt. Ghulam Maryam who is certainly her father's heir and who has sons and daughters alive. If there had been no will she would have succeeded to her father's estate upon the death of her mother and grandmother. Her grandmother is already dead though her mother is alive. It may be the case that the unmarried daughter is also entitled to succeed to her father, but it is unnecessary to decide this because admittedly the daughter who has married a pollateral must succeed and thus the claintiffs have no locus standi to sue for a declaration that Kauda's will is void and that they are entitled to succeed upon the death of his widow, Mt. Jindo. For this reason I would dismiss the appeal with costs.

Fforde, J.—I agree.

D.D. *Appeal dismissed.*

A. I. R. 1928 Lahore 136

JAI LAL, J.

Maula Bakhsh — Defendant — Appellant.

v.

Udham Singh and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1451 of 1927, and Civil Revn. No. 252 of 1927, Decided on 31st October 1927, from decree of Dist. Judge, Rawalpindi, D/- 10th March 1927.

Limitation Act, S. 14—Good faith—Presentation of appeal to a wrong Court—The Court taking time in considering that appeal does not lie to that Court—S. 14 applies.

A suit for redemption the value of which for the purposes of jurisdiction was Rs. 99, was decreed against the appellant who presented an appeal to the Court of the Senior Subordinate Judge who, after enquiry, held that the suit was for possession by redemption of "land" as the property in suit was initially land and its character had not been changed by anything alleged to have been done thereon by the defendant. He, therefore, returned the memorandum of appeal for presentation to the proper Court. The next day, the appellant filed the appeal in the Court of the District Judge though the presentation was not within time. The appellant claimed reduction of the time spent by him in prosecuting his appeal in the Court of the Senior Subordinate Judgs under S. 14, Lim. Act.

Held : that the provision of S. 14, Lim. Act, applies to this case as the reasons given by the appellant in support of his contention that the property in suit had changed its character were not such as could summarily be rejected. It had not been shown that the appellant had any motive for filing the appeal in the Court of the Senior Subordinate Judge ; he honestly believed that the appeal lay to that Court.

[P 137 C 1, 2]

Hargopal—for Appellant.

Ghulam Rasul Khan for *Aziz Ahmed*—for Respondents.

Judgment.—This judgment will dispose of Appeal No. 1451 of 1927 and Civil Revision No. 252 of 1927. They both arise out of the same case.

A suit for redemption was filed by the contesting respondents against Maula Bakhsh, appellant, in one case and the petitioner in the other and was decreed The value for the purposes of jurisdic-

tion was Rs. 99. The defendants being dissatisfied with the decree of the Subordinate Judge presented an appeal in the Court of the Senior Subrdordinate Judge. On the hearing of the appeal an objection was taken by the respondent that the suit being in respect of the land as defined in the Punjab Tenancy Act and the Land Revenue Act was a land suit and consequently that no appeal lay to the Senior Subordinate Judge who is competent to hear appeals in small cause and unclassed suits. The Senior Subordinate Judge, after enquiry, held that the suit was for possession by redemption of 'land' as the property in suit was initially land and its character had not been changed by anything alleged to have been done thereon by the defendant. He, therefore, returned the memorandum of appeal on the 23rd February 1927, for presentation to the proper Court. On 24th February 1927, i.e., the next day, the appellant filed the appeal in the Court of the District Judge at Rawalpindi. Admittedly, on that date, the ordinary period for appeal to the Court of the District Judge had expired. The appellant, however, claimed reduction of the time spent by him in prosecuting his appeal in the Court of the Senior Subordinate Judge, under S. 14, Lim. Act, but the learned District Judge declined to give the appellant advantage of that provision of law holding that there was no scope for doubt about the Court which was competent to hear the appeal from the decree of the Subordinate Judge and that it could not be held that the appellant filed the appeal in the Senior Subordinate Judge's Court in good faith.

Maula Bakhsh has, therefore, presented a petition for revision against the order of the Subordinate Judge, returning his memorandum of appeal for presentation to the proper Court and an appeal against the order of the District Judge dismissing his appeal as barred by time. On the finding of the Senior Subordinate Judge there is no doubt that the suit is a land suit. It related to an area of 2 kanals and 14 marlas. In 1924 the defendant built a kotha on two marlas of this land. It is true that in the kharif of 1924 the land was not cultivated and the suit was instituted on 1st July 1924. It is not, however, possible on that account alone to hold that at the time of the institution of the suit the character of the land had been changed in such a way as to make a suit relating thereto an unclassed suit. The petition for revision, therefore, is dismissed with costs.

With regard to the appeal, I hold that it must be accepted. The reasons given by the appellant in support of his contention that the property in suit had changed its character were not such as could summarily be rejected. They needed consideration. It has not been shown that the appellant had any motive for filing the appeal in the Court of the Senior Subordinate Judge. On the other hand, it appears that he honestly believed that the appeal lay to that Court. Under these circumstances I hold that this was a fit case in which the provisions of S. 14, Lim. Act, should have been applied specially because the appellant filed his appeal in the Court of the District Judge the day after the Senior Subordinate Judge decided against him. Accepting the appeal I set aside the order of the District Judge and holding the appeal to be within time, I remand it to him for decision on the merits. There will be no order as to the costs of this appeal.

N.K. *Appeal accepedt.*

** A. I. R. 1928 Lahore 137

BROADWAY AND JAI LAL, JJ.

Agya Singh—Defendant—Appellant.

v.

Sundar Singh — Plaintiff—Respondent.

First Appeal No. 2811 of 1926, Decided on 1st December 1927, from decree of Senior Sub-Judge, Delhi, D/- 31st August 1926.

** (*a*) *Civil P. C., Sch. 2, para. 21—Order filing award on arbitration without Court's intervention is not decree — Civil P. C., S. 104 (f).*

An order filing or refusing to file an award in an arbitration without the intervention of the Court is not and cannot be regarded as a decree: *A. I. R.* 1926 *Lah.* 403 and 29 *Cal.* 167, (*P. C.*), *Dist.* [P 139 C 1]

* (*b*) *Civil P. C., S. 104 (f)—Appeal from order within S. 104 (f)—Court-fees Act, Sch. 2, Art. 11 applied.*

For the purposes of Court-fees an appeal from an order under S. 104 (f), Civil P. C., would be governed by Art. 11, Sch. 2, Court-fees Act: *A. I. R.* 1927 *All.* 771, *Rel on.* [P 139 C 1]

* (*c*) *Arbitration — Dissolution of partnership—Agreement referring whole dispute to arbitrator including taking accounts—Agree-*

ment includes power to decide what property was to be taken into account.

A reference to arbitration provided that the parties had been carrying on work as contractors in partnership for a considerable period, and had decided to end the partnership business but that for certain reasons, not given, they were unable to dissolve the partnership amicably. They therefore referred their mutual disputes which related to the settlement of partnership accounts to an arbitrator who was to be the sole arbitrator and whose decision on the matter was to be binding on both. [P 139 C 2]

Held: that the agreement to refer to the arbitrator the settlement of the partnership accounts necessarily included a reference of all the disputes that might arise during the arbitration proceedings as to what property was to be taken into account: 42 *All.* 277, *Rel on.* [P 140 C 1]

Sardha Ram, *Badri Das* and *Hem Raj*—for Appellant.

Man Singh and *Kishan Dial*—for Respondent.

Broadway, J.—Two persons Sundar Singh and Agya Singh were carrying on business as contractors in partnership. About 20th May 1925 they decided to end this partnership, and referred the questions arising between them to the arbitration of Sardar Bahadur Singh who had to go into the question of dissolution of the partnership and into the accounts. The arbitrator gave his award on 15th July 1925, subsequent to which Sardar Bahadur Singh filed an application in the Court of the Senior Subordinate Judge, Delhi, for an order that the award should be filed and made a rule of Court. On 30th August 1926, an order was passed directing that the award be filed, and a decree was drawn up in the terms of the said award. Agya Singh then preferred an appeal to this Court attacking the order directing that the award be filed and paid a Court-fee of Rs. 10 on the memorandum of appeal. At the hearing of this case a preliminary objection was taken by Mr. Man Singh on behalf of the respondent Sundar Singh to the effect that the appeal was insufficiently stamped inasmuch as Art. 1, Sch. 1, Court-fees Act, was applicable. Under that article the Court-fee prescribed is an ad valorem one. Mr. Man Singh in support of his contention referred to *Gauri Shankar* v. *Anant Ram* (1). That was a decision of my own sitting alone. A reference to my judgment in that case shows that the point now before the Court was not decided by me. The proceedings in that case were under para. 16 (1), Sch 2, Civil P. C., and I held there that the appeal did not fall within the purview of S. 104 (f), Civil P. C. Reference had been made in the course of the arguments in that case to *Dharam Das* v. *Ajudhia Parshad* (2) and *Hari Mohan Singh* v. *Kali Prasad Chalina* (3), and Mr. Man Singh referred to these two authorities. Now both these cases dealt with the old Code. In *Dharam Das* v. *Ajudhia Parshad* (2), it was held that inasmuch as Art. 18, Sch. 2, Court-fees Act did not apply, the only article applicable was Art. 1, Sch. 1, Court-fees Act, fixing an ad valorem fee in the case. The question was not discussed at any length by the Judges deciding the case and *Hari Mohan* v. *Kali Prasad* (3), is really more in point. There it was held by a Division Bench of the Calcutta High Court following *Ghulam Khan* v. *Muhammad Hassan* (4), that an order having the force of a decree is in fact a decree, and it was, therefore, held that the fee payable was an ad valorem one. *Ghulam Khan* v *Muhammad Hassan* (4) is a case decided ultimately by their Lordships of the Judicial Commitee who state at p. 182 as follows:

The decisions of the Indian Courts on those provisions are so conflicting that it may be useful to state generally the conclusion at which their Lordships have arrived on some of the disputed points brought to their attention in the course of the argument.

They then proceeded to lay down certain definite conclusions and the third one is as follows:

Where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award. * * * Proceedings described as a suit and registered as such must be taken in order to bring the matter, the agreement to refer or the award as the case may be, under the cognizance of the Court. That is or may be a litigious proceedings—cause may be shown against the application, and it would seem that the order made thereon is a decree within the meaning of that expression as defined in the Civil Procedure Code.

Now, it seems to me that their Lordships held that an order directing the filing of an award in circumstances such as exist in the present case fell within the definition of the expression "decree" as defined in the Civil Procedure Code that was then

(1) A. I. R. 1926 Lah. 403.

(2) [1881] 70 P. R. 1881.
(3) [1906] 33 Cal. 11.
(4) [1902] 29 Cal. 167=29 I. A. 51=6 C.W.N. 226=8 Sar 154 (P. C.).

in force. A reference to that definition and in the definition of the term or expression "decree" as found in the existing Code are different in material particulars. There it was specifically laid down that an order specified in S. 588 of the old Code is not within this definition. A reference to S. 588 shows that an order filing an award or refusing to file an award in an arbitration without the intervention of the Court was not made appealable. It follows therefore that such an order fell within the definition of the expression "decree," and the necessary consequences followed. In the present Code S. 2 (2) defines a decree and specifically states that the expression shall not include (a) any adjudication from which an appeal lies as an appeal from an order; while S. 104 of the Code (new) sub-Cl (f) specifically provides for an appeal against an order filing or refusing to file an award in an arbitration without the interventson of the Court In these circumstances it apears to me that the order in the present case is not, and cannot be regarded as a decree and therefore the remarks of their Lordships of the Judicial Committee in *Ghulam Khan* v. *Muhammad Hassan* (4), do not appear to me to be applicable.

Mr. Man Singh on this being pointed out to him admitted that the order in this case was not a decree, but contended that it was an order having the force of a decree. He was, however, unable to cite any authority in support of his contention and I am unable myself to see how an order of this nature can have the force of a decree, and I would therefore hold that for the purposes of Court-fees, an appeal from an order under S. 104 (f), Civil P C., would be governed by Art. 11, Sch. 2, Court-fees Act. In this view I am supported by *Sarwan Pande* v. *Jagat Pande* (5). At p. 316 [103 *I. C.*] their Lordships say:

> In our judgment the Court below was wrong in holding that the memorandum of appeal was not sufficiently stamped. It is to be noted that an appeal is allowed by S. 104 (f), Civil P C., against an order filing or refusing to file an award without the intervention of the Court. That being so, the present applicant was entitled to file an appeal against the order of the learned munsif by which he ordered the award to be made a rule of the Court. The appeal being against an order the requisite Court-fee stamp was of eight annas and the memorandum of appeal being stamped with a Court-fee stamps of that value, was sufficiently stamped and the appeal cought to have been heard on the merit

(5) A. I. R. 1927 All. 771=103 I. C. 315.

I would therefore disallow the preliminary objection and holding that the memo. of appeal is sufficiently stamped proceed to hear the case on the merits.

Turning to the merits of the case: Mr. Sardha Ram for the plaintiff Agya Singh contended that the agreement to refer to arbitration dated 20th May 1925, did not contain any reference to matters which the arbitrator decided, namely, the question as to what contracts were joint, and what were not joint was not referred to the arbitrator, nor was the question as to the immovable property of the partnership. The agreement to refer is to be found translated at p. 5 of the printed paper-book from line 14 to line 22 This translation, Mr. Sardha Ram has admitted to be correct. A reference to this shows that the terms of reference were very wide. It recites that the parties to this appeal had been carrying on work as contractors in partnership for a considerable period, and had decided to end the partnership business but that for certain reasons, not given, they were unable to dissolve the partnership amicably. They therefore referred their mutual disputes which related to the settlement of partnership accounts to Sardar Bahadur Singh, Sub-Divisional Officer, who was to be the sole arbitrator and whose decision on the matter was to be binding on both.

It appears that the arbitrator went into the question as to whether certain contracts were partnership contracts or not, and also dealt with certain immovable properties which he found belonged to the partnership. It appears to me that there was nothing either irregular or improper in what the arbitrator did. In order to arrive at a proper settlement of the partnership accounts it seems to me that it was necessary for the arbitrator to ascertain first what the assets and liabilities of the partnership actually were, and in order to discover this it was obviously necessary for him to decide any dispute that might arise during the course of his investigation into the partnership affairs as to whether or not any particular contract or property belonged to and formed part of the partnership assets. In this view I am supported by *Sham Lal* v.

Parshotam Das (6). I would therefore hold that there is no force in this objection and that the agreement to refer to the arbitrator, the settlement of the partnership accounts necessarily included a reference of all the disputes that might arise during the arbitration proceedings as to what property was to be taken into account. Had there been any moneys belonging to the partnership in banks or deposited with other persons, it is obvious they would have been and ought to have been included in the distribution, and therefore I consider that the arbitrator rightly included in his distribution the immovable property which admittedly belonged to the partnership.

Next it was urged that the arbitrator had been guilty of corruption. This matter was put in issue and decided against the appellant by the Court below. The charge of corruption is based on the fact that while the award was given on 15th July 1925, the arbitrator had on 29th June 1925, deposited a sum of Rs. 20,000 in the Punjab Sind Bank at Amritsar. Admittedly there is no direct connexion between this deposit and any malpractice on the part of the arbitrator. We are, however, asked to presume that this payment was the result of a bribe or illegal remuneration given to him by the respondent. It has not been pointed out to us that the arbitrator had no private means of his own, and I think it would be unfair to raise the presumption contended for.

Next it was urged that the award was bad for want of finality, inasmuch as by Cl. 5 of the award the appellant was directed to transfer or endorse the separate title-deeds and documents and other valuable securities in favour of the respondent. It was contended that the arbitrator should have drawn up a list of all the documents referred to. Inasmuch as the arbitrator decided, rightly or wrongly, that the respondent was entitled to all the properties represented by these title-deeds and valuable securities and, as far as can be made out from the arguments advanced at the Bar, there is no doubt as to what these title-deeds and valuable securities actually were, I am unable to see that the award is bad on this account. If, in the course of the execution of the decree passed in terms of the award any question arises as to whether or not a particular title-deed refers to property which belongs to the partnership the question can be settled by the executing Court. The decree itself would to my mind be specific enough

Finally it was urged that the arbitrator was wrong in administering a special oath to the respondent. It appears that the oath was administered at the instance of the appellant and this objection therefore scarcely appears to be within his powers. In any event the arbitrator has solemnly stated as a witness that the oath was administered at the instance of the appellant, that the statement was made by the respondent on oath as required by the appellant and he filed the record of the statement made which he said had been signed by both appellant and respondent. The appellant went into the witness-box after the arbitrator had given his evidence and did not deny his signature nor contradict the arbitrator's statement. I must therefore hold that there is no substance in this objection. I would therefore dismiss this appeal with costs.

Jai Lal, J.—I agree.

D.D. *Appeal dismissed.*

(6) [1920] 42 All. 277=58 I. C. 585=18 A. L. J. 241.

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* A. I. R. 1928 Lahore 140

ADDISON AND COLDSTREAM, JJ.

Sant Singh—Plaintiff—Petitioner.

v.

Mubarak Singh nnd *others* — Defendants—Respondents.

Civil Revn. No. 35 of 1926, Decided on 14th November 1927, from decree of Sr. Sub-Judge, Rawalpindi, D/- 2nd April 1925.

* *Civil P. C., S. 115 (c) — Court deciding case applying principles of Transfer of Property Act, which is not in force in the Punjab does not act with material irregularity.*

Where the lower Court distinctly stated that the Transfer of Property Act was not in force in the Punjab but it proceeded to apply the principles of Ss. 130 and 131, T. P. Act, to the case as other principles had been followed in the Punjab:

Held: that in doing so it did not act illegally or with material irregularity in the exercise of its jurisdiction: 11 *Cal.* 6 (*P. C.*); 25 *Bom.* 337; and *A. I. R.* 1915 *P. C.* 99, *Rel. on.*

[P 141 C 2]

Gobind Ram Khanna—for Petitioner.

Mubarak Singh by *Parkash Chandra* for *Shamair Chand*—for Respondents.

Addison, J. — Defendant 3 gave Rs. 300 to defendant 1 for payment to

defendant 2. This was in 1919. Defendant 1 did not pay the amount and defendant 3 orally assigned the debt to plaintiff who sued for the amount with interest. The appellate Court applied the principles of the Transfer of property Act which is not in force in the Punjab and held that the oral assignment of the debt was invalid. Against its decree dismissing the suit this revision has been preferred.

The learned Judge who admitted the revision doubted whether interference was warranted by the terms of S. 115, Civil P. C. but since a similar case *Teja Singh* v. *Kalyan Das Chet Ram* (1) had been reported, he admitted the petition and directed it to be heard by a Division Bench.

It was held in *Teja Singh* v. *Kalyan Das Chet Ram* (1) that although the equitable principles underlying the Transfer of Property Act are followed in the Punjab, the Act itself with its technicalities does not apply and and an oral assignment of a debt for consideration is consequently not invalid. There was practically no discussion of the question whether the order could be revised under S. 115, Civil P. C. All that was said by the learned Judge in chambers was that the Subordinate Judge committed an irregularity in relying upon that Act to dismiss on a purely technical point a claim which he otherwise held to be just and equitable.

Most of the cases cited before us had reference to the refusal of jurisdiction or the assumption of jurisdiction by a Court. These fall within Sub-Cls. (a) and (b), S. 115. It was admitted that, if a revision lay in the present case, this would be by virtue of sub-Cl. (c) and not sub-Cl. (a) or sub-Cl. (b). It has, therefore, to be decided whether the appellate Court acted in the exercise of its jurisdiction illegally or with material irregularity. It was further admitted that where a Court has jurisdiction to determine a question and it has determined that question it cannot be said to have acted illegally or with material irregularity because it has come to an erroneous decision either in fact or in law; but it was argued that the appellate Court acted illegally in the exercise of its jurisdiction in relying upon the principles of an Act which was not in force in the Punjab.

(1) A. I. R. 1925 Lah. 575=6 Lah. 487.

The leading case on the subject is *Amir Hasan Khan* v. *Sheo Baksh Singh* (2). This was a decision under sub-Cl. (c). Their Lordships of the Privy Council said:

> The question then is: Did the Judges of the lower Courts in this case in the exercise of their jurisdiction act illegally or with material irregularity? It appears that they had perfect jurisdiction to decide the question which was before them namely, whether the suit was barred as resjudicata and they did decide it. Whether they decided it rightly or wrongly they had jurisdiction to decide the case; and even if they decided it wrongly they did not exercise their jurisdiction illegally or with material irregularity.

It is clear from this decision that erroneous decisions in law or fact do not come within the purview of S. 115, Civil P. C. Another decision of their Lordships is *Malkarjan* v. *Narhari* (3) where it was said:

> It (the lower Court) made a sad mistake, it is true, but a Court has jurisdiction to decide wrong as well as right.

The latter decision was approved by their Lordships of the Privy Council in *Rajwant Prasad Pande* v. *Ram Ratan Gir* (4).

There are decisions of the various High Courts on this question which appear to be difficult to reconcile. No useful purpose will be served by referring to them, as the leading authorities of the Privy Council are set out above.

There are numerous decisions of this Court in which different principles of the Transfer of the Property Act have been applied although the Act is not in force in the Punjab. The appellate Court in the present case has distinctly stated that the Act was not in force, but it proceeded to apply the principles of Ss. 130 and 131, T. P. Act as other principles had been followed in the Punjab. The only question is whether in doing so it acted illegally or with material irregularity in the exercise of its jurisdiction. I do not think so. The appellate Court was the final authority to decide the question before it and it had jurisdiction to decide it. This is not a case where the appellate Court deliberately refused to follow a decision of this Court for *Teja Singh* v. *Kalyan Das Chet Ram* (1) had not been decided when it gave its decision. It had jurisdiction to decide the question

(2) [1885] 11 Cal. 6=11 I. A. 237 (P. C.).
(3) [1901] 25 Bom. 337=27 I. A. 216=7 Sar. 739 (P. C.).
(4) A. I. R. 1915 P. C. 99=37 All. 485=42 I. A. 171 (P. C.).

whether the oral assignment of the debt was invalid and, if it erroneously decided it it cannot be said to have acted illegally or with material irregularity in the exercise of its jurisdiction. It had jurisdiction to decide wrong as well as right and its decision cannot be challenged in revision. In my judgment, therefore, no revision lies and I would dismiss the petition with costs.

Coldstream, J.—I agree.

D.D. *Petition dismissed.*

A. I. R. 1928 Lahore 142

FFORDE AND ADDISON, JJ.

Imam-ud-Din and *another* — Defendants—Appellants.

v.

Sri Ram Perbhu Dial — Plaintiff—Respondent.

First Appeal No. 2996 of 1922, Decided on 11th May 1927, from the decree of Sr. Sub-Judge., Ferozepore, D/- 26th August 1922.

(a) *Civil P. C., O.13, Rr. 4 and 5—Rules not complied with—What documents were considered by lower Court not clear—Case was remanded.*

Where the Judge who tried the case omitted to comply in any way whatsoever with the requirements of law laid down in O. 13, Rr. 4 and 5, and consequently it became impossible to say what documents the trial Court admitted in evidence and what documents or portions of documents had been taken into consideration by the trial Judge in arriving at his conclusions:

Held : that although no objection was raised in the grounds of appeal to the course adopted, the proper course was to remand the case for proper trial. [P 142 C 2]

(b) *Civil P. C., O. 13, Rr. 4 and 5—Provisions must be strictly complied with—Counsel on the opposite party must see that the Judge endorses as required by law.*

The trial Judge must strictly comply with the provisions of O. 13, Rr. 4 and 5, Civil P. C., in dealing with the documentary evidence. It is the duty of the counsel engaged in a case to see that the documentary evidence which he relies upon is properly tendered in Court and proved, and he should also see that, when admitted in evidence, the Judge places upon it the endorsement required by O. 13, Rr. 4 and 5, Civil P. C. [P 143 C 1]

Kishan Diyal and *Bishan Narain*—for Appellants.

Fakir Chand and *Jagan Nath Aggarwal*—for Respondent.

Fforde, J— After this appeal had been opened by counsel for the appellants it became apparent that none of the documents upon the strength of which the plaintiff's claim has been decreed had been legally tendered in evidence. Not a single document bears the endorsement which is required by O. 13, Rr. 4 and 5, Civil P. C. Some of the documents bear an endorsement to the effect that they were admitted in evidence, but the date shows that they were so admitted before the case proceeded to trial. Other documents bear an exhibit number and the initials of the Judge, but none of the other requirements of O. 13, R. 4, have been complied with. Other documents bear exhibit numbers only, and a fourth class bear neither an exhibit number nor any endorsement of any kind whatsoever.

The plaintiff's case depends almost entirely upon documentary evidence, but in no instance does he appear to have even attempted to produce the documents in question in Court at the proper time, and the Judge who tried the case has omitted to comply in any way whatsoever with the requirements of law laid down in O. 13, Rr. 4 and 5. It is true that the appellants did not raise this objection in their grounds of appeal ; but the difficulty that we are confronted with is a substantial one, inasmuch as it is impossible for us to say what documents the trial Court has admitted in evidence, and what documents or portions of documents have been taken into consideration by the trial Judge in arriving at his conclusions. In almost every instance in which we have been asked to examine a document a controversy has arisen at the Bar as to whether or not that particular piece of evidence was ever produced or considered. Under these circumstances it is obvious that this appeal could not possibly be decided upon the material which is before us. The Judge who wrote the judgment in this case has not attempted to weigh the evidence in a manner which will enable us to see how he has come to his conclusions. He has set out the names of a number of witnesses and stated the effect of their testimony without attempting to show what their evidence is, or what is the documentary matter which is supposed to have supported the statements which they made in Court. Counsel are not prepared to agree that we should deal with the whole of the documents before

us as though such documents had been properly admitted in evidence and, indeed, it would be hard for any such agreement to be arrived at in view of the extremely confused manner in which this material has been placed upon the record. Under these circumstances we most reluctantly feel coerced to send this case back for a proper trial and for a proper judgment. It is unfortunate that a case, which was instituted so far back as 21st of August 1920, should have to be remanded for a fresh trial simply because the trial Judge has failed to comply with the most material requirements of the Civil Procedure Code. For the above reasons we must accept this appeal and under our inherent powers remand the case to the trial Court for a proper trial. In doing so we desire to draw the trial Judge's attention to the necessity for strictly complying with the provisions of O. 13, Rr. 4 and 5, Civil P. C., in dealing with the documentary evidence. We might also point out that it is the duty of the counsel engaged in a case to see that the documentary evidence which he relies upon is properly tendered in Court and proved, and he should also see that, when admitted in evidence, the Judge places upon it the endorsement required by O. 13, Rr. 4 and 5, Civil P. C. Costs in the trial Court up to date and in this Court shall abide the event.

N.K. *Case remanded.*

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*A. I. R. 1928 Lahore 143

HARRISON, J.

Rahmat Ali Shah and *another*—Judgment-debtors—Appellants.

v.

Rikhi Kesh—Decree-holder—Respondent.

Misc. Second Appeal No. 1302 of 1927, Decided on 24th November 1927, from order of Dist. Judge, Amritsar, D/- 1st February 1927.

Civil P. C., Ss. 47 and 144 — Appellate Court varying judgment of lower Court—Lower Court's decree actually executed—Application for restitution—No ad valorem fee need be paid —Court-fees Act, Sch. 2. Art, 11—Civil P. C., S. 144.

Applications under S. 47 and 144 are classed together when referred to in S. 2 of the Code and are obviously kindred and similar applications though there is a real distinction that when a decree has been actually executed and the property has passed, the application is of the nature of an application to recover possession. It is in consequence of the decree passed by the appellate Court that the application is made under S. 144 and it is in a sense a mere accident that because the decree has been fully executed, the petitioner is prevented from coming to the Court under S. 47 and is compelled to take action under S. 144, Civil P. C. It would be most inequitable that he should be penalised by being forced to stamp his application ad valorem: 40 *Mad.* 780 and 41 *Bom.* 625, *Ref*; *A. I. R.* 1921 *Bom.* 67, *Foll.*; *A. I. R.* 1922 *All.* 223, *Ref*; *A. I. R.* 1925 *All.* 137. and *A. I. R.* 1925 *Patna* 1, *Ref.*

[P 143 C 2, P 144 C 1]

Dev Raj Sawhney—for Respondent.

Judgment.—The first point to be decided is whether this appeal has been correctly stamped with Rs. 4 as a miscellaneous appeal. Counsel for the respondent contends that the application being one under S. 144, Civil P. C., for restitution, in consequence of the judgment of this Court having varied the judgment of the District Judge, which had been actually executed at the time, the stamp should be ad valorem, and he relies upon *Jiwa Ram* v. *Nand Ram* (1), *Baijnath Das* v. *Balmakund* (2), and *Balmukund Marwari* v. *Basanta Kumari Dasi* (3), while on the other side in *Somasundaram Pillai* v. *Chokalingam Pillai* (4), *Kurgodigowda* v. *Lingam Gouda* (5). and *Hamid Ali* v. *Ahmed Ali* (6), the contrary view has been taken. In *Hamid Ali* v *Ahmed Ali* (6) the Full Bench decision of the Patna Court was considered and dissented from. The learned District Judge has followed that view and, after considering all the authorities, I find that I cannot agree with him. Applications under Ss. 47 and 144 are classed together when referred to in S. 2 of the Code and are obviously kindred and similar applications though there is a real distinction that when a decree has been actually executed and the property has passed, the application is of the nature of an application to recover possession. It is in consequence of the decree passed by the High Court that the application is made under S. 144 and and it is in a sense a mere accident that because the decree has been fully executed the petitioner is prevented from coming to the Court under S. 47 and is

(1) A. I. R. 1922 All. 223=14 All. 407.
(2) A. I R. 1925 All. 137=17 All. 98.
(3) A. I. R. 1925 Patna 1=3 Patna 371.(F. B.)
(4) [1917] 40 Mad. 780=38 I. C. 806=5 M. L. W. 267.
(5) [1917] 41 Bom. 625=41 I.C. 238=19 Bom. L. R. 638.
(6) A. I. R. 1921 Bom. 67=45 Bom. 1137.

compelled to take action under S. 144, Civil P. C. It would be most inequitable that he should be penalized by being forced to stamp his application ad valorem, and adopting the reasoning contained in 45 *Bom.* 1137, I find that the application has been duly stamped and I direct that the amount paid in excess in the District Court be refunded.

The respondent then takes a second preliminary objection that the decision of the learned District Judge contains a finding of fact on the only point agitated and the appeal does not lie. It is unnecessary to give a history of the previous litigation between the parties and it is sufficient to say that the question of whether the petitioner had been in possession at a certain time of a portion of a house, which is the subject-matter of dispute, was left open at the time the appeal was decided by this Court though it was held that he was certainly not a tenant. The finding of the District Judge is that he has failed to establish that he was in possession of any part of the house. He says:

I therefore agree with the lower Court on the facts and find that Rahmat Ali was not in possession of any portion of the house and is not entitled to restitution.

This finding cannot be challenged in second appeal. I dismiss the appeal with costs.

S.J. *Appeal dismissed.*

A. I. R. 1928 Lahore 144

BROADWAY AND ZAFAR ALI, JJ.

Emperor—Appellant.

v.

Ahmad and *others*—Accused—Respondents.

Criminal Appeal No. 600 of 1927, Decided on 3rd November 1927, from order of Sess. Judge, Attock, at Campbellpur, D/- 23rd February 1927.

(a) *Penal Code, S. 402—Accused assembled together on the night of dacoity—Two of them armed with revolvers and one with spear—Accused were held guilty under S. 402.*

Where the accused, three of whom were residents of another village, assembled on the night of the dacoity under a shisham tree, outside a village and two of them were armed with revolvers and one with a spear :

Held : that the accused committed an offence falling within the purview of S. 402, I. P. C. : 37 *P. W. R.* 1916 *Cr., Foll.* [P 144 C 2]

(b) *Criminal P. C., S. 162—Reference to statements made before police to contradict prosecution witnesses—Statements not proved and their copies not given to accused—Procedure is erroneous.*

Reference by a Magistrate to statements made by a witness before the police with a view to contradict prosecution witness is entirely erroneous when the statements were not given to the accused persons on trial and no attempt was made to prove them. [P 145 C 2]

Mackay for *Govt. Advocate*—for the Crown.

Ali Hussain Khan—for Respondents.

Judgment.—It appears that the police of the Attock District received information that certain dacoits were collecting to commit a dacoity at Dhok Baju Dakhli Kariman. The names of the dacoits were also known. Accordingly arrangements were made to prevent the commission of the dacoity and a police guard was sent out to render assistance to the villagers. This was on 23rd October 1926. The house which was to be dacoited belonged to one Dosa, a man of doubtful character himself who was shown on Register No. 10. He lived in Dhok Baju and he, together with Fakir Muhammad, was deputed by the lambardars to meet the police guard which was coming under the command of Raja Khan, Head Constable, from Campbellpur. Raja Khan was accompanied by Khan Bahadur lambardar and as they neared Dhok Baju certain men were seen at a distance. Raja Khan sent Khan Bahadur on to reconnoitre and to ascertain who those persons were. Khan Bahadur went on and found five persons seated in a depression under a shisham tree just outside Dhok Baju. He questioned them and was beaten by one of them as well as threatened by another. While he was with them Dosa and Fakir Muhammad arrived on the scene. These two, seeing the lambardar, at first did not realize that the other persons present were dacoits, but as soon as they realized this fact all three of them went off and joined Raja Khan and his policemen who were told that the men in question were dacoits. Raja Khan then moved his force nearer to these persons in order to intercept them. The dacoits fired at the police force, but, as they were armed with revolvers only, the police and villagers sustained no casualties. The police returned the fire with the result that one at least of the dacoits received a bullet

wound. The dacoits, however, succeeded in effecting their escape and the matter was reported to the police station in due course.

An investigation followed, and as the names of the five persons were known steps were taken to arrest them. The persons so arrested were Wali, Ahmad, Mehmad, Bakhsha and Mirza. Ahmad and Mehmad are brothers and these two with Bakhsha were arrested together, on 27th October 1926, at Maira Badia. They reside in another village Chhokar in the Rawalpindi District. Their arrest was effected in the courtyard of the house of the sister of Ahmed and Mehmad. Mirza was also arrested and found to have received a bullet wound in his wrist. Wali was granted a pardon and these four persons together with three others were sent up for trial charged under Ss. 399 and 402, I. P. C.

At the completion of the trial the assessors were unanimously of opinion that the case for the prosecution was correct and that all the persons sent up for trial were guilty. They accept the statement of Warl as true. The learned Sessions Judge, however, took a different view. He came to the conclusion that the testimony of Wali was unreliable and that the witnesses, who claimed to have identified the four persons named above, were not reliable. He accordingly acquitted all the seven persons who were arraigned before him.

Against this acquittal the Local Government has preferred an appeal under S. 417, Criminal P. C., in the cases of Ahmed, Mehmad, Bakhsha and Mirza, and after hearing Mr. Mackay for the Crown and Mr. Ali Hussain Khan for the respondents, in my judgment the verdict of the assessors *qua* these four persons was the correct one.

The learned Sessions Judge has recorded a lengthy and detailed judgment in which his reasons for disbelieving the approver are set out in detail. I do not think it necessary to discuss those reasons as, in my opinion, the weight to be attached to them is very considerably reduced by the fact that the learned Sessions Judge appears to have overlooked the fact that Mirza, who undoubtedly was injured by a gun hot wound and according to Lieutenant-Colonel Corry, I. M. S., Civil Surgeon by a 303 bullet, distinctly mentions the presence of Wali on the scene. It is true that Mirza denied having been at Dhok Baju for the purpose of committing a dacoity and told a story to account for his presence there, but after a careful examination of that story it seems to me that it is one that is wholly incredible. To a large extent it is based on enmity not with the police, but with a certain lambardar. Nevertheless that enmity has not been established and as held by the learned Sessions Judge, the police cannot be said in this case to have lent themselves to any fabrication.

To my mind the case rests almost entirely on the testimony of Dosa, Fakir Muhammad and Khan Bahadur. These are the three witnesses who actually saw and spoke to the dacoits on that occasion. Subsequently to the arrest of these respondents an identification parade was held under the auspices of a Magistrate of the First Class. The Magistrate has been produced as a witness and has described the steps taken by him to ensure the correctness and fairness of the identification. After consideration of his testimony I have no reason whatever to think that the witnesses had any opportunity given them to see the persons to be identified prior to the parade. Indeed none of the respondents alleged that they were shown to these persons. At this parade Dosa and Fakir Muhammad identified all four of the respondents while Khan Bahadur lambardar identified Bakhsha and Mirza alone. Now, Khan Bahadur's statement that he was sent on to reconnoitre by Raja Khan is supported by Raja Khan himself, and there is no reason to doubt the veracity of these two witnesses. Khan Bahadur says that when he arrived at the spot he found these five persons there among whom he recognized Wali as a man he already knew. None of the other four were known to him. One of the dacoits slapped him and another searched his person. He identified Bakhsha and Mirza because it was these two who slapped him and searched his person. The evidence of these witnesses, which I consider credible leaves no room for doubt as to the presence of these four, together with Wali under the shisham tree on the night in question. They corroborate very materially the statement of Wali whose evidence as far as it refers to these men appears to be perfectly clear and above suspicion.

It is true that the learned Sessions Judge refers to certain discrepancies between the statement made by Wali in Court and certain statements made by him in the course of the police investigation. It was contended, and I think rightly contended, by the learned counsel for the Crown, that the learned Sessions Judge's action in referring to statements made before the police with a view to contradict prosecution witnesses was entirely erroneous. The procedure is a simple one and it is clear that in this case that procedure was not carried out. Copies of the statements do not appear to have been given to the accused persons on trial, and certainly no attempt has been made to prove any statement made to the police by Wali and any of the other witnesses. It is clear, therefore, that references to those statements were irregular and ought not to have been made. Wali was seen by Khan, Bahadur, lambardar, with the respondents on the night in question and Wali was known to that witness. Wali later on produced a revolver and it is a curious feature in the case that Mirza, in setting up a story to explain his presence there, not only admits Wali's presence, but definitely admits that Wali was armed with a revolver. So far as Mirza is concerned that is a very strong corroboration of his (Wali's) statement. In my judgment the statements of Dosa, Fakir Muhammad and Khan Bahadur offer sufficient corroboration of Wali's statement as against these four respondents.

There is, however, further corroboration as regards Ahmed and Bakhsha. Ahmed was instrumental in producing a revolver in the course of the investigation. This revolver he had placed in the custody of Mt. Mukhi. Ahmed took the police to this woman's house and had the revolver produced. According to Wali, Ahmed was on the night in question armed with a revolver. Again Bakhsha was said by Wali to have had a spear and in the course of the investigation, Bakhsha produced a spear-head. There is thus ample corroboration of the approver's story qua these two respondents, and I am unable to agree with the learned Sessions Judge's comments as to the evidence relating to the recovery of these articles.

In the case of Mehmad it appears that he was said to have received an injury on his thigh. He was examined by Lieutenant Colonel Corry, and that witness found a small injury on the thigh, which, he says, could not possibly have been caused by a 303 bullet but might have been caused by such a bullet having first hit a stone and being splintered and one of splinters entering the body of Mehmad. He advised a skiagram to be taken, but the prosecution failed to comply with the suggestion. No steps appear to have been taken to recover the trousers that Mehmad was wearing on the occasion which must have been pierced through to cause the injury, had that injury been due to a gunshot wound as alleged. Mehmad himself says that he received this very slight injury some fifteen days before when he was playing kabaddi. Whether his account is correct or not, I consider that the learned Sessions Judge is right in thinking that the prosecution have failed to prove that Mehmad received any injury on the night in question. Against him, however, there is the testimony of Dosa and Fakir Muhammad already referred to, which, to my mind sufficiently corroborates the approver's story.

I would hold, therefore, that it has been proved beyond any reasonable doubt that these four persons along with Wali assembled on the night of 23rd October 1926 under a shisham tree at Dhok Baju, that two of them at any rate were armed with revolvers and one at least was armed with a spear. Ahmed Mehmad and Bakhsha are residents of Rawalpindi District, and their presence on the occasion requires considerable explanation. The reason for their presence at that place on the night in question has been given by the approver, and his evidence, having been so materially corroborated in other particulars, I have no hesitation in accepting his statement as to the object with which he and these other persons assembled at the spot on the night in question. In these circumstances, I consider that all the four respondents committed an offence falling within the purview of S. 402, I. P. C. In this I am supported by the decision of Mr. Justice Shadi Lal in *Karmun* v. *Emperor* (1). I would, therefore, accept this appeal and convict Ahmed, Mehmad, Bakhsha and

(1) [1916] 6 P. R. 1916 Cr.=34 I. C. 1000=37 P. W. R. 1916 Cr.

Mirza under S. 402, I. P. C., and sentence each of them to undergo rigorous imprisonment for a period of seven years.

S.J. *Appeal accepted.*

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* A. I. R. 1928 Lahore 147

TEK CHAND, J.

Hansa and *others*—Plaintiffs—Appellants.

v.

Ramlok and *others*—Defendants—Respondents.

Second Appeal No. 957 of 1927, Decided on 10th November 1927, from decree of Dist.-Judge, Hoshiarpur, D/- 1st February 1927.

* *Transfer of Property Act, S. 75—Possessory mortgage—Adverse possession for more than 12 years of a portion of mortgaged property by a trespasser who also asserts his right to it—Title is indefeasible against both the mortgagee and mortgagor.*

Adverse possession against a mortgagee is generally ineffectual against the mortgagor, especially when it begins at a time when the mortgagee is in possession but when a trespasser takes possession of the mortgaged property and asserts a title which is hostile not only to the mortgagee but which also assails the title of the mortgagor and the mortgagor allows 12 years to elapse, the title of the trespasser will become indefeasible not only against the mortgagee but also against the mortgagor 6 *P. R.* 1898 and *A. I. R.* 1925 *Bom.* 465, *Dist.*; *Marquis of Chalmondeley* v. *Lord Clinton* : 22 *R. R.* 84, *Foll.* 6 *C. W. N.* 601, *Ref. to.*

[P 147 C 2, P 148 C 1]

Fakir Chand—for Appellants.

Gullu Ram—for Respondents.

Judgment. — The land in dispute covers an area of 12 marlas, which was in the settlement of 1884-85 a part of Khasra No. 824, the total area of which was then 5 kanals 5 marlas and which was shown as barani agricultural land. By mutation dated 7th August 1884, Bhola etc. Brahmins owners of this Khasra No. 824, mortgaged it along with land in several other khasra numbers to Dhanna Saini. The mortgage was a possessory one and it is admitted that the mortgagees actually got possession of the entire mortgaged property, including the 12 marlas, now in dispute. In 1891 one Nandu Sadh, caste Chamar, got possession of this plot of 12 marlas and built a dharamasala on it. In the jamabandi of that year, in the cultivation column the land was shown in possession of Nandu, non-occupancy tenant, and in the kafiat column it was stated that no rent was charged as the land was dharamarth. This entry continued till 1907-08. In 1911-12, at the time of the new settlement this plot of 12 marlas was included in the abadi deh and described as a part of Khasra No. 1124, which was the abadi of chamars and was shown as being in their possession.

In 1905 the descendants of the original mortgagors sued the descendants of the original mortgagees for possession of the entire mortgaged property, including these 12 marlas and obtained a decree. But as this particular plot was in possession of the successors-in-interest of Nandu Chamar who had not been impleaded in that litigation, they refused to surrender possession of the land to the mortgagors. The present suit was accordingly instituted on the 21st May 1925, by the mortgagors against Ram Lok, etc, Chamars who had been in possession of this land since the death of their guru Nandu. The suit was decreed by the trial Court, but on appeal by the defendants has been dismissed by the learned District Judge. The sole question argued before me is whether the possession of the Chamars has been adverse not only against the mortgagees but also against the mortgagors. Mr. Fakir Chand for the appellants has contended that as the mortgage was with possession and the mortgagees had actually entered into possession of the property in 1884, the act of the Chamars in taking possession of the land in 1891 might be adverse against the mortgagees, but can under no circumstances be adverse against the mortgagors. In support of his contention the learned counsel has relied on *Khanu Mal* v. *Khan Muhammad* (1) and *Tarabai* v. *Data Ram* (2). The facts of those cases, however, are wholly distinguishable from those of the present case. It is no doubt true that as a general rule adverse possession against a mortgagee is ineffectual against the mortgagor, especially when it began at a time when the mortgagee was in possession, but when a trespasser takes possession of the mortgaged property and asserts a title, which is hostile not only to the mortgagee but which also assails the title of the mortgagor, and the mortgagor allows 12 years to elapse, the title of the tres-

(1) [1894] 6 P. R. 1898.
(2) A. I. R. 1925 Bom. 465=49 Bom. 539.

passer will become indefeasible not only against the mortgagee but also against the mortgagor. I cannot assent to the contention put forward by Mr. Fakir Chand that in a possessory mortgage, so long as the mortgagor is entitled only to the equity of redemption there can be no invasion of his interest, and in such a case it is not legally possible for a stranger to acquire an adverse title against him. The question was considered at great length as long ago as 1820 in the great case of the *Marquis of Chalmondeley* v. *Lord Clinton* (3) where Sir T. Plumer, M. R. held that

an equity of redemption, in common with other equitable estates in land is capable of being extinguished by the operation of the statute of limitation.

On appeal this view was affirmed in the House of Lords where Lord Eldon, L. C. enunciated the principle that

adverse possession of an equity of redemption for 20 years was a bar to another person claiming the same equity of redemption.

Reference may also be made in this connexion to the case of *Khanoo Lal* v. *Mt. Manki Bibi* (4) *Hubdar Khan* v. *Gajadhar Chaube* (5) and the remarks of Macleod C. J. at p. 546 [of 49 *Bom. Ed.*] of the recent case of *Tarabai* v. *Dataram* (2) which was cited by Mr. Fakir Chand himself.

In this case, as has already been pointed out, Nandu Chamar took possession of the land in 1891, changed its character from agricultural land to religious property, and constructed a dharamsala upon it. From the report of the local commissioner it appears that this dharamsala and the appurtenant land has descended from him to his chelas Ram Lok, etc, defendants. Now Nandu, by constructing the dharamsala not only denied the title of the mortgagee, but also that of the, mortgagor and asserted a hostile title to both. In addition to this in 1911-12 the name of the mortgagor was removed from the revenue papers and this plot was included in Khasra No. 1124 described as abadi chamaran and in the possession of the latter as owners. These facts leave no doubt that the title openly set up by the respondents in 1891, was hostile both to the mortgagors and the mortgagees and by lapse of time the rights of the mortgagors in the equity of redemption have become extinct.

Mr. Fakir Chand has relied upon the entry in the jamabandi of 1891-92 where Nandu is entered in the "cultivation" column as a non-occupancy tenant. But it is well known that persons who take possession without any title are shown in the "cultivation" column as non-occupancy tenants so long as changes in the proprietary columns are not made by mutation. Entries in the "Cultivation" column are always to be read along with those in the kafiat column, and reading the two together no doubt is left that Nandu did not hold the land under the mortgagees in 1891 or subsequent years.

This being my view of the facts of this case and the law applicable thereto, I am of opinion that the learned District Judge came to a correct conclusion in dismissing the plaintiffs' suit. The appeal fails and is accordingly dismissed with costs.

S.J. *Appeal dismissed.*

(3) 22 R. R. 84.
(4) [1902] 6 C. W. N. 601.
(5) [1914] 17 O. C. 294=25 I. C. 600.

A. I. R. 1928 Lahore 148

TEK CHAND, J.

Kanwar Ram—Plaintiff—Petitioner.

v.

Ghugi and *others*—Defendants — Respondents.

Civil Revn. No. 21 of 1927, Decided on 30th November 1927, from decree of Senior Sub-Judge, Ludhiana, D/- 12th October 1926.

• (a) *Transfer of Property Act, S. 1—Act not in force in the Punjab — Equitable principles followed —. Litigant shall not rely on technical rules contained in the sections.*

The Transfer of Property Act is not in force in the Punjab and though the Courts of the Province sometimes follow the equitable principles of common law which have been embodied in certain sections of the Act, the technical rules contained in that Act cannot be relied upon by any litigant in the Pu jab, and therefore deeds in the Punjab need not be executed or attested according to the formalities required by the Transfer of Property Act ; *A. I. R.* 1925 *Lah.* 575 and *A.I.R.* 1925 *Lah.* 92, *Ref.* [P 149 C 2]

(b) *Evidence Act, S.* 68 — *Transfer of Property Act not in force in the Punjab—Bahi entry need not be attested — S.* 68 *therefore does not apply.*

Section. 68 applies only to cases where a document is required to be attested. There is no rule of law in force in the Punjab which requires

bahi entry to be attested at all. S. 68 has therefore no applicability to such a document. [P 149 C 2]

Fakir Chand –for Petitioner.

Arjan Das - for Respondents.

Judgment.—The plaintiff petitioner instituted a suit for recovery of a certain sum of money alleged to be due on foot of an entry in the plaintiff's bahi which was alleged to have been executed by Waryam Singh, the original defendant. The entry was produced in Court and it purported to bear the thumb-impression of the debtor Waryam Singh and to be signed by two witnesses, Rikhi Ram and Sant Ram. Waryam Singh denied execution of the entry as well as receipt of consideration. Necessary issues were framed, but before the case was concluded Waryam Singh died and his heirs and legal representatives were substituted as defendants in his place. The Sub-Judge decreed the suit in full ordering that the decretal amount was recoverable only from the estate of Waryam Singh deceased. The defendants appealed to the Senior Sub-Senior urging two points: first, that execution of the entry in question had not been proved, and secondly, that proper opportunity had not been afforded to the defendants to rebut the evidence led by the plaintiff. The learned Senior Sub-Judge has accepted the defendants' appeal and dismissed the plaintiff's suit. The plaintiff has preferred a petition for revision to this Court and I have heard Mr. Faqir Chand on his behalf and Mr. Arjan Das for the defendants respondents.

The sole ground on which the learned Senior Sub-Judge has dismissed the suit is that the execution of the document has not been proved because the plaintiff, who is the alleged writer of this entry, did not enter on the document that he was its scribe and the attesting witness Sant Ram signed it without seeing the execution. In holding that on these facts the execution of the document was not proved the learned Judge has relied upon five rulings which are mentioned in his judgment. All these rulings, however, relate to cases decided in provinces where the Transfer of Property Act is in force. In four of them the question was whether the deeds in question had been executed and attested in accordance with the provisions of S. 59, T. P. Act, and in the fifth the document was a deed of gift which was required to be executed and attested in the manner prescribed in S. 123 of that Act. Now it is well known that the Transfer of Property Act is not in force in the Punjab and though the Courts of this province sometimes follow the equitable principles of common law which have been embodied in certain sections of the Act, it has been held over and over again that the technical rules contained in it cannot be relied upon by any litigant in this province. Reference may in this connexion be made to *Teja Singh* v. *Kalyan Das Chet Ram* (1) and *Dula Singh* v. *Bela Singh* (2) It is conceded for the respondent that deeds in this province need not be executed or attested according to the formalities required by the Transfer of Property Act. One of the rulings referred to by the learned Judge refers to S. 68, Evidence Act, but that section applies only to cases where a document is required by law to be attested. There is no rule of law in force in the Punjab which requires a bahi entry of this kind to be attested at all. S. 68 had, therefore, no applicability to this case. The Judge has, therefore, entirely misconceived the position and has acted with material irregularity in holding that execution is not proved.

As to the second point: Mr. Faqir Chand for the petitioner has conceded that the contesting defendants-respondents being minors are entitled to an opportunity to produce evidence in rebuttal of the plaintiff's case. The case must therefore, be sent back to the trial Court for recording the defendants' evidence. As the case is going to be retried the parties may be given opportunity to prove or disprove that the thumb-mark on the bahi entry in question was that of Waryam Singh.

For the foregoing reasons I accept this petition for revision, set aside the decree of the learned Senior Sub-Judge and remand the case under O. 41, R. 23, Civil P. C., for disposal in accordance with law. Costs will abide the event.

N.K. *Case remanded.*

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(1) A.I.R. 1925 Lah. 575.
(2) A.I.R. 1925 Lah. 92.

A. I. R. 1928 Lahore 150

SHADI LAL, C. J., AND BHIDE, J.

Nandu and *others*—Plaintiffs—Appellants.

v.

Jaimal and *another*—Defendants—Respondents.

First Appeal No. 2055 of 1922, Decided on 24th November 1927, from decree of Sr. Sub-Judge, Hissar, D/- 31st May 1922.

(a) *Landlord and Tenant—Shamilat land—Entry in previous wojib-ul-arz as to its impartibility—Landlord's suit for its partition cannot be allowed.*

Where the wajib-ul-arzes of a village of 1854, 1882 and 1901-02 contained a condition that the shamilat land of the village should not be partitioned, but the condition was absent from the wajib-ul-arz of 1921, which did not expressly say that the lands in dispute will hereafter be subject to partition,

Held: that the condition as regards the impartibility of the shamilat land of the village is still binding. [P 150 C 2, P 151 C 1]

(b) *Landlord and Tenant—Shamilat land.*

A suit by landlords for the partition of shamilat land of a village is cognizable by a civil Court: 144 *P.R.* 1907, *Foll.*; *A.I.R.* 1922 *Lah.* 88, *Dist.* [P 151 C 1]

N. C. Pandit—for Appellants.

Nand Lal and *A. R. Kapur*—for Respondents.

Bhide, J.—Civil Appeal No. 2055 of 1922 and Civil Appeal No. 1058 of 1923 arise out of suits by the occupancy tenants of the village Ruri, in tahsil Sirsa of the Hisar District, for a declaration that the shamilat land in patti Machhi and patti Harya of that village, of which partition was sought by the proprietors, was reserved for grazing purposes and was not liable to be partitioned. The occupancy tenants relied upon the conditions of the wajib-ul-arz of the settlements of 1854, 1882 and 1901-02, which were in their favour. The learned Senior Subordinate Judge, relying upon a recent extract from the wajib-ul-arz of the settlement (apparently of the year 1921), held that the condition as regards the impartibility of these shamilat lands was no longer in force. He considered, however, that the occupancy tenants were entitled to have areas of 200 and 100 bighas respectively in patti Machhi and patti Harya reserved for grazing purposes in the present circumstances of the patti and granted declaratory decree to this effect only. From this decision the occupancy tenants have appealed in both the suits.

The sole point for decision in these appeals is whether the condition as regards impartibility of the shamilat lands in dispute, which appeared in the wajib-ul-arz of the old settlements was rightly held to be inoperative now. The extract from the wajib-ul-arz of the recent settlement, on which the learned Senior Subordinate Judge, has relied, does not expressly say that the lands in dispute will hereafter be subject to partition. All that can be urged on behalf of the proprietors is that the condition as to impartibility does not appear in the wajib-ul--arz of the settlement of 1921. But this was merely due to the fact that a dispute on the question arose between the parties and the occupancy tenants were referred by the revenue authorities to get the matter settled in a civil Court. The omission of the condition as to impartibility from the wajib-ul-arz of 1921 is, therefore, by itself no evidence of the condition having become inoperative.

It is true that it has been held in some cases that certain agreements embodied in the wajib-ul-arz of a settlement were operative only for the terms of the settlement. But this cannot obviously be taken to be a general proposition, and each case must depend upon the terms of the agreement in dispute. In the year 1901-02, it appears that the unculturable land available for grazing in the village had already become much reduced in area, and the parties concerned agreed that banjar land shall always be excluded from partition and shall continue to be shamilat land set apart for grazing purposes and public good': (vide Ex. P-8, p. 22—27 of the printed paper-book). It will thus appear that the condition in question was not only not restricted to the term of the settlement, but was expressly stated to be operative for all time. It may be stated that the occupancy tenants in this village have substantial rights and pay no malikana. It seems that the agreement referred to above was arrived at for the purpose of safeguarding adequately the rights of the occupancy tenants in respect of pasture lands.

There is no evidence of any subsequent agreement between the parties concerned superseding the agreement of 1901-02. The learned Senior Subordinate Judge has held that the conditions of the village have changed and that 200 and 100 big-

has will be sufficient for the purposes of grazing in patti Machhi and patti Harya respectively. But these figures appear to have been fixed in a somewhat haphazard manner. The number of cattle is apt to vary from time to time and I am not satisfied that the areas set apart by the decrees of the Senior Subordinate Judge will be adequate for the future. In any case the parties concerned are the best judges of their requirements and the agreement arrived at by them in 1901-02, in view of all the circumstances, cannot be lightly ignored. I would therefore hold on the facts of these cases that the condition as regards the impartibility of the shamilat lands in patti Machhi and patti Harya it still binding.

On behalf of the respondents the question of jurisdiction which was raised in the lower Court, was again pressed. The learned Senior Subordinate Judge, has held on the authority of 144 *P. R.* 1907 (1) that the suit is cognizable by a civil Court and this view appears to me to be correct. On behalf of the respondents *I. L. R.* 3. *Lah.* 4 (2) was cited but the facts in the present case appear to be practically on all fours with those in *Sundar* v. *Wazira* (1), which was held to be distinguishable in *Singh Ram* v. *Data Ram* (2).

I would accordingly accept both these appeals and grant plaintiff the reliefs prayed for with costs throughout.

Shadi Lal, C. J.—I concur.

S.J. *Appeals allowed.*

(1) [1907] 144 P. R. 1907.
(2) A. I. R. 1922 Lah. 88=3 Lah. 4.

A. I. R. 1928 Lahore 151

ZAFAR ALI AND DALIP SINGH, JJ.

Ganga Ram—Defendant—Appellant.

v.

Raja Singh and *others*—Plaintiffs—and Defendants—Respondents.

Second Appeal No. 2397 of 1922, Decided on 11th January 1928, from decree of Dist. Judge, Jhelum, D/- 5th June 1922.

Custom (Punjab)—Mohyal Brahmins of village Karimpur of Jhelum District are governed by agricultural custom.

Mohyal Brahmins are primarily agriculturists and cultivate land with their own hands. They have been gazetted under the Punjab Alienation of Land Act as an agricultural tribe in the Jhelum District and they are governed by agricultural custom. [P 151 C 2, P. 152 O 1]

Nanak Chand—for Appellant.

Badri Das—for Respondents.

Zafar Ali, J.—The two questions that have been argued before us in this second appeal are: (1) whether the land in dispute was ancestral *qua* the plaintiffs; and (2) whether the alienor of the land, who is a Mohyal Brahman of village Karimpur in the Pind Dadan Khan tahsil of the Jhelum District, was governed by agricultural custom which restricted his power of alienation. On both these questions the concurrent findings of the Courts below are in favour of the plaintiffs, and we are of opinion that there is sufficient evidence on the record in support of either finding.

As regards (1): the evidence is :

(a) that Mohyal Brahmans were among the early settlers in this village as stated in the history of its foundation;

(b) that the name of Hazari, the common ancestor of the plaintiff and the alienor, is given in the pedigree table of the proprietors of the village prepared at the first regular settlement; and

(c) that the two branches of the defendants of Hazari held almost equal lands in 1860 and that the land sold formed part of joint holding in which either branch had one-half share in that year.

We are of opinion that this threefold evidence, taken as a whole, fully justified the inference that the land had descended from Hazari. The history of the foundation of the village militated against the theory that Hazari's two sons might have acquired the land jointly by purchase in equal shares.

On the other point the evidence is that Mohyal Brahmans are primarily agriculturists and cultivate land with their own hands. They have been gazetted under the Punjab Alienation of Land Act as an agricultural tribe in the Jhelum District. They settled in the village along with Mussalman agriculturists of the Jalab tribe and their only occupation was to cultivate land and not to perform priestly functions. Not unlike several other agricultural tribes they possess a martial spirit and many of them serve in the army. In Rose's Glossary of Tribes, Vol. 2, Mohyals are described as secular Brahmins. In the Gazetteer of the Jhelum District, Part A, published in 1904, the following occurs at page 120 :

The Muhials do not number more than some eleven thousand souls in the Province, and they are rather widely distributed, though their principal habitat is the Jhelum District.

* * * * * Though numerically unimportant, they are a stirring and enterprising race, and frequently rise to prominence in the service of Government, which they enter in large numbers : they make excellent soldiers, but it is chiefly in civil appointments that they have earned distinction. They are remarkable amongst the Hindu population being hereditary agriculturists seldom if ever, practising trade or usury, and specially despising the life of indolence led by the ordinary Brahmin, who lives by charity, and with whom the Muhial, though admitting a common origin, strongly objects to be classed.

In view of all that has been stated above we are of opinion that Mohyals are governed by agricultural custom.

These being our findings, we dismiss the appeal with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 152

JAI LAL, J.

Siraj-ud-Din—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1020 of 1927, Decided on 18th November 1927, from order of Sub-Divl., Mag., Hissar, D/- 31st August 1927.

Criminal Trial—Evidence of witnesses for prosecution should not be recorded piecemeal.

When the evidence for the prosecution is recorded piecemeal, then there is every opportunity for each succeeding witness to know what the statement of the previous witness was and also on what lines the cross-examination of the witnessess was being conducted on behalf of the accused. Such a procedure is irregular. [P 152 C 1]

Abdul Aziz—for Appellant.

Feroze Din for *Govt. Advocate*—for the Crown.

Judgment.—Siraj-ud-Din, appellant, aged 18 years, according to his own statement and 20 years according to the Magistrate has been convicted by a Magistrate 1st Class, with enhanced powers under S. 30, Criminal P. C., under S. 376, I. P. C., for having raped Mt. Bakhtawar, the daughter of Nabi Bakhsh aged 13 or 14 years, on the forenoon of 18th April 1927, and has been sentenced toseven years' rigorous imprisonment. He has appealed to this Court and I have heard Mr. Abdul Aziz who represented him and also Mr. Feroze Din, counsel for the Crown.

The case for the prosecution as stated at the trial is that Mt. Bakhtawar was taking some tobacco for her father who was working in the fields outside the village and when passing in front of a kotha she was suddenly seized by the accused, taken inside the kotha, thrown on the ground and ravished. It is alleged that when she was seized on the road she cried aloud and this attracted the attention of her father, Nabi Bakhsh, who actually saw the accused drag his daughter inside. Nabi Bakhsh thereupon ran towards the kotha and in the way met Nizam and Imam Din, and all the three went and found the accused raping the girl. It is alleged that the kotha had no door and was not consequently shut, that the girl was actually crying when these witnesses reached the scene of the crime and that the accused left her when they reached there. An attempt was made to secure the accused but he made good his escape after he had been slapped by the father twice but he left a shoe and some clothes at the spot.

The statement of Mt. Bakhtawar is that the accused had a discharge before her father and his companions came to the spot. According to her the father was working at a distance of 20 or 25 paces from the place where she was seized; according to the father the distance was about 150 paces, but it is common ground that the place was visible from where the father was. It may also be mentioned that the mother and the brother of Mt. Bakhtawar were also working with her father It is further alleged that the ghagri of Mt. Bakhtawar got stained with blood as the girl bled as the result of the rape. This ghagri was secured by the Investigation Police Officer and sent to the Chemical Examiner, but no blood or semen was found thereon.

The matter was reported at the thana five kos from the village at 7 p. m. and Mt. Bakhtawar stated in that report that she was forcibly taken inside the kotha by the accused and was thrown on the ground and that the accused wanted to rape her; but on hearing her noise her father, Nizam and Imam Din came and released her and thereupon the accused ran away leaving his shoe and clothes on the spot. She added that "if her father had not arrived the accused would certainly have violated her." In her cross-examination she was confronted with

this statement but she denied that she had made it and asserted that her statement at the time was the same that she had made at the trial. The learned Magistrate has tried to explain away this serious discrepancy between the two statements by remarking that the Head-Constable who recorded the statement was inexperienced, but the learned counsel for the Crown has not supported the Magistrate in this connexion and has admitted that as a matter of fact, the statement recorded in the first information report is exactly as it was made by Mt. Bakhtawar. The learned counsel, however, opined that Mt. Bakhtawar was not willing to state that she had been disgraced and it was for this reason that she minimized the circumstances of the assault on her. I am of opinion that the statement made in the first information report represents what Mt. Bakhtawar stated to the Head Constable, and this view is supported by the manner in which the report is recorded.

The eyewitnesses have supported the case for the prosecution as put forward at the trial. Their testimony is almost consistent and is not open to any serious criticizm. But the learned counsel for the appellant has invited my attention to the facts that the evidence for the prosecution was recorded by the learned Magistrate piecemeal with the result that there was every opportunity for each succeeding witness to know what the statement of the previous witness was and also on what lines the cross-examination of the witness was being conducted on behalf of the accused. There is force in this contention and the record discloses a disregard of the instructions of this Court as to the manner in which the evidence has to be recorded. I consider that there is justification in the complaint of the counsel for the accused that his client has been prejudiced by the manner in which the evidence was recorded in this case.

The medical evidence, however, has an important bearing on the case. The medical witness has stated that the hymen of the girl was ruptured but that this rupture was not a recent one. He is also of opinion that it was not the first time that the girl had been subjected to sexual intercourse. He noticed one slight injury on the person of the girl and was of opinion that was due to forcible intercourse. But in cross-examination he admitted that the injury might be due to intercourse with the consent of the girl. Under these circumstances, in my opinion it is not possible to hold that the medical evidence supports the case for the prosecution. On the other hand, it tends to support the contention of the counsel for the appellant that if there was sexual intercouse with the girl by the accused on the particular day it was with her own consent and, that, therefore, it was not a case of rape. The contention receives further support from the fact that the parents and a brother of the girl were working in a field about 150 paces from the scene of the occurrence and the place where the girl was seized by the accused was visible from there. It is unlikely that the accused would have dared to forcibly seize the girl under the circumstances. Moreover, it is alleged that on hearing her cries her father immediately ran to the scene of the occurrence and before his arrival the accused had practically finished the intercourse. This story, in my opinion, is improbable and is inconsistent with the allegation that the girl was raped.

The investigation in this case was not started till 24th April whereas the offence is alleged to have been committed on 18th April and the matter reported at the police station the same day. The girl was not examined by the medical witness till 26th April. The accused naturally asserts under the circumstances that the case regarding him has been fabricated.

Though I am not prepared to hold that the accused did not have intercourse with Mt. Bakhtawar on the day of occurrence I am not satisfied that such intercourse was forcible or without the consent of the girl. It is not improbable, as contended by the counsel for the convict that the girl was a consenting party and that when the matter became public, first a report of an attempt to rape or an offence under S. 354, I. P. C., was made at the thana but subsequently the story was developed as stated at the trial.

Having regard to all the circumstances I am of opinion that the accused is entitled to the benefit of doubt, and accepting his appeal I acquit him and order his release forthwith.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 154

FFORDE AND ADDISON, JJ.

Sham Das—Plaintiff—Appellant.

v.

Kishan Chand and *others*—Defendants—Respondents.

First Appeal No. 934 of 1925, Decided on 31st May 1927, from decree of Sr. Sub-J., Amritsar, D/- 23rd March 1925.

(a) *Contract Act, S. 74—Joint Hindu trading firm—Firm appointing trustees to realize assets and discharge debts—Sale of property by the trustees — Vendee depositing earnest-money—Trustees agreeing to secure signatures of proprietors but failing to do so—Vendees are entitled to get the contract rescinded and get the earnest-money back or to affirm the contract and recover damages.*

When two parties have entered into the relation of vendor and purchaser by making a binding contract for the sale of land, the vendor is bound to show a good title to the property sold and to comply with all necessary and reasonable requisitions to ensure such a title. To show a good title and to convey the property sold are conditions precedent to the purchaser's liability on the contract. In the case of the breach of this duty on the part of the vendor, the purchaser is at liberty, where the contracting parties can be restored to their former position, either to rescind the contract and to obtain restitution in integrum or to affirm the contract and to recover damages for the breach. [P 155 C 2 ; P 156 C 1]

A joint Hindu trading firm having fallen into financial difficulties and being unable to meet the demands of its creditors, appointed trustees for the creditors to realize the firm's assets and to discharge its liabilities and the deed of trust laid down the condition that the trustees would be competent to execute deeds of sale in respect of the houses themselves or get the same executed by members. The premises of the above firm were duly put up for auction and knocked down to the plaintiff and a deposit of Rs. 15,800 was made by the vendee. A deed of sale was executed by the trustees in favour of plaintiff, but the signatures of other proprietors were not secured though the trustees expressly agreed to secure them. The plaintiff sued for the rescission of the contract and return of the deposit.

Held : that the vendees were acting with complete bona fides in their endeavour to secure a reasonably sound title to the property which they had contracted to buy. The defendants' failure to execute a good conveyance, owing to their omission to secure the signatures of the adult members of the joint Hindu family owning the property, amounted to a breach of one of the main duties of the contract, and entitled the vsndees to "sue under the equitable jurisdiction of the Court to enforce rescission and procure the consequent restitution."
[P 154 C 2 ; P 155 C 1 ; P 156 C 2]

(b) *Hindu Law—Joint family — Alienation by the manager—Vendee is justified in insisting on other adult members to be parties to the contract.*

It is a reasonable and proper requisition on the part of the vendee that not only the manager of the family but also adult members, whose names can reasonably be secured, should be parties to the conveyance. [P 156 C 1]

Sheo Narain, Din Diyal Khanna and *Hem Raj*—for Appellant.

G. C. Narang and *Maya Das Sethi* for *D. R. Narang*—for Respondents.

Fforde, J.—This is a suit for rescission of a contract of sale of certain shop premises and for return of the deposit money. The sale was by public auction under the instructions of the defendants who were selling as trustees for a joint Hindu trading firm known as Jawala Nath-Kanshi Ram. This firm, having fallen into financial difficulties, and being unable to meet the demands of its creditors, appointed the defendants trustees for the creditors to realize the firm's assets and to discharge its liabilities. The deed of trust, which is dated 27th January 1922, was made between Nathu Mal, Harikishen Das and Bishen Das of the one part, and Lala Kishen Chand and Lala Gokal Chand (the defendants respondents) of the other part. Nathu Mal and Harikishen Das are brothers and senior members of the joint Hindu family, while Bishen Das is their nephew. The deed starts with the following recital:

A debt of about one lac and twenty thousand rupees is due by our firms styled Jawala Nath-Kanshi Ram at Amritsar and Benares. We raised this amount from different creditors and spent it in connexion with our business. According to Hindu law all the members of the family are liable for payment of the said amount. As we cannot ourselves arrange for payment of the aforesaid debt, we have appointed Lala Kishen Chand, son of Lala Sain Das, and Lala Gokal Chand, son of Lala Shib Sahai, caste Khatri, and Bhai Gurmukh Singh, son of Bhai Narain Das, caste Arora, residents of Amritsar, Katra Ahluwalia and Chauk Darbar Sahib, as our trustees to arrange for payment of the debt.

The property vested in the trustees is then described, and the deed continues :

The trustees shall be competent to execute deeds of sale in respect of the said houses themselves or get the same executed by us. If any purchaser of a house or shops wishes to join any one of us in connexion with the execution of deed of sale or secure the signature of any person from amongst us and the members of our family we shall have no objection in this behalf.

The present suit is mainly concerned with this latter clause. The premises which are the subject-matter of this

litigation, were duly put up for auction and knocked down to the plaintiff Sham Das for Rs. 63,200, and a deposit of Rs. 15,800 was made by the vendee on 15th August 1922. A deed of sale was executed on 7th November 1922 by the trustees (the respondents) in favour of Sham Das, and another deed of even date was executed by the same persons in favour of Lala Dunni Chand and Lala Durga Das who had agreed, with the consent of the vendors, to take a portion of the property which had been knocked down to Sham Das. In both these sale-deeds there appears the following recital:

Let it be noted that we have secured on this deed of sale also the signatures of the proprietors of the firm known as Jawala Nath-Kanshi Ram for the satisfaction of the said vendees.

In point of fact, the name of only one of the proprietors, namely Harikishen, appears as a vendor in this conveyance.

The whole question now is whether or not the purchaser were entitled to insist upon the other members of the firm Jawala Nath-Kanshi Ram joining in the conveyance. There is no doubt that the trustees did agree to procure the signatures of these persons to the deed of sale, and it is equally clear that they neglected to do so. The vendors now say that the trustees could by themselves give a good title, and that it was not necessary to have the name of any member of the joint family added to the conveyance. The purchasers, on the other hand, have all along been insisting that all the joint owners of the property should execute the deed. After several vain attempts to make the vendors comply with their request the vendees, on 6th March 1923, sent a telegram to the trustees, informing them that if they did not comply with their request within 24 hours, they would be held liable for the consequences. This was followed up by a telegram on 7th March 1923, informing the trustees that, as they had failed to perform their part of the contract, the vendees cancelled the contract and claimed damages and return of the earnest-money. No reply was made to these telegrams until 10th April 1923, when the trustees sent the following telegram through Mr. Todar Mal, Barrister :

Under instructions from Messrs. Gokal Chand-Kishen Chand this formal notice to repeat they were throughout readily willing to complete and register sale-deeds of two shops of Jawala Nath-Kanshi Ram are to even now and though non-essential Nathu Mal-Bulla Mal sign the deed, but you evaded to perform your part as market gone down all responsibilities yours.

The vendees replied by formal notice, dated the 17th April 1923, to the trustees, giving them a further opportunity to secure the required signatures to the conveyance, and notifying them that if these signatures were not obtained within a period of one week from the date of notice, the vendees would take proceedings for recovery of the earnest-money. The trustees replied to this by a post-card, dated the 21st April 1923, addressed to Lala Sham Das, plaintiff, in which they informed him that if he attended at the house of Lala Duni Chand, vakil, at 5 p. m. on 24th April with the deeds of sale of the premises in question, the signatures of the remaining original proprietors of these premises would be secured there. In pursuance of this notice, the parties with their friends met on the appointed day at the office of Mr. Duni Chand. It is alleged that Nathu Mal and Bishen Das (alias Bulle Shah), two of the members of the proprietary family, were willing to sign the deed of sale but did not do so; and the meeting proved abortive. No further steps appear to have been taken by the trustees to secure the necessary signatures, and the next step was the institution of the present suit on 1st May 1923, by Sham Das.

The questions to be decided are whether: (1) the vendees were entitled to insist upon at least the male members of the proprietary family joining in the conveyance; (2) the failure of the trustees to procure such signatures entitled the vendees to rescind the contract and recover the deposit money; and (3) the vendees gave the trustees reasonable time to comply with their demand.

In my judgment, all these questions must be answered in the affirmative. When two parties have entered into the relation of vendor and purchaser by making a binding contract for the sale of land—as was admittedly the case here—the vendor is bound to show a good title to the property sold and to comply with all necessary and reasonable requisitions to ensure such a title. To show a good title and to convey the property sold are conditions precedent to the purchaser's liability on the contract. In the case of the breach of this duty on the part of the

vendor, the purchaser is at liberty where the contracting parties can be restored to their former position, either to rescind the contract and to obtain *restitutio in integrum* or to affirm the contract and to recover damages for the breach. (William's, Vendor and Purchaser, 3rd Edn., Vol. I, p. 35.) If in the present case the signatures required by the purchasers were necessary for the purpose of giving a good title, the failure to secure those signatures is a breach of one of the main duties which the vendors had to fulfil. The learned trial Judge in the course of his judgment has said :

> The plaintiff was no doubt entitled to get a good marketable title * * * The purchaser, while he is not on the one hand at liberty to raise doubts which are not considerable or rational, cannot be compelled on the other hand to take a title which will .expose him to litigation and hazard.

With these expressions I am in entire agreement, but I do not agree with the learned Judge that the plaintiff did get a good conveyance in view of the omission of the vendors to secure the signatures of the adult members of their family to the deed of sale. The deed of trust itself provides that these signatures shall be secured should any purchaser of the property auctioned so require. The vendors, moreover, expressly undertook to secure these signatures. Any person buying house property owned by a joint Hindu family is always open to the risk of subsequent litigation to defeat his title. It is a very common thing for members of such a family who were minors at the time of the sale to bring a suit often at the instigation of one of the adult members for the purpose of setting aside such a sale. A purchaser is entitled to insist that every reasonable step shall be taken to reduce to a minimum the chances of such litigation succeeding. Although he can never be immune from the risk of litigation, he can at least reduce its prospects of success by securing the signatures of all the adult members of the joint family to the deed of sale. In order to get a good contract of sale, I think, it is a reasonable and proper requisition on the part of the vendee that not only the manager of the family, but also all adult members, whose names can reasonably be secured, should be parties to the conveyance. As I have said, not only was this safeguard provided for in the deed of trust under which the trustees were authorized to sell the property in dispute, but the trustees expressly agreed to this condition.

It remains to be considered whether the purchaser gave the trustees reasonable time to carry out their obligation in this regard. I am satisfied that they did. Negotiations on this matter were continuing from November 1922, until April 1923. The trustees had every opportunity to make arrangements for securing the signatures of the proprietors, and they do not appear to have made any but half-hearted attempts to do so. They have nowhere said that they were not given sufficient time. They accepted the final notice of the 17th April without demur and, indeed, formally undertook to comply with it. The suggestion—which the learned trial Judge seems to have accepted—that the purchasers in insisting upon the signatures in question were merely doing so for the purpose of avoiding the contract of sale, owing to the fact that the value of house property had fallen, is not warranted on the evidence before us. House property is said to have been falling in value since 1921, but there is no convincing evidence that there was a sudden drop in value shortly after the auction had taken place. The plaintiff Sham Das was a lessee of a portion of the premises sold and had been carrying on his business there for a considerable time. He genuinely desired to acquire this property to prevent his business being disturbed in the event of those premises being acquired by some other purchaser. I think the vendees were acting with complete bona fides in their endeavour to secure a reasonably sound title to the property which they had contracted to buy. The defendants' failure to execute a good conveyance, owing to their omission to secure the signatures of the adult members of the joint Hindu family owning the property, amounted, in my judgment, to a breach of one of the main duties of the contract, and entitled the vendees to

> sue under the equitable jurisdiction of the Court to enforce rescission and procure the consequent restitution. (Williams Vendor and Purchaser, 3rd Edn. Vol. I. p. 35).

The learned trial Judge has given what amounts to a compromise decree, for which he had no sanction from the parties and which was not within the scope

of the suit. He has ordered that the trustees shall execute two fresh sale deeds in favour of the plaintiff, to be signed by all the members of the joint Hindu family carrying on business under the name and style of Jawala Nath-Kanshi Ram. If the trustees fail to produce these deeds so signed within one month, the learned Judge has declared that the plaintiff shall be entitled in equity to a refund of the deposit, namely, Rs. 15,800. If the deeds, however, are produced in Court within the time specified, the plaintiff's suit is to be dismissed. I can only infer from this decision that the learned Judge, in agreement with the plaintiff, took the view that the names of all the members of the joint family were necessary for the purpose of conveying a reasonably good title.

In my judgment, the plaintiff is entitled to have the contract of sale rescinded and to be restored to his original position. The deposit of Rs. 15,800 has been in the hands of the defendants, and Dr. Narang states that it has been drawing interest at the rate of four per cent. I think, therefore, that the plaintiff is entitled to a refund of this sum with interest at four per cent. from the date it was paid to the defendants until the date of its refund. I would accordingly accept this appeal, decree the rescission of the contract of sale and order the defendants to refund to the plaintiff the sum of Rs. 15,800 together with interest at four per cent. from the 15th August 1922, up to the date of realisation, and I would also award the plaintiff his costs throughout.

Addison, J.—I concur.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 157 (1)

ZAFAR ALI AND DALIP SINGH, JJ.

Ganga Ram—Defendant—Petitioner.

v.

Nikka Singh—Plaintiff—Respondent.

Civil Revn. Petn. No. 662 of 1926, Decided on 18th January 1928, from decree of Small Cause Court Judge, Amritsar, D/- 25th June 1926.

Limitation Act, S. 20—Endorsement regarding part payment of debt must be by the person making payment.

In the absence of a mark by the debtor himself under the endorsement, the clear words of S. 20 requiring the payment and the handwriting to be made by one and the same person are not complied with by an endorsement by another person at the instance of the person making the payment: 28 *C. L. J.* 222, *Foll*; *A. I. R. Pat.* 476, *Diss. from.* [P 157 C 2]

Mohammad Monir—for Petitioner.

Gulzari Lal Sahgal —for Respondent.

Dalip Singh, J.—The question of the law to be decided in this revision which was referred to a Division Bench by order dated the 4th November 1927 is whether an endorsement of part payment of the principal made at the instance of an illiterate debtor is sufficient to extend limitation under S. 20, Lim. Act.

In this case there is no endorsement or mark made by the debtor himself under the endorsement. As pointed out in the referring order the only two rulings directly in point are *Bali Ram* v. *Sabha Sukh* (1), a Division Bench ruling of the Calcutta High Court, and *Sri Ram* v. *Kasi Mollah* (2), a single Bench ruling of the Patna High Court.

We respectfully agree with the view of law as laid down in *Bali Ram* v. *Sabha Sukh* (1) and we do not agree with all respect with the ruling reported as *Sri Ram* v. *Kashi Mollah* (2). As pointed out in *Bali Ram* v. *Sabha Sukh* (1) it has not been suggested in any case that in the absence of a mark the clear words of S. 20, Lim. Act, requiring the payment and the handwriting to be made by one and the same person are complied with by an endorsement by another person at the instance of the person making the payment. We, therefore, hold that the revision must be accepted and the suit dismissed as barred by limitation. There will be no order as to costs.

S.J. *Revision accepted.*

(1) [1918] 28 C. L. J. 222=44 I. C. 516=23 C. W. N. 930.

(2) A. I. R. 1921 Pat. 476.

A. I. R. 1928 Lahore 157 (2)

SHADI LAL, C. J., AND ZAFAR ALI, J.

Budha Mal—Defendant—Appellant.

v.

Rallia Ram and *others* — Plaintiffs—Respondents.

First Appeal No. 180 of 1923, Decided on 13th May 1927, from decree of Senior Sub-Judge, Gurdaspur, D/- 13th November 1923.

Appeal — Forum — Value of appeal is the amount found due to plaintiff by Court.

The amount ascertained by the Court to be due to the plaintiff, and not the sum at which

he values his claim tentatively and approxiufately, should be regarded as the value of the mit for the purpose of determining the forum so the appeal : 58 *P. R.* 1902 ; 46 *P. R.* 1906 ; 34 *Cal.* 954 (*F. B.*) ; and 20 *Bom.* 265, *Foll.* ; 40 *Mad.* 1 and *A. I. R.* 1925 *All.* 376, *Diss. from.*

[P 158 C 2]

Badri Das, *Kidar Nath Chopra* and *Hem Raj*—for Appellant.

Moti Sagar and *Mehi Chand Mahajan*—for Respondents.

Sir Shadi Lal, C. J.—This appeal arises out of a suit for the rendition of accounts, and the question of law debated before us is whether the appeal is cognizable by the High Court or by the District Court. A perusal of the plaint shows that the plaintiffs valued their relief tentatively and approximately at Rs. 1,100 and asked the Court to grant them a decree

for the amount that may be found due to them on rendition of accounts.

The Subordinate Judge, who exercises an unlimited pecuniary jurisdiction, has passed a decree for Rs. 11,000 odd in favour of the plaintiffs and directed them to make up the deficiency in the Court-fee.

Against this decree the defendant has preferred the present appeal, and Mr. Moti Sagar for the respondents raises the preliminary objection that the appeal lies to the District Judge, and not to this Court. The question for determination is whether the forum of appeal is determined by the amount at which the plaintiff values the relief sought by him or by the amount found by the trial Court to be due to him. There is a divergence of judicial opinion on the subject, but the view taken by the Punjab Chief Court in *Mamman Mal* v. *Abdul Aziz* (1), and *Manna Lal* v. *Samandu* (2), and subsequently followed by this Court, is to the effect that it is the amount found by the Courts to be due to the plaintiff, and not the value put by him on his relief, which must be regarded as the value of the suit for the purpose of determining the Court to which the appeal lies. The same rule has been laid down by a Full Bench of the Calcutta High Court in *Ijjatulla Bhuvan* v. *Chandra Mohan* (3), and by the Bombay High Court in *Ibrahimji Issaji* v. *Benjanji Jamsedji* (4). The Madras and the Allahabad High Courts have, however, adopted the view that the amount at which the plaintiff values his relief, though approximately, determines the forum of the suit as well as of the appeal : vide *Kannayya Chetti* v. *Venkata Narasayya* (5), and *Muhammad Abdul Majid* v. *Ala Bakhsh* (6).

It will be observed that S. 7 (iv) (f) of the Court-fees Act allows the plaintiff to put his own value upon the relief sought by him, but S. 11 of the Act makes it clear that, when a higher sum is found due to him, he must make good the deficiency in the Court-fee before he can execute the decree. It is beyond dispute that the value fixed by the plaintiff in the plaint is only a tentative one, and there is no valid reason why this approximate value should be treated as binding upon the parties for the purposes of determining the forum of the suit as well as that of appeal. If the contention urged on behalf of the respondents be accepted, it would lead to some absurd results. Suppose the plaintiff values his claim in the plaint at Rs. 500 and institutes his suit in a Court whose jurisdiction is limited to suits of which the value does not exceed Rs. 1,000 Not only would the trial Court be competent to pass a decree for Rs. 1,00,000, if such sum is found due to the plaintiff, but an appeal from that decree would lie to a Subordinate Judge of the 1st Class, whose decision on questions of fact would be final. The Courts should avoid, as far as possible, an interpretation of law which would lead to an absurdity of this character.

It is unnecessary to examine the various judgments which have been cited at the Bar, because, as I have already stated, a difference of opinion undoubtedly exists on the subject. Suffice it to say that after considering the matter carefully I am not prepared to dissent from the rule which has been consistently followed in this province, that the amount ascertained by the Court to be due to the plaintiff, and not the sum at which he values his claim tentatively and approximately, should be regarded as the value of the suit for the purpose of determining the forum of the appeal. I accordingly

(1) [1902] 58 P.R. 1902.
(2) [1906] 46 P.R. 1906.
(3) [1907] 34 Cal. 954=6 C.L.J. 255=11 C.W. N. 1133 (F.B.).
(4) [1895] 20 Bom. 265.
(5) [1916] 40 Mad. 1=32 M.L.J. 221=5 M.L. W. 580=39 I.C. 439=(1917) M.W.N. 367.
(6) A.I.R. 1925 All. 376=47 All. 534.

hold that the appeal is cognizable by this Court, and that the preliminary objection must be overruled.

Zafar Ali, J —I agree.

N.K. *Pre-objection overruled.*

A. I. R. 1928 Lahore 159

JAI LAL, J.

Ruchi Ram Khattar — Defendant—Petitioner.

v.

Sarab Narain Shah and *another*—Plaintiff and Defendant—Respondents.

Civil Petn. No. 358 of 1927, Decided on 5th December 1927, for transfer of a suit.

Civil P. C., Ss. 22, 23 and 151—Petition by defendant for transfer of suit to his place of residence for his convenience is not acceptable.

The principle is well established that it is the right of the plaintiff to choose the forum for his action, and that in deciding whether the plaintiff should be deprived of that right, a very strong case must be made out by the defendant, and further that in deciding whether a suit should or should not be transferred it is not merely the convenience of the defendant that has to be considered, but the plaintiff's convenience also should he borne in mind.

[P 159 C 2, P 260 C 1]

Badri Das and *G. C Narang*—for Petitioner.

Moti Sagar, Shamair Chand and *Qabul Chand*—for Respondents.

Order.—This is an application under Ss. 22, 23 and 151, Civil P. C., made by the defendant Ruchi Ram Khattar for the transfer of the civil suit for the recovery of Rs. 1,08,974-8-3, instituted in the Court of the Subordinate Judge of Rawalpindi, to the Dera Ismail Khan District in the North-Western Province. The suit is based on a promissory note admittedly executed by the petitioner in favour of one Sundar Das. Sundar Das, it is alleged, endorsed the promissory note in favour of Sarab Narain Shah, plaintiff. The promissory note was admittedly executed in Dera Ismail Khan, where the petitioner resides, but it is alleged that Sundar Das, who also is a defendant in the suit and is a resident of Rawalpindi, endorsed to Sarab Narain Shah in Rawalpindi. Sarab Narain Shah himself is a resident of the Jhelum District. He does not carry on any business in Dera Ismail Khan.

The application for transfer is made on the ground that there was a dispute between Ruchi Ram aud Sundar Das with regard to certain contracts alleged to have been jointly taken by them, which was referred to arbitration. The award of the arbitrator was that Sundar Das should pay Rs. 1,25,000 to Ruchi Ram. An application was therefore made in the Court of ths District Judge at Dera Ismail Khan to file the award and it appears that during the pendency of that application Ruchi Ram attempted to attach before judgment the amount due from him to Sundar Das on the basis of the promissory note, but for some reason or other he did not succeed to attach the amount. It is alleged by the petitioner that in order to prevent the attachment of the amount due on the promissory note Sundar Das has fictitiously endorsed the promissory note to Sarab Narain Shah, a relation of his. It is alleged that a good portion of the amount due on the promissory note has been paid by the petitioner and that this will be the main defence in the case. It is, therefore, contended that it will be very inconvenient for the petitionor (the defendant) if the suit is tried in Rawalpindi as he will have to bring his witnesses all the way from Dera Ismail Khan, or it will be necessary to issue commission for their examination as the Court is not competent to procure their attendance in Rawalpindi, a course which, it is intended, will be unsatisfactory. It will thus be observed that the sole ground for the transfer of the suit is the convenience of the defendant.

The petition is strenuously opposed both by Sarab Narain Shah and Sundar Das. Sarab Narain Shah, as I have already stated, has no connexion with Dera Ismail Khan and naturally it will be very inconvenient to him if he is made to go to that district to prosecute h case.

A large number of judicial authorities were cited by counsel on both sides in support of their respective contentions. I do not propose to discuss them in this judgment as an examination thereof shows that each depended on its particular facts which influenced the learned Judges to transfer or not to transfer the cases before them. The principle, however, is well established that it is the right of the plaintiff to choose the forum for his action and that in deciding whether the plaintiff should be deprived of

that right a very strong case must be made out by the defendant, and further that in deciding whether a suit should or should not be transferred it is not merely the convenience of the defendant that has to be considered, but the plaintiff's convenience also should be borne in mind. Now, in the present case, while it is true that it suits the petitioner (the defendant) that the case should be tried in Dera Ismail Khan where he resides and carries on business, it is equally clear that it will be very inconvenient to the plaintiff if he is ordered to prosecute his suit in the Dera Ismail Khan District. It also appears from the allegation made by the petitioner in the petition for transfer that the right of the plaintiff to maintain the suit is likely to be questioned on the alleged ground that the transfer was fictitious and malafide. I express no opinion whether such a plea is open to the defendant or not or whether there is any substance in that plea, but if such a plea is raised it may be necessary for the Court to adjudicate on the genuineness of the transfer of the promissory note to the plaintiff. Evidence on that point will be available mostly in Rawalpindi.

After a careful consideration of all the circumstances I am not satisfied that this is a fit case in which I should exercise my discretion by transferring the case to the Dera Ismail Khan District. It is obvious that both parties are anxious to look to their own convenience and to disregard the interest of the other party. But the plaintiff having the primary right to choose the Court for the institution of the suit, I see no reason to deprive him of that right in this case. The consequence is that this petition is dismissed with costs.

S.J. *Petition dismissed.*

A. I. R. 1928 Lahore 160

SHADI LAL, C. J., AND AGHA HAIDAR, J.

Ram Saran Das and *another*—Defendants—Appellants.

v.

Bhagwan Singh and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 2334 of 1924, Decided on 17th November 1926, from decree of 1st Cl. Sub-Judge, Amritsar, D/- 30th May 1924.

Transfer of Property Act, S. 72—Improvements—Mortgagee in possession making temporary improvements in the property mortgaged without the consent of the mortgagor—He is not entitled to compensation for the improvements made.

A mortgagee is not entitled to be recouped for any improvements that he makes upon the mortgaged property unless he obtains the consent of the mortgagor beforehand. The improvement for which he can claim to be compensated at the time of the redemption of his mortgage must be a lasting and permanent improvement. It must have increased the saleable value of the property and it must be a reasonable sum the payment of which would not make the redemption of the mortgage by the mortgagor difficult or impossible: *Sheppard* v. *Jones* (1882) 21 *Ch.* 469 ; 43 *Bom.* 69, and 78 *P. R.* 1919 ; *Foll.*: (1882) 21 *Ch.* 469 ; 20 *Bom. L. R.* 895 and 78 *P. R.* 1919, *Foll.* [P 161 C 2]

Badri Dass—for Appellants.

Dev Raj Sawhney and *Bal Kishan*—for Respondents.

Judgment.—This appeal arises out of a suit brought by the mortgagors for possession by redemption of certain property which had been mortgaged to defendants 1 and 2, on payment of a sum of Rs. 5,500. The mortgagees were let into possession and the period mentioned in the mortgage-deed was three years. The mortgagees were to realize the profits of the mortgaged property and to appropriate it in lieu of interest after paying the Government revenue.

The date of the mortgage was the 25th August 1911, and the present suit was instituted on the 22nd December 1922. The main defence of the defendants for the purposes of this judgment is to the effect that the mortgagees had not been put into possession of the mortgaged property during the first three years of the mortgage, although they admit that they have received the profits for the first two years. They, therefore, claim profits for one year. They further plead in para. 2 of their written pleas that

> with consent of the mortgagors they have effected repairs to a ghair abad well and had got two pipes set up therein at a cost of Rs. 600.

They claim this sum for having made improvements upon the property. They further plead that they had planted some orange trees on the land at an expense of about Rs. 600 or Rs. 700 and they ask to be reimbursed for that outlay. They also say that they reclaimed certain banjar land by spending about Rs. 1,000 and claim this sum also from the plaintiff. There were certain other pleas

which do not seem to have been pressed and which need not be noticed by the Court. The trial Court decreed the plaintiffs' suit, but went on to hold that they must pay, in addition to Rs. 5,500, the mortgage-money, a further sum of Rs. 1,550 being the estimated profits for the year during which possession was withheld from the mortgagees by the mortgagors.

The defendants-mortgagees have come up in appeal to this Court challenging that part of the decree of the Court below which has refused to allow them the costs of the alleged improvements and the expense incurred by them in planting orange trees and in reclamation of the land. The plaintiffs have filed a cross-appeal in which they challenge the finding of the Court below as to the sum of Rs. 1,550.

The learned counsel for the defendants-mortgagees did not seriously press his case as regards the alleged planting of orange trees and the reclamation of banjar land, but he strenuously argued that the mortgagees were entitled to the costs incurred in the so-called improvements, effected by them by executing certain borings in the ghair abad well. It is unfortunate that the contesting defendants' pleader did not clearly define his position as regards the alleged improvements and has led evidence in a somewhat haphazard manner. At first he put forward the case of the repairs having been effected with the consent of the mortgagors but afterwards goes on to suggest the general plea of improvement in the same paragraph.

In the evidence produced by the defendants, they attempt to make out a case both of consent and of improvement. The trial Court has very properly decided as a fact that no consent by the mortgagors has been established. On the general question of improvement the Court has also decided against the contesting defendants. The transfer of Property Act (4 of 1882) does not apply to the Punjab and so we need not consider the provisions of that Act. We are thrown back upon the general principles of law so far as it applies to the question of improvements effected by a mortgagee while in possession. According to the old English authorities a mortgagee was not entitled to be recouped for any improvements that he might make upon the mortgaged property unless he obtained the consent of the mortgagor beforehand.

But the tendency of later decisions appears to be more favourable to the mortgagee in this respect, and it has been laid down that, prima facie, a mortgagee who has expended money in improvements is entitled to an inquiry whether the outlay has increased the value of the property and to be allowed such outlay so far as the value is proved to have been increased thereby : vide Coote on Mortgages, Vol. 2, 1924 edn. p. 1225.

The leading authority on the subject is the well-known case of *Sheppard* v. *Jones* (1). It lays down that the improvement for which the mortgagee can claim to be compensated at the time of the redemption of his mortgage must be a lasting and permanent improvement. It must have increased the saleable value of the property and it must be a reasonable sum the payment of which would not make the redemption of the mortgage by the mortgagor difficult or impossible. This is nothing but ordinary justice that the increase in the price of the property should not go into the pocket of the mortgagor without his reimbursing the mortgagee whose money was instrumental in raising the price of the property. The law is also very succinctly put by Mr. Fisher in his well-known work on Mortgages, vide paras. 1782 and 1783 of Fisher's Law of Mortgage : see also the cases reported as *Nijalingappa* v. *Chanabasawa* (2) and *Rikhi Kesh* v. *Jwala Sahai* (3). Thus the law is clear and well settled. Let us apply the law to the proved facts of the case.

Now, there is no evidence on the record to show that the improvement was a lasting one or that it materially increased the saleable value of the property. The alleged improvement, according to the mortgagees consisted of making some holes in the bottom of a ghair abad well. An official was examined as a witness on behalf of the mortgagees. He stated the borings were done in 1917 and that the pipes inserted in those borings worked for four or five years. Now, the suit was brought in 1922, so that the effect of the improvement must have been exhausted before the time the suit was actually filed in Court. After the removal of the pipes

(1) [1882] 21 Ch. 469 = 31 W. R. 308 = 47 L. T. 604.
(2) [1919] 43 Bom. 69 = 47 I. C. 751 = 20 Bom. L. R. 895.
(3) [1919] 78 P. R. 1919=52 I. C. 862.

or their decay in the ordinary process of nature there would only remain a hole in the soil at the bottom of the well. The walls of this hole in course of time are bound to bank in after the removal or decay of the pipes. We have thus no evidence on the record to show that the improvement was of a lasting nature and such as would increase the value of the property and permanently add to its utility. This being so and the plea of consent being rightly decided by the trial Court against the mortgagees, we think that the decision of the Court below on this point was right and accordingly we dismiss the defendants-mortgagees' appeal with costs.

Now remains the question of the cross-appeal filed by the plaintiffs-mortgagors. We are satisfied on the evidence that the mortgagees were not given possession by the mortgagors during the years 1911, 1912 and 1913. The defendants-mortgagees admit that they received the profits for two years from Nand Singh, one of the mortgagors, and we think that the mortgagees are entitled to the profits of the year 1913-14. We, therefore, affirm the decree of the trial Court on this point and dismiss the plaintiffs-mortgagors' appeal with costs.

S.J. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 162

TEK CHAND, J.

E. I. Ry., Calcutta—Defendant—Appellant.

v.

Jot Ram-Chandra Bhan—Plaintiff—Respondent.

Second Appeal No. 1434 of 1927, Decided on 8th December 1927, from decree of Dist. Judge, Delhi, D/- 7th March 1927.

**(a) Railways Act (9 of 1890), S. 72—Risk-note B—Date of forwarding note—Railway receipt and risk-note not same—Risk-note cannot give immunity to railway company from liability of goods lost.*

According to risk-note B, as approved by the Governor-General in Council the forwarding note, the railway receipt and the risk-note must all be executed on the same date, and so where there is no proof that they were executed on the same date, the risk-note for goods consigned is not in the approved form and it cannot afford immunity to the railway from its liability as a bailee, in case the goods are lost : 20 *C. W. N.* 685, *Rel. on.* [P 163 C 2]

(b) Interpretation of Statutes—Exceptions—Evidence Act, S. 105.

In order to bring a case within the exception, strict compliance with its terms is necessary. It is one of the established cannons of interpretation that exceptions are to be taken most strongly against the party for whose benefit they are introduced. [P 163 C 2]

Cordon Noad—for Appellant.

Shamair Chand—for Respondent.

Judgment.—The suit, which has given rise to this second appeal, was instituted by the firm of Messrs. Jot Ram-Chandar Bhan, merchants, Delhi, against the E. I. Ry. for recovery of Rs. 630, being the amount of compensation for non-delivery of 11 complete bags of sugar and shortage of two maunds in the remaining 115 bags which had been consigned to the appellant from the Kidderpur Docks to Delhi.

The defendant railway denied liability alleging loss by theft committed in a running train for which it was protected to the term of risk-note-B, under which the goods had been booked at a reduced rate. The plaintiffs denied having executed the risk-note and further urged that "even if there was any risk-note it was illegal." The Court framed the following issues :

(1) Were the goods in question booked at a reduced rate under risk-note ?
On defendant.

(2) Were the goods short-delivered lost on account of the wilful negligence of the defendant ?
On plaintiff.

(3) Were the goods short-delivered lost in transit ?
On defendant.

(4) To what compensation are the plaintiffs entitled ?
On defendant.

It found issues 1 and 2 in favour of the defendant and issue 3 in favour of the plaintiff and dismissed the suit, leaving the parties to bear their own costs. On appeal the learned District Judge held the execution of the risk-note by the plaintiff proved, but passed a decree in favour of the plaintiff for Rs. 528-10-0 on the ground that the risk-note was inoperative as it had not been executed on the same day on which the forwarding note and the railway receipt were executed and also because it had not been proved that the consignment was actually carried by the railway at reduced rates.

The defendant railway has filed a second appeal and on its behalf the learned Government Advocate has contended that the risk-note is not inoperative in any way. The railway receipt (Ex. D-X) bears date 6th October 1922 while the forwarding note (Ex. D-3) produced by the defendant is dated 4th October 1922. The risk-note, Ex. D-2, is in the usual printed form and the relevant portion reads as follows :

> Whereas the consignment of . . . tendered by me as per forwarding order No. . . of this date for dispatch by the E. I. Ry. Administration or their transport agents or carriers to Delhi Shahdara station and on which I have received the railway receipt No. . . . of same date is charged at a special reduced rate, etc.

It will be noticed that according to the printed form the risk-note, the forwarding note and the railway receipt must be executed on one and the same date and in this particular note, it is recited that they all bear the same date. But, as clearly stated, the forwarding note produced by the railway was not executed on the 6th but bears the date 4th October and the recital in the risk-note, the forwarding note and the railway receipt all bear the same date is incorrect. The question for decision, therefore, resolves itself to this: whether the risk-note has become inoperative by reason of the fact that no forwarding note of the date on which the risk-note was issued is forthcoming and the recital in the risk-note to the contrary is wrong. The learned Government Advocate argues that this is an immaterial error and does not in any way affect the relative rights of the parties. Mr. Shamair Chand, on the other hand, contends that the terms of the note must be strictly construed and that rigid adherence to the printed form is essential before it can be operative. Neither party has cited any authority, English or Indian, before me and so far as I am aware the case is one of first impression. I have, therefore, given the matter much careful consideration and have reduced the conclusion that the appellants' contention must prevail.

In Cl. (1), S. 72, Railways Act, it is enacted that the responsibility of a railway administration for the loss, destruction or deterioration of goods delivered to it to be carried by railway is, subject to the other provisions of the Act, that of a bailee under the Contract Act. Clause (2) of the same section declares that an agreement purporting to limit this responsibility shall, in so far as it purports to effect such limitation, be void except when it falls within one of the two exceptions mentioned therein. The first of these exceptions is when a risk-note in one of the forms approved by the Governor-General in Council has been duly executed. It will be seen that the legislature after declaring that the liability of the railway is that of a bailee, has jealously guarded any limitation of such liability, except when the consignor has agreed to cut it down by executing a note in the form approved by the Governor-General in Council.

It seems to me that in order to bring a case within the exception strict compliance with its terms is necessary and before the railway can claim protection by reason of the execution of the risk-note, it lies on it to prove that the particular note relied on, is both in form and in substance one of those approved by the Governor-General in Council. It is one of the established canons of interpretation of statutes and documents that exceptions are to be taken most strongly against the party for whose benefit they are introduced, and there is authority for the proposition that

> even though the document might have been executed by the other party the words in which the exceptions are expressed are considered as his words : see Beal's Cardinal Rules of Interpretation, p. 183.

Reference may also in this connexion be made to a Division Bench decision of the Calcutta High Court in *Mohabarsha Bankapur* v. *Secy. of State* (1) where a clerical defect in Risk-note-Y was held fatal to the defence of the railway against its liability as a bailee.

According to the risk-note B, as approved by the Governor-General in Council, the forwarding note, the railway receipt, and the risk-note must all be executed on the same date. Here the risk-note is, as already pointed out, of the 6th and the forwarding note of 4th October. There is no proof that they were executed on the same date and not on the cards which they actually bear. Whether the discrepancy is due to oversight or design, the fact remains that this particular risk-note is not in the approved form and it cannot afford immu-

(1) [1916] 20 C. W. N. 685=32 I. C. 393.

nity to the railway from its liability as a bailee.

Further, it must be noted that the plaintiffs had specifically denied that the goods had been carried by the railway at a reduced rate and the point was put in issue, the onus of which had been laid on the defendant. But no evidence was produced to discharge this onus, and, as pointed out by the learned Additional District Judge, the railway clerk, Surainder Nath, who appeared as a witness did not depose to the goods having been carried at reduced rates. The matter was within the special knowledge of the railway and could have been easily proved from their books. In these circumstances, the learned Additional District Judge was fully justified in finding this issue against the defendant. The learned Government Advocate has argued that on the finding that the risk-note had been carried by the plaintiff, the burden of proving that the goods were not carried at a reduced rate (as stated in the body of the note), shifted on to the plaintiff and he ought to have proved that the goods had not been carried at a reduced rate. But the defendant did not object to the form of the issue or the allocation of onus in either of the Courts below and I cannot allow the question to be raised for the first time in second appeal.

Mr. Shamair Chand for the respondent sought to challenge the finding of the learned District Judge that wilful negligence on the part of the railway had not been proved. But this was a clear finding of fact with which this Court could not interfere and I did not accordingly allow him to argue this point.

Having regard to my findings on the main point argued, the plaintiff succeeds and his claim was rightly decreed by the learned Additional District Judge for Rs. 528-10-0. The appeal fails and is hereby dismissed, but under the circumstances I leave the parties to bear their own costs in this Court.

S.J. *Appeal dismissed.*

A. I. R. 1928 Lahore 164

JAI LAL, J.

Muhammad Ali—Accused--Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1544 of 1927, Decided on 16th December 1927.

Police Act (5 of 1861), S. 29—Mere negligence in duty does not amount to "violation of duty."

Every negligence does not amount to "violation of duty," within S. 29 much less when it is not wilful. [P 165 C 1]

Muhammad Amin—for Petitioner.

Judgment.—These are two petitions in revision of the order dated 12th August 1927 of the Sessions Judge of Ambala whereby he upheld the conviction of the petitioners under S. 29, Police Act, and sentenced each to a penalty of two months' pay. The petitioners are two constables of police in the District of Ambala. Muhammad Ali petitioner was directed by the Sub-Inspector to arrest one Qutbu who had been suspected of theft and to produce him before the Sub-Inspector. Muhammad Ali arrested the suspect and obtained the assistance of Wali Muhammad constable at the thana of Bilaspur, and was escorting him to the place where he expected to find the Sub-Inspector. He was, it appears, riding a mare while the constable Wali Muhammad was actually holding the handcuffs of Qutbu. There were some other persons with this party who apparently had been deputed to accompany these constables by a lambardar at their request. In the way the prisoner escaped.

The petitioners were sent up for trial and were found by the Magistrate guilty of having intentionally allowed Qutbu, to escape. On appeal the Sessions Judge has disbelieved the testimony of the prosecution witnesses and has acquitted the petitioners of the offence of having intentionally allowed the prisoner to escape. He has, however, convicted them of being guilty of "violation of duty" inasmuch as, according to him, they were guilty of negligence in permitting the prisoner to escape. The following extract from the judgment of the learned Sessions Judge is an indication of what facts he was prepared to find:

In my view the only important ground of appeal is the 5th, that there is no evidence on the record to prove that the escape of Qutbu was due either to the negligence or intention on the part of the appellants. The chamar witnesses gave a story which appears to me im-

probable . . . . . In my opinionthis evidence is clearly false and the chamars have concealed the true facts or else did not accompany the party at all. Had the appellants intended to permit Qutbu to escape it is most improbable that they would have asked Gadi lambardar to furnish three chamars to accompany them . . . I can only conclude therefore that the appellants never intended to allow Qutbu to escape. The question remains whether they permitted him to escape negligently. As already stated there is no evidence at all of the actual manner of escape, but the chamars have said that Muhammad Ali was riding a horse and Wali Muhammad was holding the handcuffs, In default of any explanation by the appellants as to the actual manner of escape I think it should be held that the escape was due to the negligence of the two appellants, for had Muhammad Ali been on the look out he could have chased, he being on horseback and had Wali Muhammad been on the look out he would not have lost hold of the handcuffs.

The learned Judge then discusses the question whether "negligent sufference of escape" is an offence under S. 29, Police Act, and after aswering it in the affirmative on the ground that it fell within the expression "violation of duty" as used in that section upheld the conviction.

Now I have carefully considered the question of interpretation of the expression "violation of duty" as used in S. 29, Police Act, and am of opinion that it connotes something more than mere non-performence of duty. The word "violation" implies something more than mere omission to perform a duty. It may under certain circumstances include "illegal omission," but such omission must be of some positive duty imposed by law and it is the duty of the prosecution affirmatively to prove what under the circumstances disclosed a person who is alleged to have been guilty of violation of duty should have done and that he wilfully failed to do that. In this case the learned Sessions Judge has convicted the petitioners merely on what appears to me to be an assumption that it was for them to establish the circumstances under which Qutbu escaped from their custody.

The circumstances may and probably do raise an inference of negligence, but then I am not prepared to hold that, every negligence amounts to "violation of duty." In my opinion violation implies a certain amount of violation on the part of the accused. The facts found in this case did not raise any presumption of the existence of any consciousness on the part of the petitioners that they were breaking any rules that governed them in the matter of the escorting of the prisoner. Their negligence was not wilful. After a careful consideration of the circumstances of the case I have arrived at the conclusion that the facts disclosed do not fall within the ambit of S. 29, Police Act. Accepting this petition I set aside the conviction of the petitioners and direct that the penalty if paid be refunded to them.

S.J. *Petition accepted.*

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HARRISON, J.

Sodagar—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1348 of 1927, Decided on 25th November 1927, from order of Dist. Magistrate, Montgomery, D/- 11th August 1927.

Hindu Law—Aroras—Marriage with maternal aunt by chadar andazi ceremony is invalid.

The marriage by the chadar andazi ceremony with his maternal aunt by an Arora, who is governed by Hindu law, cannot be a legal marriage. [P 165 C 2]

J. L. Kapur for *R. C. Soni*—for Petitioner.

Jamna Das—for the Crown

Judgment.—Sodagar has been convicted under S. 498 of enticing and retaining Mt. Jawali, who is said to be the wife of one Sawan Ram. The question raised on revision is that the parties being Aroras no valid marriage could have taken place by chadar andazi or any other form of ceremony between this man Sawan Ram and Jawali. The relationship is that Sawan Ram is the sister's son of the deceased husband of Mt. Jawali. There is the evidence of the two witnesses to the effect that such a marriage is valid, one a Mahomedan and the other a Brahmin, who stated in the widest possible terms that Hindus can marry their maternal aunts—a proposition which is not supported even by counsel for the complainant. The position, therefore, is that if the parties are governed by Hindu law, and the presumption is that Aroras are so governed, the marriage was no marriage. Further if it was performed at all, it was performed by the chadar andazi ceremony

which, I understand from both sides, is not recognized by the strict Hindu law. The only possibility, therefore, is that, although Aroras as a whole are governed by Hindu law, the members of the particular family are governed by the agricultural custom of the people amongst whom they live, a fact which would only be established by clear and convincing evidence. There is none. The case must, therefore, fail as the first essential has not been proved, I accept the application for revision and acquit the accused.

S.J. *Application accepted.*

A. I. R. 1928 Lahore 166

SHADI LAL, C. J., AND BHIDE, J.

Bengal North-Western Railway Co.—Defendant—Appellant.

v.

Firm Dassundhi Mal-Bishambar Das—Plaintiffs—Respondents.

First Appeals Nos. 1084 and 2769 of 1925, Decided on 6th December 1927, from decree of Sr. Sub-Judge, Karnal, D/- 4th February 1925.

(a) *Railways Act, S. 72—Risk-note.*

A risk-note signed by a person other than the one who consigned or delivered the goods to the railway is invalid : 20 *C. W. N.* 685, *Rel. on.* [P 169 C 1]

(b) *Railways Act, S. 72—Risk-note proved invalid—Damage proved—Railway must prove that it was not due to their negligence.*

In the absence of a valid risk-note damage being proved, it is for the railway to account for it and show that it was not due to any negligence on their part. [P 169 C 1]

(c) *Railways Act, S. 72—Risk-note A—Loss due to undue delay in transit is not covered.*

Risk-note A confers exemption from liability only in respect of the "condition" of the goods at the time of the delivery at destination. It cannot confer immunity from liability for loss due to other causes, e. g., loss due to fall in prices resulting from undue delay in transit, or loss due to disappearance of goods due to theft etc. : *A. I. R.* 1924 *All.* 760 and *A. I. R.* 1924 *All.* 8, *Rel. on.* [P 169 C 1 2]

(d) *Railways Act, S. 56—Refusal of railway servant to note condition of goods at delivery—Consignee refusing to take delivery—Goods sold late—Consignee cannot complain of low price.*

The refusal of railway authorities to reweigh goods or note the condition or weight in their registers at the time of delivery gives no cause of action to a consignee,and if he refuses to take delivery, he cannot complain that the sale of goods was unnecessarily delayed and consequently the goods fetched a very low price: 58 *I. C.* 200 and *A. I. R.* 1922 *Lah.* 448, *Ref.* [P 169 C 2, P 170 C 1]

The mere fact that the railway claimed demmurrage does not give rise to any implication that the railway consented to act as warehouse-men: *A. I. R.* 1922 *All.* 514 and *A. I. R.* 1926 *Lah.* 575, *Foll.* [P 170 C 1]

Moti Sagar and *Nawal Kishore*—for Appellant.

Badri Das, Shamair Chand, Qabul Chand and *Bishen Narain* — for Respondents.

Bhide, J.—Appeals Nos. 1084 and 2769 of 1925 arise out of two suits based on similar facts which were disposed of together by the Senior Sub-Judge of Karnal. The appeal in one of the suits lay to this Court, while that in the other lay to the District Judge, Karnal, but the latter appeal was transferred to this Court on the motion of the appellant. The material facts for the purposes of these appeals, which may be taken to be proved beyond any doubt, are as follows :

Certain consignments of goods consisting of makki (maize) and khali (oil-cakes) were booked under risk-notes A from Kursela (B. N. W. Ry. to Karnal and Panipat (on the E. I. Ry.) by Devi Parshad-Ram Sahai, commission agents of Kursela, and the railway receipts were endorsed in favour of the plaintiffs Dassunddhi-Mal-Bashambar Das of Karnal to whom the goods had been sold. According to the instructions of the consignor, the goods were to be sent via Mukame Ghat. The goods were booked between the 31st January 1922 and the 4th February 1922 and reached Mukame Ghat on 9th February 1922, but were detained at the latter place on account of a strike amongst guards of the E. I. Ry. owing to which the conveyance of goods in the "upward" direction, that is, towards Allahabad and Delhi had been stopped on the latter railway. The goods remained at Mukame Ghat till the 5th March 1922. On the latter date they were dispatched to Bara Banki for being sent on to Karnal and Panipat by another route and reached Bara Banki on 11th March 1922. (The judgment of the Senior Sub-Judge shows that the goods reached Bara Banki on 22nd March 1922 but this appears to be a mistake). The goods remained at Bara Banki from the 11th to the 22nd March 1922 as the O. R. Ry. to which they were to be transhipped there refused to accept the goods for some reason and the higher authorities of that railway had to be approached.

On 22nd March the goods were transhipped from the B..N. W. Ry. to the O. R.Ry. and reached Karnal and Panipat within a short time, that is between the 27th March and 1st April 1922. On arrival, however, the goods were found to be in a damaged condition. The goods at Karnal were inspected by the Assistant Medical Officer of the E. I. Ry. and his reports Ex. D. K and D. L. show that about one-fourth of the goods were in a rotten condition and unfit for consumption. Out of the Panipat consignment also some 24 bags of makki were found to be altogether rotten: vide evidence of Behari Lal, Goods Clerk, P. W. 18. The plaintiff asked the railway officials to make a note as regards the condition of the goods in the railway registers, but the railway officials declined to do so. Thereupon the plaintiff also refused to accept delivery. The goods remained at Panipat and Karnal till some time in July and August 1922 respectively, when they were auctioned after notice to the plaintiff. The goods at Karnal fetched only Rs. 1,600 while those at Panipat fetched Rs. 850. The railway company offered to pay the price realized after deducting what was chargeable as demurrage, etc. to the plaintiff, but the plaintiff refused to accept this sum and instituted separate suits in respect of the Karnal and Panipat consignments out of which the present appeals arise.

The learned Senior Sub-Judge has held that there was undue delay in transit, causing damage and deterioration of the goods, that the E. I. Ry. was not justified in refusing to make a note in their registers about the condition of the goods at the time of delivery, that the risk-note A, under which the Panipat goods were consigned, was invalid and the one in respect of the Karnal goods also could not absolve the railways inasmuch as the deterioration and damage in this case was due to undue delay in transit. It was found that in the ordinary course the goods should have reached Karnal and Panipat in about 15 days, that is, about the middle of February 1922. Calculating on the basis of the market rates for makki and khali prevailing at that time, the plaintiff was awarded a decree for Rs. 5,175-7-0 in respect of the Karnal goods and for Rs. 2,658-9-6 in respect of Panipat goods. Both the B. and N. W. Ry. and the E. I. Ry. have been made defendants, but the decrees were passed against the B. and N. W. Ry. only as according to the findings of the learned Senior Sub-Judge, the undue delay which was responsible for the damage and deterioration of the goods occurred on that railway only. From this decision the B. and N. W. Ry. have appealed in both the cases. The main points urged on behalf of the appellants were :

(1) Although there was some delay in transit it cannot be considered to be unreasonable in the circumstances of the case.

(2) The goods were in a deteriorating condition from the outset and no damage was caused by any undue delay or other negligence on the part of the appellant railway.

(3) The plaintiff was not justified in refusing to take delivery on the ground that the railway officials refused to make a note as regards the condition of the goods in the railway registers, and the appellants are not responsible for the consequences of his refusal.

(4) The goods were consigned under risk note "A" which gives complete protection to the appellants.

As regards the first point : it was conceded that the railway was bound to convey the goods to destination within a "reasonable time," but it was urged that in view of the strike on the E. I. Ry. the delay in the present case was not unreasonable. It will appear from the facts already given that the chief delay occurred at Mukame Ghat and Bara Banki. The goods were detained at the former place from 9th February to 5th March (i. e, 24 days) and from 11th to 22nd March (i. e., 11 days) at the latter place. The delay at Bara Banki has been satisfactorily explained. It was due to the refusal of the O. R. Ry. to accept the goods at first, not to any negligence on the part of the appellant railway. The same cannot be, however, said of the delay of 24 days at Mukame Ghat. It is true that the consignor had given instructions for the goods being conveyed via Mukame Ghat, but this was apparently not considered to be an essential part of the contract and the goods were eventually dispatched by the appellant railway by another route which was all along open, without reference to the consignors. It seems to me that when it was found on the arrival

of the goods at Mukame Ghat that the E. I. Ry. was not accepting goods for conveyance to destination via Mukame Ghat the Railway authorities as agents of the consignors should have either asked for further instructions from them (cf. S. 214, Contract Act), or should have sent the goods by the alternative route which was eventually adopted. I think it should have been possible to adopt one or the other course easily within the course of a week or so at any rate. I would, therefore, hold in the circumstances, that there was unnecessary delay of at least two weeks at Mukame Ghat which could not be held to be "reasonable."

It will be convenient to discuss the second and fourth points together. There is no evidence worth the name in support of the contention that the goods were in a deteriorating condition from the outset. Our attention has been drawn to the evidence of Babu Gopalji Sahai, Station Master (D. W. 4), who has stated in cross-examination that the goods had begun to deteriorate. This witness, however, admitted that he had opened only two bags. The defendants in their written statement did not allege that the goods were in a bad condition from the outset. The form of the risk-note A shows that it is intended to be taken when goods are already in bad condition or so defectively packed as to be liable to damage, leakage, or wastage. The contents of the risk-notes taken in the present case show that they were taken because the packing was defective. In each case the reason given refers to the condition of the bags and not to that of the contents of the bags. The written statements of the defendants also show that the risk-notes "A" were taken because the packing was considered defective. It must also be remembered that Munshi Lal, a servant of the plaintiffs, was present at the time the goods were booked and it can scarcely be expected that he would have accepted any goods in a deteriorating condition.

There is no doubt that part of the goods were found to be in a damaged condition on arrival at destination. The original consignments consisted of 383 bags of makki and 45 bags of khali for Karnal and 207 bags of makki and 13 bags of khali for Panipat. The reports D K and D L of the Assistant Medical Officer in respect of the Karnal consignment (which have been referred to already) show that there were only 340 bags of maize and khali intact, while the contents of the rest were lying in heaps in a rotten condition, mixed up with torn gunny-bags. The Panipat goods were not examined on arrival by the Assistant Medical Officer, but the missing goods report, Ex. D-9, shows that out of the 220 bags only 165 were intact, the contents of the rest being loose and in a rotten condition. The goods wore found to be partly damaged, not only at destination, but also at Bara Banki, where they were transhipped from the B. & N. W. Railway to the O. R. Railway on 22nd March 1922. The evidence of the railway officials at Bara Banki (D. W. 9, D. W. 10 and D. W. 11) shows that the contents of about 20 to 40 bags in each wagon containing the consignments in dispute were found to be loose and in a rotten condition at the time of transhipment.

The learned Sub-Judge has found that delay in transit was responsible for the damage, and has relied upon the opinion of Kidar Nath (D. W. 5). Kidar Nath's "opinion" on such a matter can hardly be considered relevant. In any case it is not supported by any reasons and seems to be of little value. If mere delay, i. e., lapse of time, was responsible for damage, it does not appear why it should affect only a portion of the consignments. It seems highly probable that the damage was due to some other cause, but the evidence on the record does not disclose it. The learned Senior Sub-Judge seems to be inclined to think that damage may have been also caused by the goods lying on the river bank at Mukame Ghat. But there is no evidence to show that the goods were taken out for transhipment at Mukame Ghat. In fact, the evidence on the record is to the contrary. The evidence of Kidar Nath (D. W. 5) shows that when the B. & N. W. Railway wagons reached Bara Banki, the Kursela seals were intact except in the case of one wagon.

The appellant railway ascribes the damage to defective packing and seeks protection under the risk-note A. It was argued on behalf of the plaintiff that as a matter of fact the packing was not defective and the railway had no authority to demand risk-note A at all. But

this plea was not raised in the lower Court and on the evldence as it stands it does not appear justifiable to hold that the appellant railway had exceeded its authority in demanding the risk-note A. The learned Senior Sub-Judge has found that the risk-note A in respect of the Panipat consignment was invalid owing to the fact that it was not signed by the consignor or their agent. This finding seems to be correct. The Panipat risk-note purports to bear the signature of one Munshi Lal, who was a servant of the plaintiff. He was not the person who consigned or delivered the goods to the railway and his signature on the risk-note is of no avail. The name "Devi Prasad Chaudhri" also appears on this note, but Devi Prasad has denied having signed it and the evidence of the Station Master, Kursela (D. W. 7) shows that it was Munshi Lal who wrote the name. Risk-notes, under which a railway claims exemption from liability have to be strictly proved cf. *Mohabarsha Bankapur* v. *Secy. of State* (1) and the risk-note A, in respect of the Panipat consignment, cannot, therefore, help the appellant. The validity of the risk-notes in respect of the Karnal consignments is not disputed.

The Panipat risk-note being invalid, the position of the railways in respect of that consignment was that of an ordinary bailee, and it was incumbent on the railways to show that they took as much care of the goods during transit as a man of ordinary prudence would have done. In the absence of a valid risk-note damage being proved, it was for the railways to account for it and show that it was not due to any negligence on their part. But no such evidence has been produced.

The appellants would, therefore, be liable for the damage to the Panipat goods during transit.

In respect of the Karnal goods, however, the risk-notes would seem to protect the railway. The risk-notes are prima facie evidence of defective packing, and this evidence has not been rebutted. In the absence of any other explanation, it must, I think, be held that a part of the goods was damaged during transit owing to defective packing and such loss is covered by the risk-notes.

The risk-note A, however, confers exemption from liability only in respect of the "condition" of the goods at the time of the delivery at destination. It cannot confer immunity from liability for loss due to other causes, e. g., loss due to fall in prices resulting from undue delay in transit, or loss due to disappearance of goods, due to theft etc., cf. *B. N.-W. Ry.* v. *Munna Lal Bishambhar Nath* (2) and *E. I. Ry. Co.* v. *Gopi Krishan* (3). In the present instance it has been found that there was an unreasonable delay in transit of at least two weeks. The goods reached destination about the end of March. So, if there had been no "unreasonable" delay, they should have reached there about 15th March. If, therefore, there was a fall in the price of the goods in question between 15th March and 1st April the appellant railway would be liable for the loss resulting therefrom.

The net result of the above findings is that at the time of arrival of the goods at destination the liability of the railway was as follows: (a) there being an unreasonable delay of two weeks in transit, the railway was responsible for loss (if any) due to fall in the price of the goods during that period.

(b) In respect of the Panipat goods, the railway was liable to compensate plaintiff for the goods which were found to be damaged.

(c) In respect of the Karnal goods, the railway was not liable for any damage and was only bound to deliver the goods in the condition in which they arrived.

The last point for decision is whether the plaintiff was justified in refusing to take delivery merely because the railway officials refused to make a note in their registers about the quality and quantity of the goods, and what are the consequences of the refusal. It is conceded on behalf of the plaintiff that there is no provision in the Indian Railways Act, or the rules framed under that Act, requiring railway officials to make a note as regards the condition or weight of goods at the time of delivery. The weight of authority is in favour of the appellant's contention that the refusal of railway authorities to re-weigh goods or note the condition or weight in their registers at the time of delivery gives no cause of action to a consignee. This was taken as "settled law" in *Suraj Mal* v. *B. N.*

(1) [1916] 20 C. W. N. 685=32 I. C. 393.

(2) A. I. R. 1924 All. 760=46 All. 844.

(3) A. I. R. 1924 All. 8=45 All. 534.

Ry. Co. (4), which follows a number of previous authorities ; and the same view was taken by the Single Bench of this Court in *Secy. of State* v. *Sham Lal Deoki Nandan* (5). It seems unfortunate that the plaintiff refused to take delivery under a mistaken notion of his rights, but in view of the authorities referred to I think it must be held that the railway was not responsible for the consequences of his refusal to take delivery.

Owing to plaintiff's refusal to accept delivery at destination, the E. I. Ry. was entitled to sell the goods after notice under S. 56, Indian Railways Act, and action was taken accordingly. The Panipat goods were sold for Rs. 850 on 26th July 1922, and the Karnal goods for Rs. 1,600 on 9th August 1922. The railway claimed Rs. 694-13-0 on account of freight, wharfage, etc., in respect of the Karnal goods and Rs. 362-5-0 on account of similar charges in respect of Panipat goods, and offered to pay the balance to the plaintiff, but he refused to accept the same.

It was argued on behalf of the plaintiff that the sale was unnecessarily delayed, with the result that the goods deteriorated still further and fetched a very low price. As regards this it may be pointed out that the liability of the railway as "carriers" terminated when the plaintiff refused to accept delivery. In the absence of any agreement to that effect, the railway cannot be held liable even as warehouse-men, thereafter. The mere fact that the railway claimed demurrage does not give rise to any implication that the railway consented to act as warehouse-men : *Chapman* v. *G. W. Ry.* (6), *Gangaji Cotton Mills Co. Ltd.* v. *E. I. Ry. Co.* (7), and *Secy. of State* v. *Harkishan Das Kurumal* (8). After the plaintiffs' refusal to accept delivery the railway's liability was merely as holders of unclaimed property under S. 56, Railways Act, and the provisions of that section appears to have been complied with.

It has been found above that the plaintiff was entitled to claim damages on account of fall in price (if any) of the goods between 15th March and 1st April. There seems to be no evidence on the record as regards any fall in price of the goods in question during this particular fortnight, but, in any case it appears unnecessary to go into this question as plaintiff himself refused to accept delivery without any legal justification and precluded himself from selling the goods at the time.

As a result of the above findings, my conclusion is that plaintiff is only entitled to recover the balance of the sale price as offered by the E. I. Ry. plus the value of the goods out of the Panipat consignment which were found to be damaged on arrival at destination. (The judgment then gave details of the above and concluded.) On the above findings I would accept both the appeals and, setting aside the order of the learned Senior Subordinate Judge, pass decrees in favour of the plaintiff as follows :

(i) *Civil Appeal No.* 1084 *of* 1925 (*Karnal case*).—Decree for Rs. 905-3-0 only. Plaintiff to pay costs of appellant throughout.

(ii) *Civil Appeal No.* 2769 *of* 1925 (*Panipat case*).—Decree for Rs. 1242-14-6 only. Parties to bear their own costs throughout.

Shadi Lal, C. J.—I concur.

D.D. *Appeals accepted.*

(4) [1920] 58 I. C. 200.
(5) A. I. R. 1922 Lah. 448.
(6) [1880] 5 Q. B. D. 278=42 L. T. 252=49 L. J. Q. B. 420=44 J. P. 363=28 W. R. 566.
(7) A. I. R. 1922 All. 514=44 All. 763.
(8) A. I. R. 1926 Lah. 575=7 Lah. 370.

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* A. I. R. 1928 Lahore 170

TEK CHAND, J.

Mt. Parbati—Defendant—Appellant.

v.

Mt. Durga Devi—Plaintiff—Respondent.

Misc. First Appeal No. 1850 of 1927, Decided on 8th December 1927, from order of Senior Sub-Judge, Ludhiana, D/- 20th July 1927.

(*a*) *Civil P. C., Sch.* 2, *paras.* 17, 20—*Application to file agreement—Arbitrator delivering his award and filing it in Court before disposal of the application—Application becomes infructuous and Court cannot make second reference to arbitrator.*

In a case where at the time when the application under para. 17 to file the agreement was made, the arbitrator had not entered upon the arbitration, but before the application could be disposed of, he had actually delivered his award, and filed it in Court, *Held* : that the application had become infructuous and the Court cannot make another reference to the arbitrator as the object of having the agreement to refer to arbi-

tration filed in Court under para. 17 which is to direct the arbitrator to enter upon his duties and to deliver his award, is achieved, though not through the agency of the Court. [P 172 C 1, 2]

The proper course for the parties to follow in such a case is to take steps under para. 20 to have the award made a rule of Court. This may be done either by amendment of the previous application or by withdrawing it and filing a fresh application under para. 20. [P 172 C 2]

✻ (b) *Arbitration—Private arbitration—Award set aside—Another award cannot be ordered without fresh agreement freely entered into by parties.*

Where in a private arbitration the arbitrator has once delivered the award, and that award has for some reason or other been set aside, the Court cannot direct the arbitrator to make another award without a fresh agreement freely entered into by both the parties. [P 173 C 1]

✻ (c) *Arbitration — Arbitrator after award becomes functus officio and his authority cannot be revived by the award being set aside.*

The proposition of law is firmly established that an arbitrator becomes functus officio as soon as he delivers the award: *Mordue* v. *Palmer*, (1870) 6 *Ch.* 22 and *Brooke* v. *Mitchell*, (9 *L. J.* (*N. S.*) *Ex.* 269; 38 *All.* 83 and *A. I. R.* 1921 *Pat.* 161, *Foll.* It is also beyond question that an arbitrator's authority once exhausted is not resuscitated by the award being set aside or becoming otherwise void, so as to enable him to make a fresh award; 35 *P. R.* 1884; 67 *P. R.* 1886, *Dist.* [P 173 C 1]

Mehr Chand Mahajan for *Jagan Nath Aggarwal*—for Appellant.

Fakir Chand—for Respondent.

Judgment.—One Nathu Mal died sonless in 1908 leaving him surviving a widow, Mt. Puran Devi, and two daughters Mt. Durga Devi plaintiff-respondent and Mt. Parbati defendant-appellant. Both these daughters are married and Mt. Parbati has got a son named Piare Lal. Mt. Puran Devi died on 22nd January 1925, and disputes arose between the daughters about succession to the property of Nathu Mal. On 11th April 1925 an agreement was executed by Mt. Parbati and Mt. Durga Devi referring the dispute to the sole arbitration of one Mansa Ram.

On 30th April 1925 Mt. Durga Devi filed an application under Sch. 2, para. 17, Civil P. C., in the Court of Mr. Barkat Ali, Senior Subordinate Judge, Ludhiana, praying that the aforesaid agreement be filed in Court, and a reference made to the arbitrator to decide the dispute and deliver an award. Various adjournments were granted principally owing to the difficulty in having the summonses served on the opposite party Mt. Parbati. As she failed to appear, the Court on 13th November 1925, directed ex-parte proceedings to be taken against her. On that date the Court also passed an order directing the plaintiff's mukhtar "to produce the arbitrator with the faisla salsi (award) on 18th December 1925." On that date the learned Judge was on leave and the case was adjourned to 25th January 1926. In the meantime the arbitrator had started proceedings on 13th December 1925, and as Mt. Parbati did not appear before him he delivered an ex-parte award on 7th January 1926.

On the date fixed for the hearing of the case, i. e., 25th January 1926, the arbitrator appeared in Court and filed his award. Time was granted to the parties to file objections on or before the 6th February 1926. On that date Mt. Parbati appeared and filed a number of objections against the award. The case was next taken up on 12th April 1926, on which date Mr. Barkat Ali passed an order holding that the proceedings taken up to that date had not been quite legal inasmuch as no order under para. 17 (3) had been passed directing the agreement to be filed nor had any order issued to the arbitrator under Cl. 4 of the same paragraph. He accordingly directed that the case should "begin de novo according to the provisions of para. 17," and called upon Mt. Parbati to show cause why the agreement be not filed.

It is important to note that this order has been interpreted by Mr. Barkat Ali's successor, Mr. Muhammad Hassan, who has decided the case, as one superseding the award dated 7th January 1926, and both Mr. Mehr Chand for the appellant and Mr. Fakir Chand for the respondent are agreed (though on different grounds) that this order had the effect of setting aside the award.

On 12th April 1926, after the above order had been passed both parties were examined at length as to the circumstances under which the agreement dated 11th April 1925, to refer the dispute to arbitration had been executed and the following issue was framed:

Was not the agreement freely consented to by Mt. Parbati?

Onus probandi on defendant.

The case was adjourned for evidence to 18th October 1926, but for one reason or

another no progress was made for a whole year until 2nd July 1927, when Mr. Muhammad Hassan took it over. On that date an application was presented by the appellant stating that it was useless to make an enquiry into the legality of the agreement dated 11th April 1925, as the arditrator had already made an award on 7th January 1926, and the reference to him had exhausted itself. The respondent was ordered to give a reply to this application and in the meantime evidence was recorded. On 20th July 1927, the learned Subordinate Judge passed an order holding that the defendant-appellant had failed to prove that the agreement had not been voluntarily executed by her and ordered that the agreement be filed and a reference made to the arbitrator directing him to file a fresh award on or before 9th August 1927.

Against this order a miscellaneous appeal under S. 104 (d), Civil P. C. has been preferred by Mt. Parbati and it has been urged on her behalf that the arbitrator having delivered an award on 7th January 1926, and actually filed it in Court on 25th January had become functus officio and no fresh reference could be made to him to deliver another award, even though the award already delivered had been superseded by order of the Court.

Mr. Mehr Chand for the appellant and Mr. Fakir Chand for the plaintiff-respondent have addressed me at length on this point and after giving my best consideration to their respective contentions, I am of opinion that this appeal must succeed. At the time when the application under para. 17 to file the agreement was made by the respondent, the arbitrator had not entered upon the arbitration, but before this application could be disposed of he had actually delivered his award on 7th January 1926, and it had been, as already stated, filed in Court on 25th January 1926. The application had, therefore, become infructuous as the Court could not make another reference to him. The object of having the agreement to refer to arbitration filed in Court under para. 17 is to direct the arbitrator to enter upon his duties and deliver his award; but where the arbitrator has actually delivered the award before the application is disposed of, the object that the application had in view is achieved, though not through the agency of the Court and nothing further remains to be done on application. All proceedings under that paragraph must, therefore, necessarily come to end. The proper course for the parties to follow in such a case is to take steps under para. 20 to have the award made a rule of Court. This may be done either by amendment of the previous application or by withdrawing it and filing a fresh application under para. 20. But in the present case this procedure was not followed. On the other hand the Court proceeded to set aside the award on 12th April 1926. After this had been done, the lower Court had, in my opinion, no jurisdiction to proceed with the matter any further under para. 17.

The fact that in this particular case the Court, on 13th November 1925, had directed the plaintiff's mukhtar to produce the arbitrator with faisla sals[i] (award) and that the arbitrator did fil[e] the award in Court on 25th January 1926, in pursuance of this order is wholly immaterial for the decision of the point now before me. In the first place, I am not quite sure whether in the vernacular order of that date the words "faisla salsi" were not written by an oversight for "iqrarnama salsi" (agreement to refer). But even if this was not the case, and the Court really meant to direct the arbitrator to file the award on 13th November 1925, this order was one directing the arbitrator to enter upon the arbitration and to proceed to deliver his award and must be taken to have been passed under para. 17 (4). If this were so, the procedure under para. 17 had been complied with and the application granted. In this view of the case also, the reference to the arbitrator could not be made a second time by the Court on 20th July 1927, and the order under appeal is obviously wrong.

Mr. Fakir Chand, while admitting that the legal position is as stated above, has tried to distinguish the present case on the ground that the reason given by Mr. Barkat Ali for setting aside the award was that the proper procedure under para. 17 had not been followed, and that it was a necessary consequence of that order that the Court should follow the proper procedure and make a fresh reference to the arbitrator. I am not at all pressed by this argument and consider it to be wholly fallacious. At this stage of

the litigation, I am not concerned with the reasons given by Mr. Barkat Ali in his order of 12th April for superseding the award. His reasons may be right or may be wrong, but the fact remains that the award was set aside and both parties acquiesced in it. Mr. Fakir Chand admits that his client could have appealed against that order under S. 104, Civil P. C., but did not do so, and, consequently the order became final under S. 105 (2). In this view of the matter also, the case resolves itself to the same point, viz., whether in a private arbitration where the arbitrator had once delivered the award, and that award had for some reason or other been set aside, can the Court direct him to make another award without a fresh agreement freely entered into by both the parties. There is no doubt whatever that the only possible answer to this question is in the negative. The proposition of law is finally established that an arbitrator becomes functus officio as soon as he delivers the award: *Mordue* v. *Palmer* (1). The reference to him has exhausted itself, his authority is at an end and he is not at liberty to exercise a fresh mind on the case and to deliver another award: *Brooke* v. *Mitchell* (2).

Reference may also be made to Russell on Arbitration and Award, 11th edn., p. 156 et seq; Banerji on Law of Arbitration in India, p. 237-38, *Har Narain* v. *Bishembhar Nath* (3); and *Satish Chandra Bose* v. *Paliram Aggarwalla* (4). It is also beyond question that an arbitrator's authority once exhausted is not resuscitated by the award being set aside or becoming otherwise void, so as to enable him to make a fresh award. As pointed out by Russell,

> his authority once exercised, though ineffectually, is gone for ever.

For the contrary view Mr. Fakir Chand has cited 35 *P. R.* 1884 and *Ralla* v. *Badhawa* (5). The former of these rulings, however, related to an application to refer a pending suit to arbitration under S. 508, old Civil P. C. It was found that the order passed by the Court under S. 512 of the Code was not in accordance with the application and it was held that the reference was invalid and consequently the award delivered thereon was not a proper award. That case is wholly distinguishable from the present, as here the reference was not made in a pending suit, but the parties had agreed out of Court to refer their dispute to arbitration. It is hardly necessary to emphasize that the two cases stand on an entirely different footing. In pending suits the authority of the arbitrator is derived from the order of the Court making the reference and if this order is defective there is no proper reference and consequently there can be no legal award. On the other hand, in a private arbitration it is the agreement entered into between the parties which confers jurisdiction on the arbitrator to deal with the dispute. In such a case, if proceedings are taken under para. 17 and a reference secured under Cl. 4, it is not this reference which constitutes the arbitrators as a private tribunal, but it is merely the machinery by which the tribunal already constituted by agreement of parties is made to function. This ruling is, therefore, of no assistance to us in the decision of the present case.

In the second case *Ralla* v. *Badhawa* (5) the reference no doubt had been made under S. 523 of the old Civil P. C., corresponding to the present Sch. 2, para. 17, but there the agreement to refer contemplated that in the event of there being a difference of opinion and an umpire being appointed, an award should be made by a majority of them. On such difference arising an umpire was appointed, but the reference actually made under S. 523 did not provide for the umpire acting jointly with the arbitrators and delivering an award in agreement with one or the other of them and the award actually given by the umpire differed from that given by either arbitrator. The result was that neither the reference under S. 523 nor the award that followed thereon was in accordance with the agreement. The tribunal had not been constituted in accordance with the agreement and there was in effect no award at all. The Chief Court accordingly held that both the reference and the so-called award were illegal and remanded the case to the lower Court for making a proper reference and having a proper award. It will thus be seen that that decision proceeded

(1) [1870] 6 Ch. 22=40 L. J. Ch. 8=19 W. R. 86=23 L. T. 752.
(2) [1840] 9 L. J. (N. S.) Ex. 269=6 M. & W. 473=4 Jur. 656=8 D. P. C. 392.
(3) [1916] 38 All. 83=31 I. C. 907=13 A. L. J. 1129.
(4) A. I. R. 1921 Pat. 161=6 P. L. J. 287.
(5) [1886] 67 P. R. 1886.

on its peculiar facts and is no authority for the contention put forward by Mr. Fakir Chand.

I, must, therefore, hold that the order under appeal, making a fresh reference to the arbitrator and calling upon him to deliver a fresh award, is illegal and ultra vires and must be set aside. Accordingly I accept the appeal and direct that the respondent's application be dismissed. Having regard to all the circumstances of the case, I order that the parties shall bear their own costs in both Courts.

S.J. *Appeal accepted.*

A. I. R. 1928 Lahore 174

ZAFAR ALI, J.

Hamir Singh and *others*—Defendants—Appellants.

v.

Sundar Singh and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1332 of 1927, Decided on 17th November 1927, from decree of Dist. Judge, Hoshiapur, D/- 7th January 1927.

Pre-emption—Sale by sonless proprietor—Suit by reversioners for declaration that sale is inoperative as against their reversionery rights—Resale of land to the reversionars by the vendees—Son of original vendee bringing a suit for pre-emption—Suit for pre-emption cannot succeed.

Two sonless proprietors sold certain lands and their collaterals instituted suits against vendor and his vendee for a declaration that the sale or sales effected by him would be inoperative as against their reversionary rights; but suits were compromised. The vendees resold the lands to the reversioners for certain sums somewhat less than they had paid to their vendors and the reversioners mortgaged the same to them for the same amounts. Afterwards the son of one of the original vendees brought a suit for pre-emption :

Held : that the reversioners got the lands not as ordinary purchasers, nor in pursuance of a bargain in open market, but as reversioners and they could not be deprived of what they got as reversioners by a pre-emption suit.

[P 174 C 2, P 175 C 1]

N. C. Pandit—for Appellants.

H. C. Kumar—for Respondents.

Judgment.—The three second appeals Nos. 1332, 1333 and 1344 of 1927 arise out of two identical pre-emption suits, and the only question involved in all of them is whether the sales on which the suits were based gave the plaintiff a right of pre-emption ; and if they did, what was the consideration for each sale and could it be paid. The plaintiff succeeded in both the Courts below. The facts that need be stated to determine the above questions are as follows :

Two sonless proprietors named Nikka and Naraina having sold certain lands individually by three separate deeds their collaterals, Hamira and others, instituted the two suits, one against each vendor and his vendee or vendees for a declaration that the sale or sales effected by him would be inoperative as against their reversionary rights. After issues had been framed, but before evidence, these suits were compromised. The vendees resold the lands to the reversioners for certain sums somewhat less than they had paid to their vendors and the reversioners mortgaged the same to them for the same amounts. The deeds of sale as well as of mortgage were executed and registered together, and the suits were then withdrawn.

One of the pre-emptors is a son of one of the original vendees and one is a collateral of another.

Now, there can be no manner of doubt that the transactions, as evidenced by the registered sale-deed were sales, but at the same time it is clear that the sales were effected in pursuance of a compromise based on the principle of give-and-take. The reversioners gave up their claim as put forward in their plaints and the original vendees gave up the lands. As the reversioners had not got the purchase money to pay up at once, they left the lands in mortgage with the vendees for that money. If instead of executing sale-deeds the parties had executed a deed of compromise embodying the same terms, a decree would have followed on that compromise and that would not have given rise to a claim for pre-emption. The deeds, however, give effect to the terms settled for compromising the suits and were executed as a matter of fact to create evidence of that compromise.

Even if it were decided that the transactions were sales pure and simple, then the question is what was the consideration for each sale. It was not only the money which the reversioners contracted to pay, but also the abandonment of their rights to secure which they had instituted the suits. It is obvious that the vendees one and all would not have agreed to re-sell the lands to the rever-

sioners if they had not been apprehensive of the results of the litigation. Thus the reversioners got the lands not as ordinary purchasers, nor in pursuance of a bargain in open market, but as reversioners. It follows, therefore, that besides the money that they agreed to pay there was the additional consideration for the sales that the suits were withdrawn. This additional consideration cannot be valued in money, but the pre-emptors must pay the whole of the consideration before they can get the lands. As they cannot possibly do this, they cannot succeed in their suits. They cannot deprive the reversioners of what the latter have got as such. For all these reasons I am of opinion that the suits for pre-emption must fail.

Before concluding the judgment a preliminary objection raised by the respondents' counsel must be noted. This was that the appeal was barred by time because according to the office note it was returned to the appellants' counsel to be re-filed within a week, but it was actually re-filed long after the expiration of that week. Along with the memorandum of appeal in each case copy of the judgment of the trial Court was attached, but the office wanted that copy of the detailed judgment of the trial Court, which was filed in one case should also be filed in the other case. It was not necessary for purposes of the appeal to file that copy, but the appellants' counsel obtained an additional copy of that judgment and it was for that reason that the re-filing of the appeal was delayed. The appeal did not become barred by time on account of that delay.

On the merits I accept the appeals and reversing the orders of the Courts below dismiss the plaintiff's suits with costs throughout.

N.K. *Appeals accepted.*

A. I. R. 1928 Lahore 175

HARRISON, J.

Faiz Mohammad—Complainant—Petitioner.

v.

Nabu and *another* — Accused— Respondents.

Criminal Revn. No. 1235 of 1927, Decided on 7th October 1927, reported by Sess. Judge, Karnal, on 15th July 1927.

(a) *Criminal P. C., Ss. 256 and 257—Accused requesting to recall prosecution witnesses for further cross-examination after framing of charge — Complainant willing to deposit expense of witnesses—Order directing complainant to pay costs to accused is illegal.*

The accused, after the charges were framed, requested to recall the prosecution witnesses for further cross-examination. The complainant stated that the witnesses were won over by the accused and thus he was unable to produce them in Court but he was willing to pay the process-fees for their production. Thereupon the Magistrate ordered him to pay the process-fee and costs of witnesses and also a certain sum of money to be paid to the accused as costs.

Held: that the order directing the complainant to pay costs to the accused was quite unjustifiable. [P 175 C 2 ; P 176 C 1]

(b) *Criminal P. C., S. 257—Accused calling prosecution witnesses for further cross-examination—It is doubtful whether complainant should pay expenses.*

It is doubtful whether under the Code, it is the duty of the complainant to pay the expenses of his witnesses over again for further cross-examination. [P 176 C 1]

The language of S. 257, Criminal P. C., seems to imply that it is the accused who applies for re-calling of prosecution witnesses for cross-examination and it is he who should pay the expenses and not the complainant. [P 176 C 1]

Facts.—This was a case under S. 323, I. P. C. After the prosecution evidence in the case had been recorded the accused were charged under S. 323 on 7th June 1927. On 8th June they stated that they will further cross-examine all the prosecution witnesses. The Magistrate ordered the complainant to produce his witnesses again on 7th June. On that date the complainant filed a petition that his witnesses who were related to the accused had been won over by the other side and so were not willing to come with him and that he will deposit their expenses and will have summons issued to them. On this the Magistrate (Chaudhry Ghasi Ram, Magistrate, Second Class, Thanesar) adjourned the case to 24th June directing the complainant to pay process-fee and costs of the witnesses and also ordered the complainant to pay Rs. 20 as costs to the accused. It is against this order that complainant has applied for revision.

Grounds. — The complainant had given a very plausible reason for the non-attendance of his witnesses. Without inquiring into the truth or falsehood of this allegation the Magistrate should not have ordered him to pay Rs. 20 as costs to the accused.

The complainant is a boy aged 13 or 14 years only. The Magistrate seems to have lost sight of this fact.

It is doubtful whether under the Criminal Procedure Code it is the duty of the complainant to pay the expenses of his witnesses over again for further cross-examination. There seems to be no provision in the Criminal Procedure Code to justify this procedure.

There is a note to S. 257 in Rama Natha Aiyer's Criminal Procedure Code, Vol. 2, p. 1016, to the effect that there is nothing in the Code which enables the Magistrate to demand from a complainant the expenses to be incurred by his witnesses for cross-examination in a warrant case. In *Amin Chand* v. *King-Emperor* (1) it was laid down that under S. 256, Criminal P. C., it is the duty of the Magistrate to re-call prosecution witnesses for cross-examination if the accused so demands after the charge is framed. The Sessions Judge who forwarded that case for revision to the High Court was of opinion that it was the duty of the Magistrate to re-call such witnesses presumably at the public expense. The language of S. 257, Criminal P. C., seems to imply that it is the accused who applies for re-calling of prosecution witnesses for cross-examination and it is he who should pay the expenses and not the complainant. It was not, therefore, for the complainant to pay expenses or to produce witnesses in this case. The Magistrate should have called the witnesses either at the expense of the Government or at the expense of the accused. His order, therefore, that complainant should pay Rs. 20 to the other side was not quite justified, the more so because the complainant in this case was willing to deposit the expenses of the witnesses. It is recommended, therefore, that the order of payment of costs, Rs. 20, may be set aside.

Order —For the reasons given by the learned Sessions Judge, I set aside the order directing the payment of Rs. 20 by the complainant to the accused.

S.J *Order set aside.*

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(1) [1907] 12 P. R. 1907 Cr.=45 P. L. R. 1908 =32 P. W. R. 1907 Cr.

A. I. R. 1928 Lahore 176

SHADI LAL, C. J., AND BHIDE, J.

Hindustan Assurance and *Mutual Benefit Society Ltd., Gujranwala* — Defendant—Appellant.

v.

Khalasa Bank, Gujranwala and *another*—Plaintiff and Defendant—Respondents.

First Appeal No. 1924 of 1926, Decided on 30th November 1927, from decree of Sr. Sub. Judge, Gujranwala, D/- 28th April 1926.

Contract Act, S. 196—Ultra vires transaction of directors but within powers of the company, can become valid if ratified by shareholders of company having full knowledge of facts of the transaction.

A transaction, which is ultra vires of the directors but within the powers of the company, can be rendered valid if it is ratified by the company. But a person relying upon a ratification by the shareholders must satisfy the Court that they had full knowledge of the facts relating to the transaction to be ratified or that the means of knowledge were available to them. [P 177 C 2]

Badri Das and *A. N. Chona*—for Appellant.

Mehr Chand Mahajan and *Narain Singh*—for Respondents.

Shadi Lal, C. J.—On 5th October 1917, Diwan Mangal Sen executed a bond in favour of the Khalsa Bank Limited, Gujranwala (hereinafter to be described as the bank) for fifty thousand rupees which he acknowledged to be due by him to the bank on hundis and a floating account and promised to pay the money with interest by certain instalments. It appears that he was, at that time, the Managing Director of the Hindustan Assurance and Mutual Benefit Society Limited, Gujranwala, (which will be described hereinafter as the Assurance Society), and on the aforesaid date he executed also a deed on behalf of the Assurance Society, by which the society stood surety for the payment of the debt owed by him to the bank, and hypothecated certain properties by way of security for the performance of the promise.

The principal debtor paid some of the instalments due under the bond, and upon his failure to discharge the remaining liability the bank brought the present action for the recovery of the amount due to it and sought to make the principal debtor as well as his surety liable for the payment of the debt. The

trial Judge has granted a decree against both the defendants, and that decree is not challenged by Mangal Sen. It is the Assurance Society which contests its liability as a surety, and the main question debated in this appeal is whether the Assurance Society is legally bound by the contract of suretyship made on its behalf by the managing director.

It may be stated at the outset that, on 23rd September 1917, the directors of the Assurance Society had passed a resolution declaring that

> the Board is willing to stand as surety for Diwan Mangal Sen's personal liability with the Khalasa Bank Limited and to give them lien on the company's property if need be

and it was this resolution that was recited in the surety bond by Diwan Mangal Sen, as his authority for executing the document. Mr. Badri Das for the appellant has argued that the resolution expressed only the willingness of the directors to stand surety for the debts of Diwan Mangal Sen but did not convey their final consent to the execution of the surety bond. There can, however, be little doubt that the resolution was intended to give expression, not to a mere pious wish on the part of the directors, but their decision, that the Assurance Society should become surety for the payment of the debt. Nor could the cancellation of the resolution on 20th October 1917, detract from the obligation which had already been accepted under the surety bond executed in pursuance of that resolution. The question, however, remains whether the directors had any authority to make the Assurance Society liable as a surety for the debt of a private person. Neither Art. 112, which deals with the general powers of the directors, nor Art. 114, which specifies the special powers conferred upon them, makes any mention of such a contract of suretyship It is true that under Cl. (1) of Art. 114 the directors were competent

> to enter into contracts for the society and to contract on behalf of the society, such debts and liabilities as they may in the exercise of their discretion, consider necessary in transacting the business of the society. . . . .

but this clause was obviously intended to include such acts as were necessary for the transaction of the ordinary business of the society and for purposes incidental thereto. A contract to stand surety for the payment of a debt due by a third person cannot be regarded as an act of the above description and does not come within the ambit of the clause.

A transaction, which is ultra vires of the directors but within the powers of the company, can be rendered valid if it is ratified by the company. But a person relying upon a ratification by the shareholders must satisfy the Court that they had full knowledge of the facts relating to the transaction to be ratified or that the means of knowledge were available to them. The learned counsel for the respondent admits that there is not a particle of evidence to show that the matter was ever placed before the shareholders, and there can, therefore, be no ratification by the company. In this view of the case, it is unnecessary to consider whether the powers expressed in the Memorandum of Association conferred upon the company any authority to enter into the contract in question.

I must accordingly hold that the Assurance Society is not bound by the contract of suretyship, and the action, founded as it was upon that contract, must fail, in so far as the Assurance Society is concerned. But it is urged that part of the money borrowed by Mangal Sen was utilized for the purposes of the company, and that the latter should, at any rate, refund the benefit derived by it. This contention is, in my opinion, wholly untenable. In the first place, the action, as stated above, was founded upon the contract of suretyship, and the plaintiff cannot be allowed to rely upon a different cause of action. Secondly, the facts, though obscure, do not support this new claim by the bank. It is clear that the debt, for which Mangal Sen executed on 5th October the bond for fifty-thousand rupees, was due by him on the basis of three documents for thirty-thousand, thirteen-thousand and seven-thousand rupees respectively (vide pp. 44 and 45 of the paper-book). It, however, appears that out of the sum of thirty thousand rupees, for which Mangal Sen acknowledged his liability, twenty-five thousand five hundred rupees were credited to the Assurance Society in the books of the bank in satisfaction of a debt due by it to the bank but there is nothing to show how and why Mangal Sen, who admittedly was acting on behalf of the Assurance Society, got the Society recorded as a debtor of the bank

for that amount. Be that as it may, one thing is absolutely clear. The plaintiff agreed that the debt due by the society should be discharged and that Mangal Sen's liability should be accepted in lieu thereof. Consequently entries were duly made in the books of the creditor to give effect to this transaction, and the Assurance Society was no longer under any liability which could be enforced in a Court of law.

The result of the above discussion is that I allow the appeal preferred by the Assurance Society and dismiss the plaintiff's suit against it with costs in both the Courts.

The cross-objections preferred on behalf of the bank relate to the prayer contained in the plaint that interest on the decretal amount be awarded from the date of the institution of the suit up to the date of realization. This prayer was evidently overlooked by the trial Judge, but there is absolutely no reason for disallowing future interest. I accordingly accept the cross-objections and direct that Diwan Mangal Sen shall pay the decretal amount with interest thereon at 6 per cent per annum from the date of institution of the suit up to the date of realization.

Bhide, J.—I agree.

S.J. *Appeal allowed.*

A. I. R. 1928 Lahore 178 (1)

FFORDE, J.

Bishan Singh—Accused—Petitioner.

v.

Abdul Ghafur—Complainant—Respondent.

Criminal Revn. Petn. No. 1532 of 1927, Decided on 9th Nov. 1927, from order of Sess. Judge, Karnal, D/-22nd June 1927.

(a) *Criminal P.C. S. 439—Revision—Order of discharge must be clearly wrong.*

Before an order of discharge or acquittal can be set aside, it must be proved that it is clearly wrong. [P 178 C 2]

(b) *Criminal P. C. S. 439—Retrial.*

An order for retrial in a case of discharge under Ss. 342, 355 and 506, Penal Code, after a lapse of about two years, amounts to travesty of justice. [P 178 C 2]

G. C. Narang and *Brij Lal*—for Petitioner.

Ghulam Rasul—for Respondent.

Judgment,—Sardar Bishan Singh was tried by Mr. Manmohan Nath, Magistrate 1st Class, Karnal, on 25th November 1925, for various alleged offences under S. 342, 355 and 500, I. P C. After hearing the evidence the learned Magistrate, in a very careful, full and clear judgment, discharged the accused. On 4th February 1926 the complainant filed a petition for revision of this order of discharge. Notice of that petition was not served on the accused until April 1926. The hearing was fixed for 4th December 1926 and the learned Sessions Judge who heard the revision application did not pronounce the judgment till 22nd June 1927. The result is that a year and a half after the present petitioner had been discharged he has been ordered to be retried.

The first question which I have to decide is whether the learned Sessions Judge was correct in holding that the Magistrate's order is perverse as he alleges it to be. So far from holding that that order is perverse I am satisfied that it is entirely warranted by the evidence in the case. By no possible line of reasoning could it be held that it is clearly wrong which is what the law requires to be held before an order of discharge or acquittal can be set aside. I need only say that I find myself, on hearing the whole case in entire agreement with the conclusion which was arrived at by the learned trial Magistrate and with the reasons which he has given in his judgment for arriving at that conclusion. I may add that an order in a case of this kind for retrial of the accused after such a lapse of time amounts to a travesty of justice. I accordingly accept this petition, set aside the order of the learned Sessions Judge and affirm the order of discharge passed by the learned trial Magistrate. I order the further proceedings now pending to be quashed.

S.J. *Petition accepted.*

A. I. R. 1928 Lahore 178 (2)

HARRISON AND JAI LAL, JJ.

Municipal Committee, Amritsar — Plaintiff—Appellant.

v.

Harnam Dass — Defendant — Respondent.

First Appeal No. 2444 of 1923, Decided on 25th May 1927, from decree of Sr. Sub-Judge, Amritsar D/- 23rd June 1923.

Decree — Setting aside—Mistake of trying Court—Decree cannot be set aside.

A decree once obtained can only be set aside on the ground of fraud. It cannot be set aside on the ground of mistake where the mistake was not the mistake of the plaintiff nor of the defendant but the mistake of the Munsif who tried the suit : 43 *Cal.* 217, *Foll.* [P 179 C 2]

Fakir Chand and *Sham Das*—for Appellants.

Badri Das, J.L. Kapur and *Kidar Nath*—for Respondent.

Harrison, J.—The history of the litigation between the parties is that in the year 1919 the plaintiff, who is the mahant of a temple in Amritsar, brought a suit against the Municipal Committee which resulted in his obtaining a decree for ejectment and also for rent, that decree being upheld by the appellate Court in 1920. The case was tried by a 1st Class Munsif.

In 1921 the Municipal Committee instituted the present suit in the Court of the Senior Subordinate Judge, for possession of the area which formed the subject-matter of the previous litigation and also for a certain additional plot. So far as the additional portion is concerned a decree has been given and no appeal has been presented. So far as the original portion is concerned the suit has been dismissed by the Senior Subordinate Judge who, relying on *Topanidhi Dhivraj* v. *Sreeputhy Sahanee* (1), has held that the question of title is res judicata and, therefore, the plaintiff's suit cannot succeed.

On appeal it has been contended before us on the strength of *Shibo Kant* v. *Baban Kant* (2), and other authorities that the matter is not res judicata inasmuch as the Muusif was not competent to try the present suit even if its valuation be reduced to whatever it was in the year 1919 and the additional portion be deducted. On the other side reliance has been placed upon *Mt. Sahibzadi Begam* v. *Mahomed Umar* (3), and it is contended that this lays down precisely the same law as the Privy Council rulings, *G. H. Hook* v. *Administrator General of Bengal* (4), and *Ramachandra Rao* v. *Ramachandra Rao* (5). It is unnecessary for us to give any finding on this somewhat difficult point as, in our opinion, the appeal must fail on the alternative contention of the respondent. This is that the suit is nothing more nor less than a suit to circumvent and set aside a decree and that this is patent on the face of the record and is recited in so many words in the plaint. It is well-established law that if this is so the suit cannot proceed and it is not necessary to quote any further authority than *Kusodhaj Bhukta* v. *Braja Mohan Bhukta* (6). A decree once obtained can only be set aside on the ground of fraud. No such fraud as been pleaded in this case. It is only necessary to read the plaint to come to a decision for in para. 5 the following passage occurs :

> The defendant on the basis of wrong facts obtained a decree for ejectment against the Committee on 31st July 1919, and he afterwards ejected the plaintiff,

and, in para 6,

> after the passing of the decree the defendan ejected the plaintiff and now, without the permission of the plaintiff, (no reason being shown why he should get the permission of the dispossessed-tenant.)

has unlawfully begun to construct "a building on the site in dispute, etc." Counsel contends that this fact of building altered the position and necessitated the case and urges that had it not been for the building the Committee might possibly have refrained from bringing this suit. This is neither here nor there. In our opinion the suit is plainly one to set aside a decree on the ground of mistake. The mistake was not the mistake of the plaintiff nor of the defendant, but the mistake of the Munsif who tried the suit and of the Judge who dismissed the appeal. *Kusodhaj Bhukta* v *Braja Mohan Bhukta* (6), makes it absolutely clear that this cannot be done. We, therefore, find, without going into the question of res judicata that the plaintiffs' suit regarding this portion must fail and has rightly been dismissed. We dismiss the appeal with costs.

D.D. *Appeal dismissed.*

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(1) [1880] 5 Cal. 832=6 C. L. R. 305.
(2) [1908] 35 Cal. 353=12 C. W. N. 359=7 C. L. J. 470.
(3) A. I. R. 1926 Lah. 603=8 Lah. 15.
(4) A. I. R. 1921 P. C. 11=48 Cal. 499=48 I. A. 187.
(5) A. I. R. 1922 P. C. 80=45 Mad. 320=49 I. A. 129.
(6) [1916] 43 Cal. 217=31 I. C. 13=19 C.W.N. 1228.

A. I. R. 1928 Lahore 180

AGHA HAIDAR, J.

Gopal Singh—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 212 of 1927, Decided on 18th November 1927, for transfer of the case from Court of Dist. Magistrate, Lyallpur.

Criminal P. C., Ss. 526 and 476—Prosecution of witness for perjury at conclusion of his evidence—Accused applying for transfer of case—Case should be transferred as the action of the Magistrate was precipitate and not at proper time.

Where in a criminal case a certain witness was being examined and at the conclusion of the evidence of this witness the Magistrate ordered his prosecution under S. 193, I. P. C. and at the conclusion of the hearing of the case on that date that he did formally order his prosecution:

Held: that the action of the Magistrate, however well intended it may be, was, to say the least of it, precipitate. The proper time, if he was inclined to take action against any witness under S. 476, Criminal P. C., would have been at the time of delivering judgment in the main case. [P 180 C 1, 2]

Mukand Lal Puri—for Petitioner.

Order.—This is an application for the transfer of a case. A lengthy affidavit has been filed on behalf of the applicant and it contains a lot of verbiage. There are number of other allegations too which have been met by the learned Magistrate who has submitted his explanation. There is one matter, however, on which, I am afraid, I cannot agree with the view of the learned District Magistrate. A certain witness named Ganesh Das was being examined, and at the conclusion of the evidence of this witness, the learned District Magistrate ordered his prosecution under S. 193, I. P. C. The Magistrate further ordered that the witness may be detained in Court until the end of the hearing to show cause why he should not be prosecuted. As a matter of fact at the conclusion of the hearing of the case on that date he did formally order his prosecution, acting apparently under the provisions of S. 476, Criminal P. C. The Magistrate in his explanation submits as follows:

The whole attitude and expression of the witness showed so obviously that he was telling lie that the dignity of a Court of law required that immediate notice should be taken of the matter and I accordingly recorded the note referred to.

The "note" here refers to the Magistrate's decision ordering action being taken under S. 193, I. P. C. In my opinion, this action of the learned Magistrate, however well intended it may be, was, to say the least of it, precipitate; the proper time, if he was inclined to take action against any witness under S. 476, Criminal P. C., would have been at the time of delivering judgment in the main case. My own view is that such a step as the Magistrate took in the present case is bound to strike terror into the heart of the defence witnesses, and under the circumstances they would be most unwilling to give evidence. This would be very prejudicial to the defence in the case. In a sense the step taken by the learned Magistrate is tantamount to condemning the testimony of one witness at least as false before the trial of the case had concluded. This alone is sufficient to justify the transfer applied for: *Golam Bari Gazi* v. *Yar Ali Khan* (1).

Having regard to all the circumstances of the case, in my opinion it would be better if the case were to be transferred to the neighbouring District of Sheikhupura. I feel certain, in my mind, that the learned Magistrate would have decided the case with perfect impartiality and according to his own lights, but the action taken by him against this particular witness was such as to create a reasonable apprehension in the mind of the accused person that the Magistrate had made up his mind against him. The case may be transferred to the neighbouring District of Sheikhupura, but it is distinctly understood that the evidence, so far as it has been recorded in the case, would stand good and only fresh evidence would be produced on behalf of the defence if the accused persons so wish. The case has been dragged on for a long time, which is regrettable, and I trust the Magistrate, before whom the case now goes, would see to it that there are no adjournments and the case is disposed of as soon as possible.

S.J. *Case transferred.*

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(1) A. I. R. 1925 Cal. 480.

* A. I. R. 1928 Lahore 181

HARRISON AND TEK CHAND, JJ.

Doda Shah — Decree-holder — Petitioner.

v.

Bishen Das—Judgment-debtor — Respondent.

Civil Revn. No. 767 of 1926, Decided on 9th December 1927, from order of Senior Sub-Judge, Rawalpindi, D/- 24th July 1926.

* *Civil P. C., Ss. 47 and 145 — Sapurdar being a surety his liability can be enforced in execution proceedings.*

A sapurdar being a person to whom goods attached in execution of a decree are entrusted is a surety and his liability can be enforced in execution proceedings in virtue of S. 145 read with 47, Civil P. C. [P 183 C 1]

Gobind Das—for Petitioner.

Gobind Ram Khanna—for Respondent.

Order of Reference.—In execution of a money decree some moveable property belonging to the judgment-debtor was attached, and was handed over by the bailiff for custody to the respondent who executed what purports to be a bond on 26th March 1925. In this bond it is recited that the obligor would be responsible to produce the attached property when called upon to do so by the Court or any of its officials, that on his failure to do so he would be liable to make good the amount of the decree and that the Court would be entitled to recover the same from his person and property.

It appears that the respondent on being called upon by the Court to produce the property attached failed to .comply with the order and consequently the Court proceeded to recover the amount of the decree from him in execution proceedings. An objection was taken by him that he was not liable as the proper y remained in the possession of the judgment-debtor and also that he not being a surety under S. 145, Civil P. C., no execution proceedings could be taken against him. The Senior Subordinate Judge held on appeal that the respondent was liable to be proceeded against in execution proceedings as he was governed by S. 145, Civil P. C., but he held that as the property remained in possession of the judgment-debtor, the respondent was not liable to produce the same. The decree-holder has come up to this Court on revision.

Counsel for the respondent has raised a preliminary objection that the Senior Subordinate Judge having held that the property attached remained in the shop of the judgment-debtor and was not placed in the hands of the appellant though he signed the security bond,

this petition cannot be entertained. I do not read the finding of the learned Subordinate Judge to mean that the respondent did not make himself liable for the production of the property attached. It seems to me that what the learned Judge intended to hold, and on the material before him that was the only finding that could reasonably be arrived at, was that the respondent on being entrusted with the property made himself responsible to produce it when called upon to do so by the Court or any of its officials, but that the property was not physically taken out of the judgment-debtor's shop and given in possession of the respondent and therefore that no liability is incurred by him as it is not shown that the respondent has himself done away with the property entrusted to him. This view cannot be sustained. By executing the bond the respondent admitted that the property had been entrusted to him and that he made himself liable to produce it or to compensate the decree-holder. He is liable under the bond whether the judgment-debtor concealed the property or he himself misappropriated it. The fact of the attachment of the property is also admitted in the bond. I overrule the objection of the counsel for the respondent and hold that the respondent was liable under the clear terms of the bond to produce the property and on his failure to do so to make good the loss of the decree-holder.

The important question that required decision in this case is whether the liability of the respondent could be enforced in execution proceedings or whether it was necessary to bring a regular suit to enforce such liability, On that point previous authorities seem to be divergent. So far as this Court is concerned in *Darbari Mal* v. *Kanshi* (1) liability under similar circumstances was ordered to be enforced in execution proceedings. There was, however, no adjudication on the point as no objection was taken to the power of the Court to proceed summarily. This was followed in *Nazir Ahmad* v.

(1) [1919] 60 P.R. 1919=51 I.C. 653=74 P.L R. 1919.

Bakhshi Ram (2), in which it was held that such liability could be enforced in execution proceedings; beyond citing the authority of *Darbari Mal* v. *Kanshi* (1), however, the learned Judge did not discuss the question. I am inclined to hold that the liability of the person to whom attached property has been entrusted for custody under the circumstances disclosed in this case can be enforced in execution proceedings. The question, however, is one of importance, and, in view of the divergence of opinion in the other Courts, I refer it for decision to a Division Bench. The papers need not be printed. An early date will be fixed.

Opinion :

Harrison, J.—The question referred to this Division Bench by Jai Lal, J., is the method in which the liability of a sapurdar can be enforced, a sapurdar being a person to whom goods attached in execution of a decree are entrusted in accordance with the rules framed by this Court. The alternative suggestions are that the liability should be enforced in execution proceedings in virtue of S. 145 read with S. 47, Civil P. C., and that a regular suit should be instituted in the ordinary way, after assignment of the bond by the Court to the decree-holder.

On two occasions Single Judges of this Court in *Darbari Mal* v. *Kanshi* (1) and *Nazir Ahmad* v *Bakhshi Ram* (2), have followed the procedure of enforcing the liability in execution proceedings. In *Darbari Mal* v. *Kanshi* (1) the question was not raised nor considered nor decided. In *Nazir Ahmad* v. *Bakhshi Ram* (2) it was held that, under S. 145, Civil P. C, a sapurdar was a surety, but the question was not agitated of how he came to fall within the definition. In the Madras High Court there has been some conflict of opinion. The two Judges, who first dealt with the question, differed as to the applicability of S. 145 : *Subba Reddi* v. *Veerareddy* (3). Subsequently a Division Bench accepted the view of Sadasiva Iyer J., in *Raja of Venkatagiri* v. *Sura Krishna Reddi* (4) and held that the section did not apply. Finally, a Division Bench, while agreeing that the section was not applicable, held that, in exercise of its inherent powers, the executing Court could go into the matter and dispose of it : *A. I. R.* 1926 *Mad.* 1005. The Judicial Commissioner of Nagpur in *Khetsi Das* v. *Harba* (5) and both Judicial Commissioners of Peshawar in 1927 *P. L. R.* 525 have held that S. 145 does not apply, and the latter Court has gone so far as to hold that property attached in consequence of an application made to the executing Court by a man holding a simple money decree is not an attachment in execution, a view with which we find ourselves wholly unable to agree. On the other hand a single Bench of the Allahabad High Court in *Madho Prasad* v. *Peary Lal* (6), has held that a sapurdar is a surety and can be proceeded against as such.

Now, the necessary ingredients to be established, before it can be held that the relationship of principal and surety exists, are that there shall be two persons, that the former shall be liable to perform certain duties and the latter shall undertake, in the event of his failing to do so, that he will either perform them himself or indemnify the promisee. It is urged that he, the sapurdar should be treated as the surety of the bailiff, who entrusted him with the goods, but the handing over of the goods absolved the bailiff from liability under the rules of this Court and, therefore, it cannot be said that the sapurdar's duties begin on the failure of the bailiff to perform any duty. Similarly, it cannot be said that he is a surety of the decree-holder, and the only possible position is that he is the surety of the judgment-debtor. As showing that this is the true position Shagat Govind Das referred us to the form relating to attachment of moveable property in execution of decree for money, being No. 8, Appendix E, of Sch. 1, Civil P. C. In that the following words occur :

> These are to command you (i. e. the bailiff) to attach the moveable property of. . . . and unless the said judgment-debtor shall pay to you the said sum of Rs. . . . . together with Rs. . . the costs of this attachment, to hold the same until further orders from this Court.

What is contemplated, therefore, is in the first place attachment, then payment followed by release of the attached property, and in the alternative, there having been failure to make such payment, the retention of the attached property until the further orders of the Court. In

(2) A.I.R. 1925 Lah. 412.
(3) [1919] 9 M.L.W. 476=52 I.C. 410=(1919) M W.N. 219.
(4) [1920] 12 M.L.W. 329=39 M.L.J. 472=60 I.C. 134=(1920) M.W.N. 784.
(5) [1918] 16 N.L.R. 178=47 I.C. 956.
(6) A.I.R. 1921 All. 220.

other words, so long as the property remains in the hands of the bailiff so long does the duty of the judgment-debtor persist. He is bound to pay the whole of the decree and he is not discharged by the attachment or the retention of the property. At this point, the sapurdar comes into the picture and takes the place of the bailiff at the stage at which the judgment-debtor has failed to make the payment after attachment, and he carries out the duties of the bailiff in retaining the property until the further orders of the Court. His duties, therefore, are conditional upon the continued failure of the judgment-debtor to perform his duty and satisfy the decree-holder's debt, and in this sense he is, in our opinion, a surety, for he cannot be said to function, except on the failure of his principal to carry out his obligation. There can be no doubt that title in the attached property does not pass to the sapurdar, but remains with the judgment-debtor who receives any benefit or sustains any loss which may occur during the period of attachment. It is clear that the surety of the sapurdar is liable under S. 145 and in our opinion his principal the sapurdar himself, is also liable though for wholly different reasons.

We hold Ss. 145 and 47, Civil P. C., are both applicable. With this expression of opinion we return the case. (In accordance with the opinion expressed, the petition was accepted).

N K. *Petition accepted.*

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*A. I. R. 1928 Lahore 183

TEK CHAND, J.

Edulji Dinshaw and *another*—Applicants.

v.

Dhanpat Mal Bhagwan Das—Opposite Party.

Mis. Appln. No. 535 of 1927, Decided on 26th October 1927.

*(a) *Civil P. C., S. 23—Transfer—Original side Judge is subordinate to High Court.*

For purposes of transfer of a case the Judge sitting on the original side of the High Court is subordinate to the High Court: *A. I. R.* 1922 *Lah.* 306, *Diss. from*; *A. I. R.* 1923 *Rang.* 22, *Foll.* [P 184 C 2]

*(b) *Civil P. C., S. 22—Suit for specific performance of contract to sell property at M—Suit filed at M—Facts that correspondence was done at K, that some witnesses would come from K and defendant would feel convenient at K are not sufficient grounds for transfer.*

It is well settled that where the law allows a person to institute a suit in two different Courts, it is the plaintiff who is the arbiter litis. It is he who has the right to choose his forum and his choice will not be interfered with by Courts except where special circumstances are proved to exist: 167 *P. R.* 1919; 21 *O. C.* 217; and *A. I. R.* 1927 *Lah.* 404, *Foll.* [P 184 C 2]

Where, therefore, a suit for specific performance of a contract to sell immovable property situated at *M* was filed at *M* and the defendants applied to have it transferred to *K*:

Held: that a departure from the ordinary rule would not be justified merely because the correspondence was conducted at *K*, or that some of the witnesses would come from *K*, or again that it would be much more convenient for the defendants to have the case tried at *K*: *A. I. R* 1924 *Lah.* 304 and *A. I. R.* 1923 *Lah.* 383, *Dist.* [P 185 C 1]

D. C. Ralli—for Applicants.

Badri Das—for Opposite Party.

Judgment.—The facts of the case which have given rise to this application, are given in detail in my order dated 30th September 1927, in Civil Miscellaneous No. 441 of 1927 and need not be recapitulated. Briefly it may be stated that on the 23rd June 1927 Messrs Edwlji Dinshaw instituted a suit against Mr. Dhanpat Mal Bhagwan Das in the Court of the Judicial Commissioner, Sind, at Karachi, for a declaration that no valid or binding agreement of sale of a factory situate at Mian Channu in the Multan District had been made between the parties, and for an injunction restraining the defendants from selling the said factory on account and at the risk of the plaintiffs. On 24th June 1927 Messrs Dhanpal Mal-Bhagwan Das filed a suit in the Court of the Senior Sub-Judge at Multan for specific performance of a contract for the purchase of the aforesaid factory which Messrs Edulji Dinshaw were alleged to have entered into with them. The defendants in this latter case were summoned to appear at Multan on 2nd August 1927. On 1st August they presented in this Court an application under Ss. 22 and 23, Civil P. C., for "transfer" of the case pending at Multan to Karachi. When that application came up for hearing before me a preliminary objection was raised on behalf of the respondents that the application was incompetent as no notice had been given by the petitioners to the respondents before moving this Court as

required by S. 22. I upheld that objection and dismissed the application.

On 13th October 1927 Messrs. Edulji Dinshaw filed the present application also under Ss. 22 and 23, Civil P. C., stating that they had sent a notice to the defendants-respondents on 4th August 1927 giving intimation of their intention to move this Court for a transfer under Ss. 22 and 23, Civil P. C. It was pointed out that the defect which proved fatal to the previous application had been removed and that this application was now in proper form.

On the case coming up for hearing before me to-day Mr. Badri Das has raised four further preliminary objections. The first of these is that this application is also incompetent as it was filed about four months after the institution of the suit and had not been instituted "at the earliest opportunity" as required by S. 22. There is, however, no force in this objection. It is admitted by both the parties that no proceedings beyond the filing of a written statement have so far been taken in the Multan Court and issues have not been settled as yet. The notice sent on 4th August 1927 was therefore given at the proper time and thus application presented at the earliest possible "opportunity" and the requirements of S 22 have been complied with. I, therefore overrule this objection.

The second objection is that in the written statement which the defendants-petitioners had filed on 2nd August they had pleaded that the Court at Multan had no jurisdiction to try the suit, which was within the exclusive jurisdiction of the Karachi Court. Mr. Badri Das contends that in face of this plea the present application under S. 22 is incompetent as that section is applicable only where it is admitted that the Court in which the suit had been filed and the Court to which it is sought to be transferred, should both have concurrent jurisdiction to try it. It appears from the record, however, that on the 18th August 1927 the defendants filed a written application before the Senior Sub-Judge, Multan, withdrawing this objection and admitting that the Multan Court had jurisdiction In view of this admission which has been repeated by Mr. Ralli in this Court, this preliminary objection also fails and is accordingly overruled.

Mr. Badri Das next objects that Ss. 22 and 23 are inapplicable as the Court of the Judicial Commissioner at Karachi is not a Court subordinate to a High Court, but tries cases on the original side and as the suit, if transferred to Karachi, would be triable by that Court on the original side, Cl. (3) of S. 23 is inapplicable.

In support of his contention the learned counsel has relied on a Single Bench judgment of Campbell, J. in *Pragji Soorji & Co.* v. *Kalu Mal Shori Mal & Co.* (1). As at present advised, I am not prepared to accept the view expressed in that ruling as sound and would, with respect, prefer to follow the contrary opinion taken by the Rangoon High Court in *Ramanathan Chetty* v. *Ramanathan Chetty* (*A. I. R.* 1923 *Rangoon* 22) as correct. I do not, however, think it necessary to deal with this matter at length as I am of opinion that this application for "transfer" must fail on the merits.

For the same reason, it is not necessary to finally decide the last preliminary objection raised on behalf of the respondents that the Karachi Court would have no jurisdiction to try the present suit, for specific performance of a contract to sell immovable property situate at Multan, as such a suit is according to *Diwan Lachhman Das* v. *W. Haslat* (2) exclusively cognizable by the Multan Court. The learned counsel on both sides have cited a number of authorities in which apparently contrary views have been held in this point and if the decision of this application had turned exclusively upon this matter I would have referred it to a larger Bench to consider the soundness of the Chief Court decision in *Lachhman Das* v. *Haslat* (2).

On the merits, lengthy arguments have been addressed to me by both counsel. It is well settled that where the law allows a person to institute a suit in two different Courts it is the plaintiff who is the arbiter litis. It is he who has the right to choose his forum and his choice will not be interfered with by Courts except where special circumstances are proved to exist: see *Shiv Prasad* v. *Kanhaya Shah Ruchi Shah* (3), *Askaran*

(1) A. I. R. 1924 Lah. 306.
(2) [1891] 39 P. R. 1891.
(3) [1919] 167 P. R. 1919=54 I. C. 935.

Baid v. *Bhola Nath* (4) and *Mt. Ram Kaur* v. *Atmar Singh* (5). Mr. Ralli relies on the following special circumstances justifying transfer in this case:

(a) that the correspondence relating to the alleged contract was conducted at Karachi,

(b) that the evidence which is to be produced in the case will be exclusively from Karachi,

(c) that both parties reside at Karachi, and

(d) that the defendants' suit having been first instituted at Karachi, it is in the interests of justice to have a decision of the disputed points at Karachi. The respondents do not, however, admit (b) and (c) as correct. In their affidavit they deny that the reside at Karachi. They state that they do not now carry on any business at Karachi and that they had given up residence there long before the suit was filed. They also controvert the allegation that all the evidence will be from Karachi. They allege that some of the negotiations took place at Mian Channu and that several of ohe witnesses to be produced reside in the Punjab. I must, therefore, reject (b) and (c) as unproved. The remaining grounds (a) and (d) are in my opinion insufficient to justify the transfer. A departure from the ordinary rule will not be justified merely because the correspondence was conducted at Karachi or that some of the witness will come from Karachi or again that it will be much more convenient for the defendants-petitioners to have the case tried at Karachi. Moreover there is the important fact to be noticed that the property which is the subject matter of this litigation is situate at Mian Channu in the Multan District. Mr Ralli for the petitioner has cited two single Bench decisions of this Court reported as *Ramji Das* v. *Brijlal-Jagannath* (6) and *Benarsi Das* v. *Kishori Lal* (7). But the facts of those cases were wholly different and I do not find that the exceptional circumstances on which the decision rested in each of these cases exist here. For the foregoing reasons, I dismiss the petition with costs. The records will be reurned to the lower Court with as little delay as possible.

D.D. *Petition dismissed.*

(4) [1918] 21 O. C. 217=48 I. C. 105.
(5) A. I. R. 1927 Lah. 404=8 Lah. 181.
(6) A. I. R. 1924 Lah. 304.
(7) A. I. R. 1928 Lah. 383.

A. I. R. 1928 Lahore 185

SHADI LAL, C. J.

Babu Mal — Complainant--Petitioner.

v.

Ghasi and *others*—Accused—Respdts.

Criminal Revn. No. 1268 of 1927, Decided on 7th October 1927, reported by the Dist. Mag.Gurgaon, on 25th July 1927.

(a) Criminal P. C., S. 439—Revision—Wrong acquittal—Order of acquittal cannot be interfered with.

A Court of Revision does not ordinarily interfere with an order of acquittal though it be wrong. [P 186 C 1]

(b) Criminal P. C., S. 233—Offences of mischief and riot tried together—Trial is bad.

In a case where the act of mischief is quite a separate transaction from that of riot, and the same persons are not accused in both the transactions, the trial is bad for misjoindor of charges. [P 186 C 1]

Facts.—The accused were challaned by the Sub-Inspector of Police under Ss. 429, 147 and 325 I. P. C. The facts are that a cow owned by the complainant trespassed into his field of jowar. Accused 1, Ghasi, killed her by giving her several blows. Net Ram, shepherd, informed the complainant of it who, accompanied by his brother Lachi Ram and his father Tika Ram, repaired to the place of occurrence and found the cow dead. Later on they were beaten by the accused very mercilessly when they complained to the accused about the killing of the cow.

Grounds.—The questions are whether there is sufficient cause to report the case under S. 438, Criminal P. C., or to move Government to appeal against the acquittal of Ghasi, accused 1, on the charge of mischief for killing the cow, and whether application should be made for enhancement of sentence for the beating of Babu Mal and Lachhi Ram. The facts are clear and fully proved.

Ghasi, in a fit of rage killed a cow which trespassed into his field. The owners, Babu Mal and Lachhi Ram, apparently set about Ghasi and Tundlla and inflicted some slight injuries. Ghasi's party then fell upon Babu Mal and Lachhi Ram and Babu Ram received five injuries and Lachhi Ram eleven (two head injuries and one neck injury). The lower Court finds that the brutal killing of a cow is not mischief because it is done by a Hindu

who cannot intend the death of a cow. This is most mischievous nonsense. Intention is no part of the ingredients of mischief and the idea that all Hindus are perfect followers of their faith is an absurd contention. As for the subsequent assault : the owners of the cow fell upon the brutal perpetrator of this gratuitous act of cruelty and this the lower Court finds only the natural thing for them to do. They did not beat the accused much and it is obvious that no right of self-defence arose that could justify the subsequent trouncing which the five convicted persons gave to the owners of the cow. As a matter of fact the two men who were beaten by the owners of the cow have been acquitted and only their friends have been convicted so that the question of self-defence does not arise. They came up afterwards to avenge the injuries of their kinsmen. The lower Court, after convicting five persons under S. 147/323 released them under S. 562, Criminal P. C.

The net result is, therefore, that the man who beat a cow to death goes scot-free and his friends who gave a sound beating to the owners of the cow are bound down under S. 562, Criminal P. C. This sort of thing will only encourage crime and cruelty.

The file of the case is, therefore, forwarded to the High Court with the request that the order of the lower Court be set aside and a re-trial of the case be ordered.

Order.—The reasons given by the District Magistrate for recommending a re-trial of the case are not sound and cannot be accepted. If an accused has been wrongly acquitted the order of acquittal can be set aside on an appeal by the Local Government under S. 417, Criminal P. C. The Court of revision does not ordinarily interfere with an order of acquittal.

There is, however, a legal defect in the trial of the case which has not been noticed by the District Magistrate. It appears that the offence of mischief was quite a separate transaction from that of riot, and, as the same persons were not accused in both the transactions, the trial was bad for misjoinder of charges.

I accordingly quash the proceedings and direct that the two offences shall be tried separately.

S.J. *Proceedings quashed.*

A. I. R 1928 Lahore 186

SHADI LAL, C.J., AND AGHA HAIDAR, J.

Banarsi Das and *another* — Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn, Petn. No. 1005 of 1927, Decided on 16th January 1928, from order of Sess. J. Amritsar, D/- 29th April 1927.

Penal Code, S. 482—Infringement of trade-mark— Aggrieved party has remedy both in civil and criminal Courts and not only in Civil—Trade-mark.

It is nowhere laid down by the legislature that under no circumstances could a dispute relating to the infringement of a trade-mark be entertained by a criminal Court and that it should always be adjudicated upon by a civil Court. The only thing which can be said is that the criminal Court may, in view of the peculiar circumstances of a particular case, stay its own hands and direct the complainant to establish his right in civil Court ; 32 *Cal.* 431: *Ref. to.* [P 187 C 2]

Kishan Dial—for Petitioners.

Sardha Ram—for the Crown.

Shadi Lal, C. J.—This is an application for revision preferred by two persons Banarsi Das and Prabhu Dial, proprietors of the firm Banarsi Prabhu Dial, Sutwala, who have been found guilty of having committed the offence of using a false trade mark, and have each been sentenced under S. 482, I. P. C., to pay a fine of Rs. 100. The complainant, Hans Raj, is a manufacturer and seller of cotton thread balls and has, since 1917, been using the mark DL as his trade-mark. The Court below found that he had by user acquired the exclusive right of using that mark for the purpose of denoting his goods. It appears that the mark has also been duly registered as his trade-mark, though registration is not necessary in order to complete his title to the trade-mark.

The accused lately began to manufacture cotton thread balls, and have been attaching the mark DL to their goods. Now the trial Magistrate, as well as the Sessions Judge, holds that the mark and the "get up" of the label used by the accused resemble very closely those used by the complainant to denote his goods, and that they are calculated to deceive the purchasers of the goods, upon which they are placed, into a belief that the goods he is buying are the goods of the owner of the first trade-mark.

We have listened to the arguments advanced by learned counsel on both sides

L. N. Dar
Advocate High Court
Jammu & Kashmir

and have reached the conclusion that the mark and the label placed by the accused upon their goods have the effect of inducing the ordinary purchaser to buy their goods in the belief that they are the goods of the complainant. The learned counsel for the accused contends that a letter or a combination of letters cannot constitute a trade mark, but there is no warrant for this broad proposition. There are no doubt English cases in which the Courts have refused to interfere with the discretion of the Registrar, who declined to register marks consisting of letters, on the ground that the registration of such marks would interfere with the right of existing or future firms having those letters as their initials to attach the initials of their firm names to goods. No such mischief can be apprehended in the present case. The trade-mark of the complainant has been used to denote his goods and it is obvious that the letters DL are not the initials of the firm of the accused. There can be little doubt that these letters have been placed by the accused upon their goods simply because they bore a close resemblance to the complainant's trade-mark.

Mr. Kishan Dial for the accused also urges that the dispute between the parties can be appropriately decided by civil Courts, and that the complainant should be allowed to have recourse to criminal Courts. In support of his contention the learned counsel place his reliance upon the judgment of the Calcutta High Court in *Dowlat Ram* v. *Emperor* (1), where Maclean, C. J., made the following observations :

> It seems to me that when a case of this class is brought into a criminal Court, if the Magistrate is of opinion that there is bona fide dispute as to whether the complainant has any trade-mark at all or whether the accused is or is not eniitled to use the mark he is using, I say if the Magistrate is satisfied that there is this bona fide dispute he should not deal with the matter as a criminal matter, but leave to the complainant to maintain, if he can, in a Civil Court the right which he claim. If after the decision of the civil Court it be found that he has a trade-mark and that the accused is fraudulently counterfeiting that trade-mark the case could be then properly brought into a criminal Court under the section to which I have referred.

Now, there can be no doubt that a person aggrieved by the infringement of his trade-mark has two remedies open to him: (1) he can institute criminal proceedings under the Indian Penal Code or (2); he can bring an action for an injunction and damages. It is nowhere laid down by the legislature that an aggrieved person should seek his remedy in a civil Court and not in a criminal Court. The only thing which can be said is that the criminal Court may, in view of the peculiar circumstances of a particular case, stay its own hand and direct the complainant to establish his right in a civil Court. It is neither possible nor desirable to give a list of the circumstances which might justify this course or to crystallize the discretion of the Court into a hard and fast rule. The existence of a bona fide dispute as to the right to use a trade mark may, as held in *Dowlat Ram* case (1) constitute a sufficient reason for a criminal Court declining to deal with it as a criminal matter. Or, if there has been undue delay in commencing criminal proceedings, the Court may direct the aggrieved party to establish his right in a civil Court. There may be other cases in which the dispute may be regarded to be a fit one for trial by a civil Court. It would be, however, absurd to suggest that under no circumstances could a dispute relating to the infringement of a trade-mark be entertained by a criminal Court and that it should always be adjudicated upon by a civil Court. This contention, if accepted, would render the law enacted by the Indian Penal Code nugatory.

The case before us is a simple one, and no circumstance has been shown which would warrant our interference with the right of the complainant to invoke the aid of the criminal Courts. Indeed, the Courts below have not only entertained the complaint but pronounced their verdict in favour of the complainant, and I am unable to discover any valid reason to justify interference by a Court of revision.

I accordingly dismiss the application.

S.J. *Application dismissed.*

(1) [1905] 32 Cal. 431.

A. I. R 1928 Lahore 187

DALIP SINGH, J.

Khem Chand and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 114 of 1927, Decided on 14th March 1927.

(a) *Criminal P. C., S. 133—Obstructions by several persons—Magistrate's order not specifying obstructions raised by each person, nor*

stating that obstructions were raised jointly by all—Order is bad.

When, in proceedings under S. 133 instituted against a number of persons, it is alleged that various unlawful obstructions have been caused upon a public way, but it is not alleged that all the persons had jointly raised those obstructions, it is essential that the order should state accurately, with regard to each person, the specific obstructions made by him which he is required to remove : 44 *Cal.* 61, *Foll.*[P 188 C 2]

(*b*) *Criminal P. C., S.* 138—*Jury of two nominees of the parties and the foreman appointed by Magistrate is not legally constituted.*

When the Magistrate appoints only the nominees of the two parties, with a foreman appointed by himself, the jury is not constituted legally and is incapable of making a legally binding award : 23 *Cal.* 499, *Foll.* [P 188 C 2]

Facts.—An application was made by some persons under S. 133, Criminal P. C., for removal of certain obstructions by certain persons. An initial order was recorded in the case by the Magistrate and the jury was appointed, but their verdict was not acceptable to either party. Later on the Magistrate passed an order that the case be sent back to the jurors for recording the evidence of the parties which they had not done before and filing a fresh award. But, on the next day he recorded a statement of the foreman of the jury that all the obstructions in the shamilat land should be removed and then passed an order. It is against this order of the Magistrate that the present application for revision has been filed.

Grounds.—The initial order of the Magistrate does not specify what are the obstructions raised by each one of the accused. I am very doubtful if a single proceeding could have been taken agsinst all the 16 persons because the obstruction raised by each was his own affair and the others had nothing to do with it. So I think that each person should have been separately proceeded against. But even if the single proceeding against all the 16 persons be held valid, the initial order of the Magistrate should have specified what was the nature and the extent of the obstruction raised by each person. In *Raimohan Karmokar* v. *Emperor* (1) it was held that an order issued under S. 133, should not be vague and indefinite but must be such that the persons to whom it is directed may be able to learn from its terms what it is that they are to do for the purpose of complying with it and that when in proceedings under S. 133 instituted against a number of persons it is alleged that various unlawful obstructions have been caused upon a public way, it is essential that the order should state accurately with regard to each person the specific obstructions made by him which he is required to remove unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned.

That the jury was not legally constituted, firstly : because there was no application by the accused, as required by Ss 133 and 138 for the appointment of jury ; secondly, the Magistrate's order of 29th May shows that he appointed two of the nominees of the one party and two of the other and foreman himself. S. 138 lays down that the foreman and half of the remaining members shall be nominated by the Magistrate and *Upendra Nath* v. *Kritish Chandra* (2) shows that when the Magistrate appoints only the nominees of the two parties, with a foreman appointed by himself, the jury is not constituted legally and is incapable of making a legally binding award.

It is recommended, therefore, that the order of the Magistrate may be set aside.

Order.—Proceedings under S. 133, Criminal P. C., have been forwarded by the learned Sessions Judge of Karnal for revision to this Court on the ground that the order of the Magistrate does not specify what are the obstructions raised by each of the accused. I do not find on the record any allegation that all the persons had jointly raised these obstructions or that they had raised them in conspiracy with each other. I, therefore, consider that the order was bad in form. I also hold as pointed out by the learned Sessions Judge that the jury was not legally constituted in that the Magistrate seems to have appointed the entire Jury himself instead of appointing the foreman and half the jury and leaving the other half to be nominated by the parties. I, therefore, accept the revision and set aside the order of the learned Magistrate.

S.J. *Revision accepted.*

(1) [1917] 44 Cal. 61=35 I. C. 969=20 C. W. N. 1171.

(2) [1895] 23 Cal. 499.

* A. I. R. 1928 Lahore 189

TEK CHAND, J.

Mangal Singh—Petitioner.

v.

The Crown—Opposite Party.

Criminal Revn. Petn. No. 371 of 1927, Decided on 20th May 1927, against order of Sess. Judge, Lahore, D/- 10th September 1926.

* (a) *Criminal P. C., S.* 123 (2)—*Case submitted to Sessions Judge—Order of imprisonment in default is to be passed by the Sessions Judge.*

Under S. 118 the Magistrate is empowered to make an order requiring the accused to execute a bond with or without sureties to maintain good behaviour for such period as he thinks fit to fix. If the period for which security is demanded exceeds one year, then the Magistrate is required by S. 123 (2) to submit the record to the Sessions Judge, and it is for the Sessions Judge after examining the record to pass such orders as he thinks fit. In such cases the order fixing the term of imprisonment which the accused is to undergo on default of furnishing security is be fixed by the Sessions Judge and not by the trial Magistrate: 29 *P. R.* 1910 (*Cr.*); (1899) *A.W.N.* 151 and (1903) *A W.N.* 28; *Rel. on.* [P 190 C 1, 2]

(b) *Criminal P. C., S.* 123 (2)—*Case submitted to Sessions Judge—He has seisin of the case.*

After a Magistrate has submitted the record to Sessions Court under S. 123 (2) the seisin of the case is thenceforward with that Court. [P 190 C 2]

(c) *Criminal P.C., S.* 123 (2)—*Sessions Judge must come to an independent finding.*

Where a case is submitted to a Sessions Judge under S. 123 (2), the Sessions Judge is bound to examine the evidence himself and come to an independent finding as to the propriety of the order demanding security and the period for and amount in which it is to be demanded: 15 *P. R.* 1900 (*Cr.*) and 25 *All.* 275, *Rel.* [P 191 C 1]

Where he merely confirms the order passed by the trial Magistrate without notice to the petitioner and without examining the record, it is irregular and must be set aside: 35 *Bom.* 271 and *A. I. R.* 1925 *Oudh* 517, *Rel. on.* [P 191 C 1]

Shaukat Rai—for Petitioner.

Judgment.—Proceedings under S. 110, Criminal P. C., were instituted against Mangal Singh, petitioner in the Court of Khan Sahib Gul Muhammad Khan, Magistrate 1st Class, Lahore. The learned Magistrate held the enquiry and found that the acts of the petitioner fell within the purview of S. 110. He accordingly ordered the petitioner to furnish security in the sum of Rs. 5,000 with two sureties to be jointly and severally liable, and to execute recognizance in the like amount to be of good behaviour for a period of three years. The learned Magistrate at the end of his order directed that on failure of the petitioner to furnish security as stated above he "shall undergo three years" rigorous imprisonment. This order was followed by another order of the same date recorded at 4 p. m. stating that the security had not been furnished and that the record be sent to the Sessions Judge for proper orders as required by S. 123 and that the petitioner be sent to jail by means of a warrant of imprisonment in default of his furnishing security.

On 7th August Mr. Hakumat Rai counsel for the petitioner presented an application in the Sessions Court praying that (a) the petitioner be released on bail and (b) arguments be heard before the case is decided. On 13th August 1926, he filed another application in the Sessions Court repeating the prayer that bail be allowed and that counsel may be heard on evidence and the order of the learned Magistrate set aside or the amount of security reduced.

Both these applications were laid before Colonel Nicolas, Sessions Judge, on 13th August 1926. He refused the prayer for bail, but passed no order on the merits.

On 16th August 1926 two persons Labh Singh and Mohan Singh appeared before the Magistrate and agreed to furnish the required security. Their surety bonds were accepted and the petitioner released on bail. A report to this effect was submitted to the Sessions Judge on 21st August. On record being laid before Lala Topan Ram, Sessions Judge, he directed notice to issue to the petitioner and to the District Magistrate presumably with a view to examine the evidence and hear counsel, but curiously enough no date was fixed on which the petitioner or his counsel was to appear. In the order passed on that date there is a blank, where the date on which the case was to come up for hearing was to be filled, but it seems the matter was overlooked and no date actually fixed, nor does it appear that any notice was sent to the petitioner or his counsel.

On 25th August 1926 the learned Sessions Judge ordered that an explanation be called for from the Magistrate as to why he had released the petitioner on bail after a reference under S. 123 had been made to the Sessions Court, and when that Court was seised of the case. On 4th September 1926 the Magistrate replied that

as the petitioner was in jail, and the sure ties appeared before him on 16th August 1926 he thought it proper to accept their surety bonds and to release the petitioner.

This explanation of the Magistrate was laid before the Sessions Judge on 10th September 1926, which was not on the date fixed for the hearing of the case, and on which the petitioner or his counsel were not present. On this day the learned Sessions Judge passed the following order:

> The explanation is not satisfactory and the Magistrate's order in accepting the bail was not in accordance with the procedure. But as the bail has been furnished the order demanding security is confirmed.

It is obvious that at the time of passing this order the learned Sessions Judge did not examine the evidence nor did he record any finding of his own on the merits of the case. He simply confirmed the order of the Magistrate demanding security on the simple ground that " bail had been furnished."

In the meantime on 4th September 1926, the petitioner preferred an appeal to the District Magistrate, Lahore, against the original order of the trial Magistrate dated 6th August 1926, ordering him to furnish security under S. 110. This appeal came up for hearing before Mr. Ogilvie, District Magistrate, Lahore, on 25th October 1926, and he held that as the Sessions Judge had already confirmed the Magistrate's order on 10th September 1926 no appeal lay to him

The petitioner has preferred a petition for revision to this Court and he attacks the order of Lala Topan Ram, Sessions Judge, dated 10th September 1926, confirming the order of the Magistrate demanding security and also the order of the District Magistrate dated 25th October 1926, holding that no appeal lay to his Court.

To begin with, it must be held that the learned trial Magistrate was in error in directing in his order dated 6th August 1926, that in default of the petitioner furnishing the security demanded, he was to undergo rigorous imprisonment for three years. Under S. 118, Criminal P. C., the Magistrate is empowered to make an order requiring the accused to execute a bond with or without sureties to maintain good behaviour for such period as he thinks fit to fix. If the period for which security is demanded exceeds one year, then the Magistrate is required by S. 123 (2) to submit the record to the Sessions Judge, and it is for the Sessions Judge after examining the record to pass such orders as he thinks fit. It is now well settled that in such cases the order fixing the term of imprisonment which the accused is to undergo on default of furnishing security is to be fixed by the Sessions Judge and not by the trial Magistrate: see *Nanku* v. *Emperor* (1), and the two Allahabad leading cases *Queen Empress* v. *Jafar* (2) and *Emperor* v. *Jawahir* (3). This part of the order passed by the learned Magistrate was wholly without jurisdiction.

Again, after the Magistrate had submitted the record to the Sessions Court under S. 123 (2) the seisin of the case was thenceforward with that Court and the petitioner could be released on bail by that Court alone. The Magistrate had no jurisdiction to accept bail and release the petitioner. This was the second irregularity committed by the Magistrate. The explanation sent by him to the Sessions Judge was obviously insufficient.

The irregularities committed in the case, however, did not end here. When the case came up before the learned Sessions Judge it was his duty to issue notice to the petitioner and after hearing him or his counsel and examining the record to come to an independent finding on the merits as to whether the order furnishing security was, or was not justified and if so, for what period and in what sum, security was to be demanded. As pointed out above the learned Sessions Judge originally intended to summon the petitioner and give him an opportunity of being heard, but for some reason or other he seems to have overlooked this and confirmed the Magistrate's order demanding security, without affording the petitioner or his counsel any opportunity of being heard. It is hardly necessary to emphasize that that this procedure was irregular, and wholly unjustifiable more especially when Mr. Hakumat Rai, counsel for the petitioner, had already filed two applications specifically requesting that he may be afforded an opportunity of being

(1) [1910] 29 P. R, 1910 Cr.=8 I. C. 385=116 P. L. R. 1910.
(2) [1899] A. W. N. 151.
(3) [1903] A. W. N. 28.

heard. Again the learned Sessions Judge was bound to examine the evidence himself and come to an independent finding as to the propriety of the order demanding security and the period for, and amount in which it was to be demanded: *Crown* v. *Ida* (4) and *Emperor* v. *Girand* (5). The order passed by the learned Sessions Judge on 10th September 1926, merely confirming the order passed by the trial Magistrate without notice to the petitioner and without examining the record is irregular and must be set aside: *Emperor* v. *Amir Bala* (6) and *Bahadur* v. *Emperor* (7).

D.D. *Order set aside.*

(4) [1900] 15 P. R. 1900 Cr.
(5) [1903] 25 All. 375=(1903) A. W. N. 79.
(6) [1911] 35 Bom. 271=10 I. C. 802=13 Bom. L. R. 203.
(7) A. I. R. 1925 Oudh 517.

A. I. R. 1928 Lahore 191

HARRISON, J.

Kunda Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 285 of 1927, Decided on 20th May 1927, from order of Sess.-Judge, Ferozepur, D/- 14th January 1927.

Punjab Excise Act (1914), *S.* 61 (1) (*A*)—*Liquor suspected to be of K distillery—Crown must prove that the liquor could not have come from K distillery and then accused would be required to prove that he got it from K.*

The accused was charged with being in possession of illicit liquor. The Chemical Examiner's opinion was that the suspected liquor was not definitely distinguishable from the spirits made at *K* distillery.

Held: that until and unless the Crown had shown that the liquor could not in the ordinary way of business have come from *K* distillery, the onus did not shift on to the accused of showing that that was where he got it from. [P 191 C 2]

Duni Chand—for Petitioner.

Muhammad Rafi for *Govt. Advocate*—for the Crown.

Judgment.—Kundha Singh, a Jat of the Ferozepore District, has been convicted under S 61 (1) (A), Excise Act, of being in possession of 10 chhitaks of illicit liquor and 9¼ seers of lahan. His appeal has been dismissed by the Sessions Judge and his revision is before me. I am not impressed in any way by any of the points urged by counsel, nor by any of the grounds entered in the petition. I am of opinion that the Sessions Judge has rightly held that these articles were found in the possession of the accused.

As regards the liquor, however, a point arises which I have raised myself and which is in my opinion of considerable importance, namely, whether it is or is not shown to be illicit. The report of the Chemical Examiner is as follows :

> The contents of the exhibit are, by analysis, pot-still spirit essentially different from the refined licit patent-still spirit as sent under the advice of your letter No. 474 Ex., dated 12th July 1926. The suspected liquor, however, is not definitely distinguishable from the refined pot-still spirits made at the Karnal Distillery. Hence in my opinion the suspected liquor is of illicit origin, supposing that Karnal Distillery spirits have no possible access to the place of seizure. The alcoholic strength is 40·2 per cent proof.

In other words, as an expert, all that the Chemical Examiner can say is that the liquor in question is either pot-still of the Karnal Distillery or illicit liquor. Speaking as an ordinary rational man and not as an expert, he adds that the natural conclusion that, if Karnal Distillery can be excluded on it being shown that liquor therefrom had no access to the Ferozepore District, it follows that the liquor is illicit. The Sessions Judge merely recites that the liquor was illicit, for the point was not urged before him. The trial Court disposes of the question by saying that the liquor was sent to Chemical Examiner, "who has certified that it is of illicit origin." The Chemical Examiner says nothing of the sort as I have explained above. It was, therefore, necessary that the Crown should show that in the ordinary way of business liquor from the Karnal Distillery does not find its way into the Ferozepore District and probably, when the comparative distances of the rival distilleries of Karnal and Amritsar from Ferozepore are remembered, it would have been easy enough to do so. Until and unless, the Crown had shown that the liquor, on which this open verdict has been returned, could not in the ordinary way of business have come from the Karnal Distillery, the onus did not shift on to the accused of showing that that was where he got it from. Had the Crown produced such evidence the onus would doubtless have shifted. A second method of showing that liquor is illicit is that of proving the strength and showing that

it is above that at which liquor is issued from an authorized distillery. In this case we find that the strength of the liquor was extremely low, being only 40 per cent of proof or 60 per cent below proof. The strength at which liquor is issued from the distilleries as explained in Art. 588 of the Punjab Excise Manual is 80 per cent of proof and 20 per cent below proof. This test, therefore, is of no value. I am not prepared to hold that the liquor is illicit, and I should like to point out that in similar cases it is most desirable that evidence such as I have described above should be led on the subject and that it would be quite enough to show that ordinarily the Karnal Distillery which, I understand, distils the whole of the pot-still licit liquor to be found in the Punjab, does not ordinarily send that liquor to the district in question.'

Had the only article found in possession of the accused been this liquor I should have accepted the application and acquitted him. He was, however, found to be in possession of 9¼ seers of lahan. "Lahan" has been declared by Notification No. P. G. N. 25, dated 5th January 1915, to be liquor, and just as liquor cannot be strengthened, so it cannot be dissolved, into its component parts and there can be no such thing as licit lahan, this being the term used for describing the material while in the process of manufacture. I find therefore that in virtue of the lahan the guilt of the accused is established.

In addition to six months' rigorous imprisonment the accused was ordered to pay a fine of Rs. 100 or in the alternative to undergo three months further rigorous imprisonment. The amount of lahan fonnd in his possession was not great and as no implements of distilling were discovered he presumably was not conducting these operations on a big scale. I think under the circumstances, and taking into account the fact that he has been sentenced to pay a substantial fine in addition to imprisonment, the amount of imprisonment already undergone together with the fine may be treated as sufficient punishment. Except for this reduction of sentence I dismiss the application for revision.

D.D. *Sentence reduced.*

A. I. R. 1928 Lahore 192

SHADI LAL, C. J., AND ZAFAR ALI, J.

Shankar Das and *another*—Plaintiffs—Appellants.

v.

Hukam Chand and *another*—Defendants—Respondents.

First Appeal No. 2819 of 1926, Decided on 10th November 1927.

Civil P. C .O. 34 R. 2—Interest—Recovery of money on basis of mortgage deed—Interest from date of institution of suit to the date of payment—Rate of interest not penal—Interest should be allowed.

In a suit for the recovery of a certain sum of money on the basis of a mortgage deed Court is bound to award to the mortgagee interest on the principal from the date of the suit upto the date fixed by the Court for payment of the mortgage debt at the rate stipulated in the mortgage deed, unless the rate is penal or the rate is excessive and the transaction is substantially unfair. [P 192 C 2]

Anant Ram Khosla—for Appellants.

Judgment.—This appeal arises out of a suit for the recovery of a certain sum of money on the basis of a mortgage deed : and the question for determination is whether the trial Judge was justified in disallowing interest from the date of institution of the suit to the date of payment. As pointed out in Mulla's Commentary on the Civil Proccdure Code, at p. 160, the Court is bound to award to the mortgagee interest on the principal from the date of the suit up to the date fixed by the Court for payment of the mortgage debt, at the rate stipulated in the mortgage-deed, unless the rate is penal or the rate is excessive and the transaction is substantially unfair. It is not suggested that interest at 12 per cent. per annum can be regarded as penal or that the transaction embodied in the mortgage-deed was unfair. The trial Judge has acted in an arbitrary manner, and the appeal of the mortgagee must succeed.

We according allow the appeal and direct the defendant to pay interest on Rs. 7,070 at 12 per cent. per annum, from the date of the institution of the suit up to the date on which the money was paid by him to the mortgagee. The sum thus calculated, together with the costs of the appeal shall be paid on or before 1st February 1928. A decree in accordance with the terms of O. 34, R. 4, Civil P. C., shall be drawn. The respondents must pay the costs of this appeal.'

S.J. *Appeal allowed.*

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* A. I. R. 1928 Lahore 193

TEK CHAND, J.

Karim Bakhsh—Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 737 of 1927, Decided on 9th December 1927, from order of 1st Class Magistrate, Rawalpindi, D/- 15th June 1927.

(a) Evidence Act, S. 133— "Accomplice", meaning of — Distinction between accomplice and informer explained.

If, at the time when a person joined the conspiracy he had no intention of bringing his associates to book but his sole object was to partake in the commission of the crime, he cannot be called an informer but is an accomplice and his position is not modified simply because later on he turns round and carries information to the police. [P 195 C 1]

A person was present when the plans for committing a dacoity were hatched and had agreed to go to the meeting place in the evening armed with a revolver. He returned soon after and remained there for more than six hours but during this period he took no steps whatever either to inform the police or his master that a dacoity was contemplated. He then actually proceeded to a spot near the house where the dacoity was to be committed and took part in the preparations for committing the offence. It was only after it had been decided to postpone the dacoity till the moon had gone down and he had been sent to the town to bring food for two of the offenders that he for the first time disclosed the whole affair :

Held : that in view of these facts the person cannot but be regarded as an accomplice and his evidence needs corroboration in material particulars against each convict. [P 195 C 2]

(b) Penal Code, S. 399—Mere assembling is not preparation, but collecting arms, etc., and proceeding to the place of offence is.

The mere "assemblage" to commit dacoity does not amount to "preparation" within the meaning of S. 399, Penal Code ; but where the members of the gang take into their possession instruments of house-breaking and arms for the purpose of offence and defence and actually proceed to a place near the scene of the contemplated dacoity, they are guilty of an offence under S. 399 : 6 *P. R.* 1916 *Cr., Foll.* [P 195 C 2]

(c) Arms Act (1878), Ss. 19 and 20 — In order to apply S. 20 indication of intention to conceal arms from public servant must be shown.

Each case of concealment of arms must be decided on its own facts as to whether it falls under S. 19 or S. 20, Arms Act, but for S. 20 to apply there must be some special indication of an intention to conceal the possession of the arms from a public servant, railway official or public career : 8. *P. R.* 1915 *Cr.* ; *A. I. R.* 1923 *Lah.* 79 ; *A. I. R.* 1928 *Lah.* 434 ; and *A.I.R.* 1926 *Lah.* 262, *Foll.* ; 9 *P.R.* 1912 *Cr.* and *A. I. R.* 1925 *Lah.* 395, *Diss. from.* [P 196 C 1]

Muhammad Tufail for *Muhammad Alam*—for Appellant.

Mulk Raj for *Govt. Advocate*—for the Crown.

Judgment.—This judgment will dispose of criminal appeals Nos. 737, 738, 856, 857, 945 and 1080 of 1927, which are directed against the judgment of the Magistrate 1st Class (with enhanced powers) Rawalpindi, convicting Karim Bakhsh, Mir Zaman, Gheba, Bagga and Fazal Karim, appellants, of an offence under S. 399, I. P. C., for having made preparations to commit a dacoity and sentencing each to undergo rigorous imprisonment for seven years, and also against the judgment of the same Magistrate convicting Karim Bakhsh in a separate trial under S. 20, Arms Act, and sentencing him to rigorous imprisonment for seven years, the sentence to run consecutively with that passed against him under S. 399, I. P. C.

The principal witness against the appellants in the case under S. 399 is Muhammad Jan (P. W. 1), a domestic servant of one Mirza Kale Khan, Inamkhor of mauza Kalanjar, residing in Rawalpindi city. The story told by him is that the appellants Mir Zaman, Karim Bakhsh and Bagga lived in the same mohalla as his employer and that he had known them for a considerable time. On the 7th May 1927, he went to the house of Mir Zaman and found Karim Bakhsh and Bagga there. In the course of conversation Bagga informed the party that one Bawa Ganga Ram, who lived in the Hindu cremation ground happened to possess currency notes worth Rs. 900 besides cash and other moveable property and that a dacoity might be committed in his house. After consultation it was decided to commit the dacoity at the Bawa's house on the following night and during the course of conversation it transpired that Fazal Karim and Gheba appellants and Aulia Muhammad Zaman (absconders) had also agreed to join the commission of the dacoity. It was agreed that the party would meet at the underground near the fort at about 8 p. m. and that Karim Bakhsh and Fazal Karim would bring pistols. The witness Muhammad Jan was also asked to bring, if possible a pistol with him.

After the plan had been settled Muhammad Jan returned to the house of

his employer and at about 8 p. m. on receiving information from Mir Zaman, he left for the meeting place, but without a pistol as his master had kept it under lock and key. Bagga, Karim Bakhsh, Mir Zaman and Muhammad Jan arrived at the meeting ground and went into the depression. About half an hour later Gheba, Fazal Karim, Aulia and Muhammad Zaman also arrived there. Fazal Karim was armed with a spear (Ex. P. 1) and a revolver. Mir Zaman and Gheba had lathis (Exs. P. 4 and P. 5), while Karim Bakhsh had also with him an iron rod (sambal, Ex. P. 6). After consultation it was decided to commit the dacoity after the moon had gone down. As Fazal Karim and Gheba had not taken their food it was found necessary to send for it from the town. The witness Muhammad Jan was accordingly sent to bring it. He, however, went straight to his employer Kale Khan and told him that a dacoity was going to be committed in which murders might also take place. Kale Khan took the witness to the thana and there he related the whole story to Mir Afzal Khan, Sub-Inspector (P. W. 3), and Chaudhri Buta Ram, Deputy Superintendent of Police (P. W. 2), who recorded his statement Ex. P. A. It was arranged with the police that Muhammad Jan should go back to the spot with the food and some cigarettes and that the police would follow and would surround the locality where the conspirators had assembled, and that when Muhammad Jan would light a cigarette or cough, the police would fall upon the party.

Accordingly Muhammad Jan returned to the meeting place near the fort with food and cigarettes and the police arrived there at about 11 p. m. A short time after he lighted a cigarette and the police at once challenged, whereupon the conspirators readily took to their heels. The police opened fire wounding Fazal Karim appellant. Karim Bakhsh, who had a pistol, replied by firing two shots. Fazal Karim, Mir Zaman and Gheba were arrested on the spot while Karim Bakhsh, Bagga, Muhammad Zaman and Aulia ran away leaving two lathis (Exs. P. 4 and P. 5), a spear (Ex. P. 1) and a sambal (Ex. P. 6) which the police took into possession. The next morning four discharged cartridges were recovered by the police on the spot. Karim Bakhsh voluntarily surrendered himself on the 8th and Bagga was arrested on the 10th from the house of one Ghulam Hussain. In consequence of information supplied by Karim Bakhsh a revolver was recovered from a trunk which was found in the house of his brother-in-law, Hayat Bakhsh (P. W. 9), the key of which was supplied by Karim Bakhsh's wife.

Bagga, appellant, took the police to the meeting place near the fort on the 13th and a spear (Ex. P. 2) was recovered from the bushes.

In addition to (P. W. 1) Muhammad Jan the prosecution examined several witnesses. (The judgment then discussed other evidence and proceeded). Of the appellants Karim Bakhsh and Bagga pleaded alibi alleging that they were in certain villages near Chaklala, while Fazal Karim admitted that he was in the depression near the fort on the night in question and was wounded with a revolver shot, but stated that he was going to Kalanjar on an errand on behalf of Mirza Kale Khan when the police with Muhammad Jan met him and on Muhammad Jan pointing out opened fire and arrested them. Gheba's defence was practically the same as that of Fazal Karim. Mir Zaman denied having been arrested on the spot.

On appeal the first point urged by Mr. Muhammad Tufail for Karim Bakhsh is that the principal witness Muhammad Jan (P. W. 1) is an accomplice and according to the well-established rule of practice his evidence ought not to be accepted without corroboration. He contends that the lower Court has erred in treating him as an informer and in holding that no corroboration is necessary. The learned counsel in support of his contention has relied on a ruling of the Bombay High Court reported as *Queen-Empress* v. *Javacharam* (1). This ruling was however, dissented from in *Emperor* v *Chaturbhuj Sahu* (2). In criminal cases the distinction between an informer and an accomplice assumes at times considerable importance and there are certain well-established principles which ought to be taken into consideration in determining whether a person is an accomplice or an informer.

(1) [1895] 19 Bom. 363.
(2) [1911] 33 Cal. 96 = 8 I. C. 119 = 15 C. W. N. 171.

The distinction is clearly brought out by Wigmore in his well-known work on Evidence, S. 2060, the following passage :

When the witness has made himself an agent for the prosecution before associating with the wrongdoers or before the actual perpetration of the offence, he is not an accomplice; but he may be, if he extends no aid to the prosecution until after the offence is committed. A mere detective or decoy is therefore not an accomplice; nor an original confederate who betrays before the crime is committed, yet an accessory after the fact would be if he had before betrayal rendered himself liable as such.

In other words it has to be seen whether the witness had entered into the conspiracy for the sole purpose of detecting and betraying it or whether he is a person who concurred fully in the criminal designs of his co-conspirators for a time and joined in the execution of those designs till either out of fear or for some other reason he turned on his former associates and gave information to the police. If at the time when he joined the conspiracy he had no intention of bringing his associates to book, but his sole object was to partake in the commission of the crime, he cannot be called an informer but is an accomplice, and his position is not modified simply because later on he turns round and carries information to the police. The test laid down by Wigmore is also in accord with the observations of Maule, J., in his charge to the jury in the celebrated case *Reg* v. *Mullins* (3) and of Erle, J., in *Reg* v. *Dowling* (4).

It should be borne in mind that in this case the appellants were being tried for an offence under S. 399, I. P. C., viz., making preparations for the commission of a dacoity, and it is admitted by the appellants' learned counsel that if the facts as alleged by the prosecution be accepted as correct this offence was complete long before the witness Muhammad Jan (P. W. 1) gave information to the police. According to his own statement he was present at the house of Mir Zaman at 12 noon when the plans for committing the dacoity were hatched and had agreed to go to the meeting place in the evening armed with a revolver. He returned to his master's house soon after and remained there for more than six hours, but during this period he took no steps whatever either to inform the police or his master that a dacoity was contemplated. He then actually proceeded to a spot near the house where the dacoity was to be committed and took part in the preparations for committing the offence. It was only after it had been decided to postpone the dacoity till the moon had gone down and he had been sent to the town to bring food for two of the offenders that he for the first time disclosed the whole affair to his master who took him to the police where he made the report Ex. P A.

I have no doubt that in view of these facts Muhammad Jan cannot but be regarded as an accomplice and his evidence needs corroboration in material particulars against each appellant. (The judgment then discussed the evidence as to corroboration which was found to exist, and proceeded). Both Mr. Muhammad Tufail for Karim Bakhsh and Mr. Aziz Ahmad for Fazl Karim have contended that the evidence for the prosecution even if accepted, discloses an offence under S. 402 and not one under S. 399. I am, however, of opinion that this contention is devoid of all force. As held in *Karmun* v. *Crown* (5) the mere "assemblage" to commit dacoity does not amount to "preparation" within the meaning of S. 399, Penal Code, but where (as here) the members of the gang had taken into their possession instruments of housebreaking and arms for the purpose of offence and defence and had actually proceeded to a place near the scene of the contemplated dacoity they are guilty of an offence under S. 399.

I hold, therefore, that all the five appellants have been rightly convicted under S. 399, I. P. C. The sentence of seven years' rigorous imprisonment is by no means severe, in view of the fact that the appellants were armed with revolvers, spears and lathis, and, had not the police arrived on the spot on information given by Muhammad Jan the consequences would have been very serious indeed. I therefore, dismiss appeals Nos. 737, 856, 857, 945 and 1080 of 1927.

It now remains to deal with appeal No. 738 of 1927, preferred by Karim Bakhsh against his conviction under S. 20, Arms Act. Mr. Muhammad Tufail for the appellant has made a faint-hearted attempt to argue that it has not been proved that the revolver in question was

(3) [1849] 3 Cox's Cr. Cas. 526.
(4) [1849] 3 Cox's Cr. Cas. 509.
(5) [1916] 6 P. R. 1916 Cr.=34 I. C. 1000=37 P. W. R. 1916 Cr.

recovered from the possession of the appellant and that it was he, who had concealed it. Having regard, however, to the evidence given by Karim Bakhsh's brother-in-law Hayat Bakhsh and of the police officers before whom the revolver was recovered, I have no doubt whatsoever that the learned Judge of the Court below came to a correct conclusion that after Karim Bakhsh had escaped from the place where he and his fellow conspirators were in the depression near the fort, he put the revolver in a box and left it with his brother-in-law for safe custody. The possession in this case was, therefore, that of the appellant.

The next question to be considered is whether the offence falls under S. 19 or S. 20, Arms Act. Mr. Tufail has relied on the decision of Kensington, J., in *Ibrahim* v. *Crown* (6), where it was held that S. 20, Arms Act, applied only to cases where the import or export is attempted, and also on a remark of Scott Smith, J., in *Chandan Singh* v. *Crown* (7), where the former ruling seems to have been approved. The decisions as to the applicability of S. 20 are not uniform but the balance of authority is against the view taken by Kensington, J., in the ruling above cited. The question has been considered in a number of cases; *Khem Singh* v. *Crown* (8), *Sher Ali* v. *Emperor* (*A. I. R.* 1923 *Lah.* 79), *Ali Mohammad* v. *Crown* (*A. I. R.* 1923 *Lah.* 434), and recently by Addison, J., in *Chet Singh* v. *Crown* (9), in which Mr. Justice Kensington's view was definitely dissented from. I venture to think that the law has been correctly laid down by Addison, J., in the case last mentioned, where he held that

> each case of concealment of arms must be decided on its own facts as to whether it falls under S. 19 or S. 20, Arms Act, but for S. 20 to apply there must be some special indication of an intention to conceal the possession of the arms from a public servant, railway official or public career.

Applying this test to the present case I have no doubt whatsoever that the intention of the appellant in putting the revolver in the trunk, and keeping it in the house of his brother-in-law Hayat Bakhsh, was clearly to conceal the revolver from the police. I hold, therefore, that his offence fell under S. 20 and he has been rightly convicted.

I am of opinion, however, that the sentence of seven years' rigorous imprisonment imposed on Karim Bakhsh appellant under S. 20, Arms Act, is too severe. I think the ends of justice will be met by reducing it to one of rigorous imprisonment for three years which will begin after the expiry of the sentence of seven years passed against him under S. 399, I. P. C. With this modification in the sentence the appeal is dismissed.

S.J. *Appeals dismissed.*

(6) [1912] 9 P. R. 1912 Cr.=128 P. L. R. 1913 =18 I. C. 265=44 P. W. R. 1912 Cr.
(7) A. I R. 1925 Lah. 395=6 Lah. 151.
(8) [1915] 8 P. R. 1915 Cr.=28 I. C. 796=76 P. L. R. 1915.
(9) A. I. R. 1926 Lah. 262=7 Lah. 65.

A. I. R. 1928 Lahore 196

FFORDE AND TEK CHAND, JJ.

Firm Mathra Das Jagan Nath—Plaintiffs—Appellants.

v.

Firm Jiwan Mal Gian Chand—Defendants—Respondents.

First Appeal No. 2105 of 1922, Decided on 13th May 1927, from decree of 1st Cl. Sub-J., Ludhiana, D/- 6th June 1922.

(a) *Contract Act, Ss.* 211 *and* 215—*Agent joining secret combination to make personal profit—Agent is guilty of breach of duty.*

An agent, while acting on behalf of the principal joining a combination of speculators and artificially inflating the rate and then settling on the basis of these rates, acts in flagrant breach of his duty to his principal : 41 *All.* 635 ; 34 *Bom.* 292 and *A. I. R.* 1922 *Mad.* 497, *Foll.* [P 200 C 1]

It is a necessary incident of the contract of agency that the agent stands in a fiduciary relation towards his principal. His position is one involving confidence, and in the discharge of his duties, he must act with the most perfect good faith towards his principal, and should not in any way abuse the confidence reposed in him. He is bound to use his best endeavours to promote the interests of the person who has employed him. He will not be permitted to enter into any transaction in which his personal interest conflicts with his duty towards his principal, except with the consent of the latter, given after all the material circumstances and the exact nature and extent of the interest of the agent have been fully disclosed to him. In law as well as in equity an agent for the sale of goods belonging to the principal cannot, while actually selling the property or making settlements for damages on foot of such transactions, make any secret profit for himself or for persons with whom he is associated. [P 199 C 1, 2]

(b) *Contract Act, S.* 223 — *Agent settling with others against principal's order and even before due date—Agent cannot be reimbursed for settlement if made.*

An agent, when ordered by his principal not to make any settlemsnt on his behalf makes

settlements and that too even before the due date and behind the back of the principal, they cannot be binding on the principal and so the agent cannot be said to have been entitled to claim anything on account of any money that might have been paid by him to the purchasers making the settlements. [P 201 C 1, 2]

Jagan Nath Aggarwal and *Amar Nath Chona*—for Appellant.

Gokal Chand Narang and *Des Raj Narang*—for Respondents.

Tek Chand, J.—The plaintiffs in this case are a firm of commission agents working at Ludhiana under the name and style of Mathra Das Jagan Nath and the defendants are the firm of Jiwan Mal Gian Chand of Gujranwala City. Early in 1919, the plaintiffs, acting under instructions from the defendants, entered into the following transactions with third parties for the sale of salt :

(a) Two wagons to be delivered in January 1919.

(b) Five wagons to be delivered in March 1919.

(c) Ten wagons to be delivered in April 1919 (Exs. P. 12, 21.)

(d) eight wagons to be delivered in May 1919 (Exs. P. 22, 29). Delivery was in each case to be made at Ludhiana.

As regards transactions (a) and (b) : a profit of Rs. 495-6-0 accrued to the defendants, which the plaintiffs admit is due by them and there is now no dispute between the parties as to this item. With regard to (c) and (d) : the plaintiffs allege that the defendants failed to make delivery on the due dates (30th April and 31st May respectively) and the plaintiffs, as the defendant's commission agents, were compelled to settle with the purchasers and had to pay Rs. 4,003-8-9 as losses in respect of (c) and Rs 1,351-15-0 in respect of (d). In addition to this, a sum of Rs. 51-2-9 was claimed as expenses incurred on telegrams, correspondence, etc., and Rs. 245-7-3 as plaintiffs' commission, making up a total of Rs. 5,652-1-9. Adding to this, the sum of Rs. 370-14-9, which, it was alleged, the defendants owed to the plaintiffs on certain prior transactions, which are not now in dispute, and deducting Rs. 495-6-0 on account of profits due to the defendants on (a) and (b) mentioned above, the plaintiffs claimed Rs. 5,527-10-6 as principal and Rs. 100-14-3 as interest due thereon, or a total of Rs. 5,628-8-9.

The defendants, while admitting that they had authorized the plaintiffs to enter into the transactions in question on their behalf, denied their liability for the sum claimed on various grounds, which it is not necessary to give here in detail. The main pleas taken were that the April and May delivery contracts had become impossible of performance as salt could not be sent from Khewra from April to June 1919 on account of the disturbances and the declaration of martial Law, that they had never instructed the plaintiffs to fix or pay any damages on account of these consignments, that the plaintiffs had not in fact paid anything to any of the purchasers, and that, in any case, the plaintiffs in setting up these transactions had acted dishonestly and to the detriment of the defendants and were not entitled to be reimbursed for any sums that they might have paid. The rates at which the plaintiffs had calculated the damages were not admitted as correct and it was alleged that really nothing was due to the plaintiffs, but that Rs. 162-10-3 was payable by the plaintiffs to them.

The trial Court found that salt was being received at Ludhiana in April and May 1919, and, therefore, the defendants' plea that the contracts had become incapable of performance could not be sustained. On the main question in dispute, it held that the plaintiffs had failed to prove that they had made any settlements with regard to nine out of the ten wagons of April delivery and five out of eight of May delivery, but that the settlements with regard to the remaining four wagons (P. 15,. P. 22, P. 24 and P. 27) were genuine. After making allowance for certain minor items and going into the accounts the Court held that Rs. 562-15-3 was due to the plaintiffs, and for this sum a decree was passed in their favour against the defendants.

Against this judgment and decree the plaintiffs have preferred a first appeal to this Court praying that the decretal amount be enhanced to Rs. 5,628-8-9 as originally claimed ; and the defendants have filed cross-objections contending that the plaintiffs' suit should have been dismissed in its entirety.

Dr. Narang for the defendants-respondents has very properly conceded that he is unable to support the plea that the contract had become incapable of performance because of the declaration of martial Law and the consequent restric-

tions on transport of goods by the railway. The dispute, therefore, now centres round the statements alleged to have bean made by the plaintiffs with the purchasers and we have heard lengthy arguments on this point.

The main fact relating to the contracts of April delivery are these: The plaintiffs, acting as agents of the defendants, entered into agreements with third parties for supply of ten wagons of salt (Exs. P. 12-21). It is common ground that, the due date of delivery of these consignments was 30th April 1919. The contract rates for these wagons varied from Rs. 2-10-3 per maund to Rs. 2-15-6 per maund. The plaintiffs allege that on the defendants' failure to supply salt, they made settlements with the purchasers of these wagons or their respective assignees at rates varying from Rs. 3-7-0 to Rs. 4 per maund. They contend that the market rate prevailing on the due date was Rs. 4 per maund and that in most cases they settled at much lower rates, thus securing an advantage to the defendants. The defendants' case, on the other hand, is that the so-called settlements were bogus transactions, that, in any case, they were made not at the market rate at which salt was being actually sold at Ludhiana on the 30th April, but at a rate which had been artificially inflated by a ring of speculators one of whom was Jagan Nath, who is a member of the plaintiffs' firm, and that even if it be proved that any settlements were actually made the defendants are not liable to reimburse the plaintiffs for moneys so paid by them.

Mr. Jagan Nath Aggarwal, who has argued the case for the appellants with considerable ability, admits that the measure of damages at which the purchasers were entitled to recover their profits with regard to the April transactions is the difference between the contract rates and the rate prevailing in the Ludhiana market on the 30th April. The evidence on the record as to the market rate on this date is of a two-fold character. On the one hand we have it from the witnesses of both parties, e. g., P. W. 16 Babu Ram, P. W. 19 Ramji Das and D. W. 12 Sant Lal and D. W. 13 Madan Lal, whose statements are supported by entries in the respective account books, that actual transactions in salt took place on the 30th April at Rs. 2-12-0 per maund. On the other hand there is a large volume of evidence on the record, which shows that settlements between dealers in salt in respect of consignments which were to be delivered on that date were made at rates ranging from Rs. 3-7-0 to Rs. 4 per maund. Mr. Jagan Nath contends that it is the latter rate and not the rate at which actual sales took place, which ought to be taken into consideration in assessing the loss on the transaction in question.

In order to come to a correct conclusion on this point it is necessary to ascertain the real nature of the settlements which are alleged to have been made on or about the 30th April. There is ample evidence on the record to establish that the plaintiffs and a number of other persons had formed themselves into a ring for the purpose of speculating in salt. These persons had sold to each other a number of wagons of salt under written contracts, called tips and had by paper transactions amongst themselves worked up the rates artificially to a high figure, at which they made settlements on the due date without making actual delivery. These rates were known in the Ludhiana market by the technical name of "khiala." The real nature of these transactions is thus described by the plaintiffs' own witnesses. P.W. 12, Ramji Dass, states :

> We seven or eight men had effected a combination. We purchased good many tips (contracts) and then forced settlement at the best possible rates. With some we settled at Rs. 4 also. Hans Raj Lakhu, Sant Lal, Bichhya, Jagan Nath, plaintiff, Hari Ram, myself, Harcharan Dass, Nighai Ram had effected a combination. We collected some 90 tips. We received 50 railway receipts and got profits for the rest. Settlement was made at the rate agreed upon. The rate of salt was not considered as the contract did not relate to salt but to biltis.

P. W. 9, Bansi Lal, stated that the settlements were not made at the market rate, but at the fictitious rates forced up by the purchasers and the rate of 30th April was forced up by Rs. 1-4-0 per maund the rate next day being Rs. 2-12-0 per maund. One or many continue together ; they purchase tips and then force up the rates. This is technically called khiala. Similarly P. W. 11 Bhagat Ram admitted that these settlements were "effected at the rate fixed by the beoparis and not at the market rate.

It is quite clear that the rate forced up by these speculators in this manner cannot possibly be taken as the genuine "market rate" which means the price at which an ordinary customer could have purchased salt in the Ludhiana market on the due date. The idea which underlies the rule of law, that on breach of contract damages are to be assessed at the market rate is, that the party complaining should, so far as it can be done by money, be placed in the position in which he would have been, if the contract had been actually performed. It is, therefore, quite clear that the purchasers were entitled to damages according to the rate, which was actually prevailing in the market for genuine transactions of salt and which was, as shown already, Rs. 2-12-0 per maund, and not the fictitious khiala rate described above, at which the plaintiffs say they had made settlements with their purchasers. Therefore, even if the plaintiffs had authority to settle the transactions with the purchasers, they should have settled at the actual market rate and not at a fictitious rate, which was admittedly Re. 1-4-0 per maund higher.

Even if the appellants' contention be accepted that the rate at which the settlements were made was the market rate for tips I am of opinion that the plaintiffs could not legally settle with the purchasers at that rate. It must be remembered that in these transactions the plaintiffs were acting as agents on behalf of the defendants (who were not residing at Ludhiana) and as such it was their duty to act in a manner that was most beneficial to their principals. The plaintiffs, however, instead of protecting the interests of the latter, entered into a secret compact with most of the purchasers and other speculators and artificially forced up the rates with a view to benefit themselves at the expense of the sellers. I have no doubt whatever that in acting in this manner they were guilty of a flagrant disregard of their duties as agents. It is a necessary incident of the contract of agency that the agent stands in a fiduciary relation towards his principal. His position is one involving confidence, and in the discharge of his duties he must act with the most perfect good faith towards his principal, and should not in any way abuse the confidence resposed in him. He is bound to use his best endeavours to promote the interests of the person who has employed him. He will not be permitted to enter into any transaction in which his personal interest conflicts with his duty towards his principal, except with the consent of the latter, given after all the material circumstances and the exact nature and extent of the interest of the agent have been fully disclosed to him. In law as well as in equity an agent for the sale of goods belonging to the principal cannot, while actually selling the property or making settlements for damages on foot of such transactions, make any secret profit for himself or for persons with whom he is associated. The proposition is too elementary to require an elaborate discussion, but it seems to me necessary to emphasize it, as the real nature of the obligations of the agent is often lost sight of by the mercantile community in this province. It is well settled that

a person, who stands in a relation of trust or confidence to another shall not be permitted in pursuit of his private advantage to place himself in a situation which gives him a bias against the due discharge of that trust or confidence: *Burton* v. *Wookey* (1).

Similarly in *Bentley* v. *Craven* (2). Romilly, M. R., observed:

Two principles with relation to the doctrine of principal and agent have been recognized from the earliest times. One is that an agent employed to purchase cannot legally buy his own goods for his principal. Neither can an agent, employed to sell, himself purchase the goods of his principal. If he should do so, and thereby make a profit, his principal may either repudiate the trasaction altogether or, adopting it, may claim for himself the benefit made by his agent. It is founded on this principle that an agent will not be allowed to place himself in a situation which, under ordinary circumstances, would tempt a man to do that which is not the best for his principal and it is the plain duty of every agent to do the best he can for his principal.

The rigour with which the English Courts enforce the rule is clear from the following remarks of Sir George Jessel M. R., in *Dunne* v. *English* (3):

it is not enough for an agent to tell the principal that he is going to have an interest in the purchase, or to have a part in the purchase. He must tell him all the material facts. He must make a full disclosure. If in a transaction between principal and agent it appears that there has been any underhand dealing by the agent, e. g, that he has purchased the estate of the principal in the name of another

(1) 23 R. R. 249=6 Madd. 367.
(2) 104 R. R. 378.
(3) [1874] 18 Equity 524.

person instead of his own, however fair the transaction may be in other respects, it has no validity in a Court of equity.

Similarly Rigby, L. J., in *Lagnus Nitrate Co*; v. *Lagnus Syndicate* (4) laid down:

It is an equitable rule, which has always been guarded and enforced with the utmost jealousy, that no fiduciary agent shall, under pain of consequences thoroughly well known, intentionally place himself in a position in which his interest may conflict with his duty. The rule is not a mere arbitrary or technical rule of equity, but is based upon high ground of morality, and Courts of equity have always held any departure from it to be a very serious wrongdoing. The equitable rule referred to does not in any way depend upon fraud or any presumption of advantage actually taken. Indeed, it applies equally, even though it be shown that no advantage has been taken. The rule is made general in order to prevent the danger arising from the difficulty of disproving in particular cases that duty has given way to interest.

The principle underlying these decisions of the Courts in England is not peculiar to the laws of that country, but is a necessary consequence of the relationship of principal and agent. In India it has been recognised by the legislature in S. 215, Contract Act, and has been applied in various cases by the High Courts: see *Puran Lal* v. *Ford & Macdonald Co., Ltd.* (5). *Joachinson & Co.* v. *Meghjee* (6), *Achutha Naidu* v. *Oakley Bowden* (7). It is, therefore, clear that the plaintiffs, in joining a combination of speculators and artificially inflating the rate and then settling on the basis of these rates, acted in flagrant breach of their duty to their principals (defendants), and even if they actually made payment on such statements, the defendants cannot be made liable to reimburse them.

That the plaintiffs, in making these settlements acted dishonestly and in direct contravention of the express directions of their principals, is further clear from the correspondance that passed between them. On 29th April 1919 the plaintiffs sent the following telegram to the defendants (Ex, P. 40):

Your April biltis not received yet. If not received up to to-morrow, will be settled bazar rate. You will be responsible for loss.

The defendants replied the same day (Ex. D. W. 25/2):

Regret delay due unforeseen causes. Request fortnight's respite for delivery without projudice; otherwise settlement your risk.

The plaintiffs seem to have made no efforts whatever to ask the purchasers to give a "fortnight's respite as requested." Not only did they not do so, but on 30th they actually made settlements with the purchasers (some of whom were their partners and others were members of the ring) not at the real market rate, but at rates which were much highter than those prevailing in the bazar.

The due date for the May consignments (Exs. P. 22, P. 29) was the 31st of that month. On 22nd May the plaintiffs wrote to the defendants (Ex. P. 41):

You have not, to this day, the 22nd May, sent any railway receipt relating to the eight wagons of salt of May which had been sold for you on receipt of your letter, and telegrams. Please despatch the railway receipts otherwise you will have to pay the loss which the buyer will demand at the close of May. You are hereby informed of this. Please make efforts to send the railway receipts. To day the rate of railway receipt of ready goods(salt) at this place is Rs. 3-2-0. If you have a desire to make purchase, please send the reply by wire or by letter or you may come personally. Please send the railway receipts.

The defendants sent a reply by wire on 31st May 1919 (Ex. D. W. 25-1):

I can't come; dont decide for May and don't pay money or you will be responsible.

The plaintiffs, however, without waiting for this reply, had settled with all the purchasers several days before the due date. It is quite clear that the defendants cannot possibly be bound by such payments.

Now let us see if any settlements have been proved to have been actually made. As to the April consignments, the settlement relating to Exs. P. 12 to P. 14, are alleged to have been made with one Ramji Das. This Ramji Das was admittedly a partner of the plaintiffs in several salt transactions. He was a member of the "combination" which had arbitratily raised the rate of salt. He has not produced his account books and as remarked by the lower Court, appears to be an underling of the plaintiffs. Payments alleged to have been made to such a man are obviously fictitious and cannot be binding on the defendants.

The lower Court has held the settlement relating to Ex. P. 15 to be genuine, but if the transaction is scrutinized closely it will appear that it was wholly fictitious. The settlement with Jagat

(4) [1899] 68 L. J. Ch. 699=81 L. T. 334=15 T.L.R. 436=48 W.R. 74=7 Manson 165.
(5) [1919] 41 All. 635=52 I. C. 373=17 A. L. J. 805.
(6) [1910] 34 Bom. 292=3 I. C. 801=11 Bom. L. R. 779
(7) A. I. R. 1922 Mad. 497=45 Mad. 1005.

Ram, the ultimate holder of this tip is stated to have been made on the 25th April, i. e., five days before the date. It is not explained why this was done, nor is it shown how on the 25th the plaintiffs could possibly have anticipated the rate that would be prevailing in the market on the 30th. I, therefore, feel constrained to disagree with the finding of the lower Court on this point and hold that the alleged payment, even if it was ever made, is invalid.

The lower Court has examined in detail the evidence relating to the other consignments of April delivery and has found the alleged payments to be unproved. As I agree generally with the remarks of the lower Court, I do not think it necessary to repeat its reasons. It will be sufficient here to say that with regard to Ex. P. 18 plaintiffs themselves were the ultimate holders of the tip and they seem to have paid themselves the profit at the khiala rate and debited the amount to the defendants. The holders of Ex. P. 1, and Ex. P. 20 were the members of the "ring" above mentioned. Payments with regard to Ex. P. 16, Ex. P. 17, and Ex. P. 21 are alleged to have been made respectively to Sawan Mal, Jahawar Mal and Bhagat Ram on the 4th May 1919, but in the plaintiffs' account books the money in respect of these has been shown to have been paid on the 30th April to Ramji Das, who has been shown above to be an associate and dependant of the plaintiffs.

Out of the May consignments the lower Court has upheld the settlements alleged to have been made in respect of Ex. P. 22, Ex. P. 24 and Ex. P. 27, but it has overlooked the fact that while the due date was the 31st May, the plaintiffs in each case made the settlement before that date. The plaintiff's own case is that Ex. P. 22 was settled on the 30th May, that Ex. P. 24 was settled on the 25th and payment made in that account on the 29th and that Ex. P. 27 was also settled on the 30th May. It is obvious that such settlements made before the due date and behind the back of the defendants cannot possibly be binding on them. The lower Court has rightly rejected the alleged settlements relating to P. 23, P. 25, P. 26, P. 28 and P. 29, and it is not necessary to repeat here the grounds for this conclusion.

For the foregoing reasons it must be held that the plaintiffs are not entitled to claim anything on account of the money alleged to have been paid by them to any of the purchasers of April and May consignments. As to the other items, which are admitted by both parties, there is a credit balance in favour of the defendants. Nothing is, therefore, due to the plaintiffs. I would accordingly dismiss the plaintiffs' appeal and accept the cross-objections, and modifying the decree of the lower Court would dismiss the plaintiffs' suit with costs throughout.

Fforde, J.—I agree. The plaintiff has brought this suit for reimbursement for sums which he alleges he has expended as agent on behalf of his principal in compromising a number of threatened suits brought against the principal for damages for breach of contract in connexion with the sale of certain consignments of salt. To succeed in his suit the plaintiff must prove that in compromising this threatened litigation he was acting within the scope of his authority, that is to say, that he was authorized by the defendant to take the steps he did, either by the express terms of the contract of agency or by necessary implication from the defendant's conduct.

In Mayne on Damages (9th edn., p. 542) an agent's right to indemnity is expressed as follows :

> The rule is that if an agent has incurred losses or damages in the course of transacting the business of his agency or in following the instructions of his principal, he will be entitled to full compensation therefor. But in order to entitle an agent to recover from his principal under such circumstances he must show: firstly that the loss arose from the fact of his agency ; secondly, that he was acting within the scope of his authority ; and thirdly, that the loss was not attributable to any fault or laches on his part.

In *Pettman* v. *Keble* (8) it was held that where an agent, exercising his best judgment, compromised an action brought against him in respect of a contract entered into on behalf of his principal, who had notice of the action and had not given any instructions as to the course to be pursued, the agent was entitled to be indemnified, even though the plaintiff could not under the circumstances have succeeded in the action.

If the purchasers of the consignments of salt had in fact threatened to bring actions for damages for non-delivery, it

(8) [1858] 9 C. B. 701=19 L. J. C. P. 325=15 Jur. 38.

was the duty of the agent to immediately communicate this fact to his principal and take his instructions. It is true that he communicated to his principal the fact that he intended to make settlements with the purchasers, but, far from authorizing him to make any settlement on his behalf, the defendant expressly forbade his doing so. In the face of this repudiation there was no justification whatsoever for the agent taking the matter into his own hands. Far from acting within the scope of his authority he in fact acted against the express instructions of his principal. On these grounds alone the suit must fail.

S.J. *Appeal dismissed.*

** A. I. R. 1928 Lahore 202

TEK CHAND, J.

Moti Ram Prem Chand and *another*—Appellants.

v.

Kewal Ram Dharam Chand and *others*—Respondents.

Misc. First Appeal No. 960 of 1925, Decided on 25th May 1927, from order of Dist. Judge, Jhang, D/- 10th January 1925.

** (*a*) *Provincial Insolvency Act* (1920) *S.* 75—*Appeal against order of adjudication—Receiver is not necessary party.*

A receiver is not a necessary party to an appeal in which the very order of adjudication (as a consequence of which the receiver was appointed) is in question. The uniform practice of the Punjab Chief Court and of the Lahore High Court has been that a receiver is not considered a necessary party to appeals against orders of adjudication : *Lah. Civ. A. No.* 2640 *of* 1925, *Rel. on.* ; 14 *Bom.* 189 ; 39 *All.* 152 ; *Ex parte Webber,* (1890) 24 *Q. B.* 313, *Dist.* : 26 *Bom.* 476, *Expl. A. I. R.* 1925 *Cal.* 785, *Appr.* [P 203 C 2]

(*b*) *Civil P. C., O.* 41, *R.* 20—*Party impleaded in lower Court can be joined as respondent even after limitation for appeal.*

Under O. 41, R. 20, Civil P. C., a person who was a party to the proceedings in the Court below may be added as a respondent though the time to appeal against him has expired. The law of limitation does not affect the powers of the Court to implead such persons : 79 *P. R.* 1914 ; 33 *Cal.* 329 ; *A. I. R.* 1921 *Nag.* 12, *A. I. R.* 1924 *Lah.* 629 and *A. I. R.* 1928 *Lah.* 120, *Ref.* [P 206 C 1, 2]

* (*c*) *Provincial Insolvency Act* (1920), *S.* 10—*Debtor applying for adjudication must prove prima facie inability to pay his debts.*

Under the Act of 1920 it is a condition precedent to the presentation of an insolvency petition by a debtor that he must show that he is unable to pay his debts, and if he fails to satisfy the Court of his inability to pay his debts his petition must under S. 25 (2) be dismissed. At this stage the Court is not required to make a detailed or lengthy enquiry into the alleged inability of the appellant to pay his debts. It is not intended that there should be a regular trial of this matter at the very outset. But at the same time it is necessary that the debtor must make out a prima facie case to the satisfaction of the Court as to his inability to pay his debts. The onus of proof of all the essential conditions required under S. 10 lies on him, otherwise he has no locus standi to apply and his application must be dismissed : *A. I. R.* 1924 *Pat.* 66 and *A. I. R.* 1923 *Mad.* 585, *Rel. on.* [P 207 C 1, 2]

* (*d*) *Provincial Insolvency Act* (1920), *S.* 10—*Assets exceeding liability—Debtor must show inability to pay even by sale of the assets.*

Where a debtor applies to be declared an insolvent and shows that his assets exceed his liabilities, he must show also that by the sale of his interests or after realization of his assets a sum would not be secured which would enable him to pay his debts in full : *A. I. R.* 1925 *Lah.* 630, *Rel. on.* [P 207 C 2]

* (*e*) *Provincial Insolvency Act* (1920), *S.* 10—*Restriction on power of alienation is not significant in considering debtor's inability.*

The fact that the debtor's power of alienation is in certain respects restricted by statute (in this case by the Punjab Alienation of Land Act) is a wholly immaterial circumstance in considering debtor's inability to pay his debts : 27 *P. L. R.* 422 ; 142 *P. R.* 1907 ; 119 *P. L. R.* 1916; and 60 *I. C.* 463, *Rel. on.* [P 208 C 1]

Amar Nath Chona—for Appellants.

Mukand Lal Puri—for Respondents.

Judgment.— Ashaq Hussain Shah, respondent 1, applied to the District Judge, Sargodha, under S. 7, Provincial Insolvency Act, to be adjudicated an insolvent. In his application he estimated his total liabilities at Rs. 13,640 and his assets at Rs. 48,263-12-0, consisting of agricultural land which he himself valued at Rs. 45,000, a house worth Rs. 110 and moveable property and outstandings valued at Rs. 3,153-12-0. The immediate cause for his making the application was stated to be that two of his creditors had applied for his arrest in execution of decrees, which had been obtained against him for an aggregated sum of Rs. 1,575 only and which he alleged be was unable to pay. A list of 22 creditors, to whom Rs. 13,640 was said to be due, was filed with the application. Of the creditors seven appeared and supported the debtor's application while four contested it, alleging that on his own showing the debtor's assets far exceeded his alleged liabilities and thas he was obviously able to pay

his debts. The other creditors did not appear.

The learned District Judge, in a brief judgment, relying on: (a) the applicant's statement on oath that he was unable to discharge his liabilities; (b) the admission of seven of the creditors who had supported the application; and (c) the fact that the two creditors had actually applied for his arrest in execution of their decrees, came to the conclusion that the applicant was unable to pay his debts. He accordingly passed an order adjudging the debtor an insolvent, and appointed one Nazar Hussain Shah receiver of the estate.

Against this order of adjudication the appellants, who are some of the creditors, have preferred this appeal which is opposed by the debtor Ashaq Hussain Shah only. The other respondents, though served, have not appeared.

A preliminary objection has been raised by the learned counsel for the contesting respondent that the appeal cannot proceed as Nazar Hussain Shah, who had been appointed receiver of the estate by the lower Court, has not been impleaded as a party respondent. It is pointed out that in the memorandum of appeal as originally presented the only persons arrayed as respondents were the insolvent and seven of the creditors, though subsequently on the appellants' application the Official Receiver of Sargodha was brought on the record. But this was (it is urged) a meaningless proceeding as the Official Receiver of Sargodha had nothing to do with this insolvency, the person actually appointed as receiver being Nazar Hussain Shah, who had not been impleaded up to the date of the hearing, even though several opportunities had been given to the appellants to amend the memorandum of appeal; counsel for appellant admits that the Official Receiver of Sargodha was impleaded by mistake and that Nazar Hussain Shah's name has not yet been placed on the record as a party. He, however, contends that the appeal being one against the order adjudicating respondent 1 as an insolvent, the receiver appointed by the lower Court was not a person interested in the appeal and was not a necessary party to it. It is argued that the omission to implead him is not fatal to the hearing of the appeal. For the contesting respondent it is urged that from the moment of Nazar Hussain Shah's appointment as receiver the estate of the insolvent vested in him and thenceforward he represented the entire body of creditors and, therefore, his presence on the record was essential for the proper decision of the appeal. It has, however, been conceded by the respondents' learned counsel that there is no specific provision in the Provincial Insolvency Act requiring a receiver to be made a party to an appeal in which the very order of adjudication (as a consequence of which the receiver was appointed), is in question. So far as I am aware, the uniform practice of the Punjab Chief Court and of this Court has been that a receiver is not considered a necessary party to appeals against orders of adjudication. Recently the point was specifically raised in Civil Appeal No. 2640 of 1925, *Firm of Deviditta Mal* v. *Harbhagwan*, before Jai Lal, J., and the learned Judge held that the appeal could proceed in the absence of the receiver from the appellate record. Mr. Mukand Lal Puri, however, suggests that this practice is not legal and he relies on certain English and Indian authorities, which he says, support his contention and which are also cited at p. 281 of Mr. Rustomji's valuable commentary on the Provincial Insolvency Act, to support the remark that "in an appeal against an adjudication order the receiver is a necessary party."

The first of these is *In the matter of Haroon Mahomed* (1), in which on the application of the petitioning creditors, a certain firm trading under the name and style of Haji Mitha Cassum, having nine persons as its partners was adjudged insolvent under S. 9, Insolvent Debtors Act (11 and 12 Vict. c. 21). Shortly after the passing of the order of adjudication, one Haroon Mahomed applied to the Court stating that he was not and had never been a partner in the insolvent firm, and that it be declared that the adjudication order did not affect him. A rule nisi was issued by the Commissioner in Insolvency, calling upon the petitioning creditors and all other creditors of the said insolvent to show cause why the order of adjudication should not be revoked or set aside so far as the applicant was concerned. After inquiry the rule was discharged and the

(1) [1890] 14 Bom. 189.

order of adjudication confirmed. Against these orders Haroon Mahomed preferred an appeal to the appellate Bench of the High Court impleading the petitioning creditors only as respondents. Before the hearing of the appeal, however, he bought off these petitioning creditors and consequently the latter withdrew their opposition. On this a number of persons from amongst the other scheduled creditors came forward and applied to be made parties to the appeal. This application was opposed by the appellants, but was supported by the Official Assignee. The learned Judges held that in these circumstances the other creditors were entitled to be placed on the record and heard in support of the lower Court's order. The question whether the Official Assignee was a necessary party was not discussed and decided, nor is it clear from the report at what stage and at whose instance was he impleaded. All that is mentioned is that at the close of the hearing the Official Assignee asked for his costs on the ground "that he was interested in the appeal and was bound to appear," and the Court granted him costs. The point now before us does not seem to have been directly raised, nor is there any discussion or definite decision on it. Moreover, the facts of the case were very peculiar. As already pointed out, a firm consisting of nine partners had been adjudicated insolvent, and the person who was contesting the order of adjudication was one of them. The other eight partners do not appear to have been impleaded. For these reasons the case does not seem to be of much assistance to us.

The next ruling referred to is *Karsandas* v. *Magan Lal* (2), which also is a case under the Insolvent Debtors Act. There, on the application of some of the creditors the appellant had been adjudicated an insolvent by a Judge sitting on the original side of the High Court. Against this order the insolvent had preferred an appeal to the appellate Bench and at the hearing of the appeal a preliminary objection was taken on behalf of the petitioning creditors that the appeal could not proceed as the Official Assignee had not been impleaded as a party. The objection was, however, overruled by Jenkins, C. J., and the appeal allowed to be heard. Here, again, there is no discussion on the point but the decision, so far as it goes, supports the appellants rather than the respondent.

The third case cited is *Jhabba Lal* v. *Shib Charan Das* (3). That was an appeal by the petitioning creditors against an order of the insolvency Court rejecting their application for attachment of certain property which they alleged belonged to the insolvent, but which the Court had, on objections by the sons of the insolvent, declared to be the personal property of the latter. It was held that the petitioning creditors had no locus standi to file an appeal against this order. This case has obviously no bearing on the point before us.

Mr. Mukand Lal, however, places much reliance on *In re Webber Ex parte Webber* (4), where it was held by the Court of appeal that notice of an appeal against a receiving order must in every case be served on the Official Receiver within the time limited by the rules for service on the petitioning creditor. It is, however, clear from a perusal of the judgment of Cave, J., who had upheld the preliminary objection in the Divisional Court, as well as the judgments delivered on appeal by Lord Esher, M. R., and by Lindley and Lopes, L. JJ., that the decision proceeded on the peculiar provisions of O. 58, R. 2, of the Rules of the Supreme Court, and on the rule of practice which had been laid down by the Divisional Court in England for such cases. O. 58, R. 2, provides that the

> notice of appeal shall be served upon all parties directly affected by the appeal and it shall not be necessary to serve parties not so affected; but the Court of appeal may direct notice of the appeal to be served on all or any parties to the action or other proceeding or upon any person not a party.

Both the Master of the Rolls and Lindley, L. J., observed that it was doubtful whether a receiver in bankruptcy could be held to be party directly affected within the meaning of the aforesaid rule, but they decided that under R. 2 the Divisional Court was empowered to direct notice of the appeal to be served even on a person who was not a party to the proceedings. They further held that the Divisional Court was entitled to make its own rules for the impleading of parties and it could not be said that in that particular case the rule framed by that

(2) 1902] 26 Bom. 476=4 Bom. L. R. 94.

(3) [1917] 39 All. 152=37 I. C. 76=15 A. L. J. 1.

(4) [1890] 24 Q. B. D. 313=59 L.J.Q.B. 581=6 Morrell 313=38 W.R. 195=62 L. T. 485

Court, on which Cave, J., had relied, was in any way unreasonable or improper. It is thus clear that this ruling is no guide for the Indian Courts in hearing appeals against the orders of adjudication passed under the Provincial Insolvency Act. In the Civil Procedure Code there exists no rule corresponding to R. 2, O. 58, rules of the Supreme Court, nor am I aware of any rule to this effect having been framed by the Lahore High Court under its rule-making power. In practice the receiver has never been, as already stated, considered a necessary party to appeals before the High Court or the late Chief Court.

Mr. Mukand Lal's main argument, however, is based on S. 28 (2), Provincial Insolvency Act, which lays down that

> on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become available among the creditors.

It is argued that as under this section the whole of the property of the insolvent vests in the receiver and he represents not only the insolvent but also the entire body of creditors, he is the person most interested in the result of the appeal and is, therefore, a necessary party to it. I have given much careful thought and anxious consideration to this argument and have reached the conclusion that the provisions of this section, instead of supporting the contention of the learned counsel, are really against it. In order to examine the soundness of this argument it is necessary to refer to certain provisions of the Provincial Insolvency Act. S. 27 lays down that if the Court does not dismiss the petition, it shall make an order of adjudication. In S. 28 (2) it is provided that on the making of an order of adjudication the whole of the property of the insolvent shall *vest in the Court* or in a receiver as hereinafter provided. S. 56 empowers the Court to appoint a receiver for the property of the insolvent either at the time of the order of adjudication or at any time afterwards, and it is stated that "such property shall *thereupon* vest in such receiver." This is followed by S. 58 which lays down that where no receiver is appointed, the Court shall have all the rights of, and may exercise all the powers conferred on, a receiver under this Act. An examination of these sections of the Act makes it clear that on adjudication the property of the insolvent *vest in the Court* and the Court may or may not, as it thinks fit, appoint a receiver to take charge of the estate of the insolvent. It may administer the estate itself or it may decide to exercise these functions through a receiver. If and when the Court chooses to delegate its functions relating to the administra- of the estate to a receiver, then, and not till then, does the estate vest in the receiver. The receiver has no independent status of his own. He is merely an official of the Court, the hand through which the Court chooses to act. The property primarily vests in the Court, and it is only by virtue of the delegation of its powers by the Court to him that the receiver is vested with the estate: see in this connexion the remarks of LeRossignol, J., in *Prithi Nath* v. *Bashes-har Nath* (5) and also the decision of the Madras High Court in *Official Receiver of Trichinopoly* v. *Somasundaram Chet-tiar* (6). If this is the correct legal position then it cannot be argued simply because under certain circumstances the property of the insolvent vests in the receiver for certain purposes, he is a person interested in the result of the appeal and is a necessary party to it. For otherwise in cases in which the Court does not choose to appoint a receiver or where an appeal against the order of adjudication is preferred before a receiver is appointed under S. 56, it would, by parity of reasoning, be necessary to implead the Court as a party to the appeal. This position, however, is absurd on the face of it. Nobody would be heard to argue that in such a case the appeal cannot proceed because the Court, which passed the order of adjudication and in which the property vests had not been impleaded as a party respondent. This point is prominently brought out in the decision of the Calcutta High Court in *Jagannath Marwari* v. *Kala-chand Banerjee* (7), the reasoning and conclusion of which have my respectful concurrence.

On general principles, also, the objection is untenable as the ordinary rule is that in an appeal only those persons need be impleaded, who were necessary parties in the Court below and who would be

(5) A. I. R. 1924 Lah. 331.
(6) [1916] 30 M. L. J. 415=34 I. C. 602.
(7) A. I. R. 1925 Cal. 785.

affected by the order passed on appeal. Here the receiver was not and could not have been a party to the proceedings in the trial Court resulting in the order of adjudication. Further, as pointed out already, the very appointment of the receiver is dependent upon the order of adjudication and for this reason also his absence from the record is not a fatal defect to the hearing of this appeal in which the validity of this order itself is under consideration. I would, therefore, overrule this preliminary objection.

Mr. Mukand Lal next argued that there was another defect in the appeal by reason of which the appeal could not proceed. He pointed out that in the memorandum of appeal as originally presented on 20th April 1925, fifteen persons were shown as appellants. On 5th January 1926, when the case came up for hearing before Mr. Justice Broadway, it was objected on behalf of the respondents that Mr. Amar Nath Chona, who had presented the appeal, had been instructed by two creditors only and that he had no right to present the appeal on behalf of the others. Mr. Amar Nath Chona offered the explanation that his clerk had by mistake made the other thirteen creditors as appellants, though really they should have been impleaded as respondents. The case was accordingly adjourned, on payment of costs to the objecting respondent, to allow Mr. Chona an opportunity to amend the appeal. An application was in due course presented, praying that the memorandum of appeal be corrected and these 13 persons added as respondents. After certain intermediate orders which it is not necessary to mention here, this application was granted on 15th July 1926 and the 13 persons were entered as respondents. Mr. Mukand Lal argues that as these persons were actually impleaded as respondents more than six months after the order under an appeal had been passed, the appeal was barred by time against them and being defective by reason of their absence from the record ought to be dismissed. It is clear from the narrative of facts as given above that these persons were shown as appellants by a pure oversight on the part of the appellants' counsel, and on his offering an explanation to this effect the learned Judge directed these persons to be made respondents. Now, it is quite clear that under O. 41, R. 20, Civil P. C., a person who was a party to the proceedings in the Court below may be added as a respondent, though the time to appeal against him has expired. The law of limitation does not affect the powers of the Court to implead such persons: see *Shahab Din* v. *Miran Bakhsh* (8), *Girish Chander* v. *Sasi Sekhareswar* (9) and *Deokaran* v. *Nathu* (10). The question has recently been fully discussed by Broadway, J., in *Amar Singh* v. *Kashi* (11) and by Campbell, J., in *Mt. Sawani* v. *Jiwan* (12). I, therefore, hold that there is no force in this objection also and overrule it.

On the merits of the appeal the sole question for consideration is whether having regard to the provisions of Ss. 10 and 24, Provincial Insolvency Act 5, 1920, the debtor is, on the facts as stated or proved by him, entitled to present a petition for adjudication as an insolvent. In order to properly appreciate the correct legal position in respect of this matter under the existing law, it is necessary to emphasize the very material alteration that has been effected in the law by the Act of 1920.

Section 6 (3) of the former Act (3 of 1907) was as follows:

> The debtor shall not be entitled to present an insolvency petition unless
>
> (a) his debts amount to 500 Rs.; or (b) he has been arrested or imprisoned in execution of the decree of any Court for the payment of money; or (c) an order of attachment in execution of such a decree has been made and is subsisting against his property.

It will be noticed that under that section it was not necessary for the debtor to allege or prove that he was unable to pay his debts. All that was necessary to give him a right to apply for being adjudicated an insolvent was to establish one or the other of the three conditions mentioned in Cls. (a), (b) and (c) above. If his debts amounted to more than Rs. 500 or he had been arrested or imprisoned in execution of a money decree or his property was under attachment in execution of such a decree, the Court was bound to pass an adjudication order quite irrespective of the fact whether he was able to pay his debts or not : see the Leading Privy Council

(8) [1914] 79 P. R. 1914=169 P. W. R. 1914=25 I. C. 549=268 P. L. R. 1914.
(9) [1908] 33 Cal. 329.
(10) A. I. R. 1921 Nag. 12.
(11) A. I. R. 1924 Lah. 629.
(12) A. I. R. 1928 Lah. 120.

judgment, *Chhatrapat Singh Dugar* v. *Kharag Singh Lachmiram* (13). Experience, however, showed that this provision of the law was not suited for Indian conditions and that dishonest debtors made improper use of the insolvency law with a view to get out of their just liabilities even though they were really able to easily discharge them. In order to set right this defect and with a view to see that the law does not lend itself to the devices of dishonest debtors, S. 6 (2) of Act 3 of 1907 was repealed and in the new Act 5 of 1920, S. 10 was enacted as follows :

> A debtor shall not be entitled to present an insolvency petition unless he is unable to pay his debt and (a) his debts amount to five hundred rupees or (b) he is under arrest or imprisonment in execution of the decree of any Court for the payment of money, or (c) an order of attachment in execution of such a decree has been made, and is subsisting against his property.

It will be noticed that a very material alteration was made to the section by the addition of the " words unless he is unable to pay his debts" Under the present law, it is necessary for the debtor to establish both : (1) that he is unable to pay his debts, and (2) that either his debts amount to Rs. 500, or he has been arrested or his property had been attached in execution of a money decree. It has now been made a condition precedent to the presentation of an insolvency petition by a debtor that he must show that he is unable to pay his debts and if he fails to satisfy the Court of his inability to pay his debts his petition must under S. 25 (2) be dismissed. S. 10 has, however, to be read with the proviso to S. 24 (1) (a), which lays down that for the purpose of proving his inability to pay his debts the debtor is required to furnish only such proof as will satisfy the Court that there are prima facie grounds for believing the same and the Court if and when so satisfied shall not be bound to hear any further evidence thereon. In other words at this stage the Court is not required to make a detailed or lengthy enquiry into the alleged inability of the appellant to pay his debts. It is not intended that there should be a regular trial of this matter at the very outset. But at the same time it is necessary that the debtor must make out a prima facie case to the satisfaction of the Court as to his inability to pay his debts. The onus of proof of all the essential conditions, required under S. 10, lies on him, otherwise he has no locus standi to apply and his application must be dismissed : *Gobind Prasad Gir* v. *Kishun Lal Dhokri* (*A. I. R.* 1924 *Pat.* 166 ; and *Lakshminarayana Aiyar* v. *C. R. Subramaniya Aiyar* (14).

Now can it be said that in this case the respondent has made out a prima facie case of inability to pay his debts ? In my judgment on an examination of the contents of his petition and the other facts on the record, the question can only be answered in the negative. It is no doubt true that the respondent boldly asserts that he is unable to pay his debts and a few of his creditors, who represent only a small fraction of his alleged total indebtedness, support him, but the details of his assets and liabilities as given in his own petition instead of showing his inability to pay his debts lead to exactly the opposite conclusion. He values his property at Rs. 48,000 and states that the debts due by him are Rs. 13,000 odd only. He does not allege that his assets are locked up in investments for which there is no market or that they are otherwise incapable of realization.

Assuming, and at this stage it must be so assumed, that his liabilities are correctly stated in the petition, his property is according to his own valuation worth nearly four times of what he states he owes to his creditors. The rule of law applicable to such a case is thus stated by Singhal at p. 73 of his treatise on the Law of Insolvency in British India :

> Under Ss. 10 and 24, Provincial Act, the debtor should only prove that he is unable to pay his debts. Where a debtor applies to be declared an insolvent and shows that his assets exceed his liabilities, he must show also that by the sale of his interests or after realization of his assets a sum would not be secured which would enable him to pay his debts in full.

As pointed out by Harrison, J., in *Dad Khan* v. *Chandi Ram* (15), a case which is very similar to the present one,

> where the debtor himself shows the value of his property as five times the total of his debts, it is obvious that he is not unable to pay his debts under S. 10, Provincial Insolvency Act. He could either sell a fraction of his land to an agriculturist or he could charge a larger fraction in order to raise the necessary funds. Counsel contends that it is the duty of Insolvency Court to pass an order of adjudication and

(13) A. I. R. 1916 P. C. 64=44 Cal. 535=44 I. A. 11 (P. C.).

(14) A. I. R. 1923 Mad. 585.

(15) A. I. R. 1925 Lah. 630.

then to make arrangements for farming a portion of the land. If the Insolvency Court can arrange to farm a portion of the land, the applicant can equally well arrange a lease of the same portion. The words in the section must I think, be read as meaning what they say and if a man has on his own showing marketable property of an infinitely greater value than his outstanding debts, he is clearly able to pay them.

In that case as here, the debtor was an agriculturist owning large property comprising land of the value of Rs. 44,000 milch and plough, cattle, etc. He had applied to be adjudicated an insolvent on the ground that he was unable to pay his debts amounting to Rs. 9,000. The application was granted by the District Judge, but the order was set aside by the High Court. There is no doubt that in such cases the debtor is able to pay his debts, but he is not desirous of doing so. Such a person is, obviously, not entitled to apply for adjudication as an insolvent under S. 10 of the Act.

Mr. Mukand Lal Puri, as a last resort, contended that the respondent in this case was a member of an agricultural tribe and that his power to alienate his landed estate was by statute restricted and that the refusal of his application for adjudication as an insolvent would nullify the provisions of that Act. I however, fail to see the force of these contentions. The fact that the debtor's power of alienation is in certain respects restricted is a wholly immaterial circumstance. In *Barkat Ali* v. *Gurditta* (16), a similar argument was put forward before Coldstream, J., and rejected. There the debtors alleging that their debts amounted to Rs. 2,100, and that they were unable to pay their debts petitioned to be adjudicated insolvents. It was found that they were occupancy tenants and that their occupancy rights could be mortgaged for Rs. 2,500 which would be sufficient to liquidate their debts. It was, however, argued that under S. 56, Punjab Tenancy Act, the landlords' consent was necessary before the occupancy rights held by the debtors could be sold and as the landlords might have refused consent without assigning any reasons it could not be said that the debtors were able to pay their debts. The learned Judge held that as it had not been shown that the landlord had refused to allow alienation of the occupancy rights it could not be said that the debtors were unable to pay their debts and he accordingly dismissed the application.

The principle underlying this decision fully applies to the present case and is a complete answer to the first part of Mr. Mukand Lal's argument. Nor am I pressed by the suggestion that the rejection of the petition of an agriculturist debtor in the circumstances stated above would defeat the object of the Punjab Alienation of Land Act. That Act merely restricts and in some case prohibits the transfer of agricultural land by members of notified agricultural tribes to persons belonging to non-agricultural tribes. It was not intended, nor does it purport to assist well-to-do agriculturist debtors who can easily discharge their liabilities, but who are unwilling to do so, in escaping from their just obligations by getting themselves adjudicated insolvent. Nor is there anything in the Act, which is intended to prevent money-lenders from recovering sums justly due to them by any legal means in their power : see remarks of Robertson and Shah Din, JJ., in *Jahan Khan* v. *Dala Ram* (17), of Broadway, J. in *Haidar* v. *Fatteh Khan* (18) and of Chevis, J., in *Ladha Singh* v. *Ahmad Yar* (19). I, do not, therefore, see that the Land Alienation Act has any bearing on the decision of the point before me. The real question to be decided is whether the applicant is unable to pay his debts and this he obviously is not on his own showing.

For the foregoing reasons, I am of opinion that the contesting respondent was not entitled to present a petition for adjudication as insolvent and the order passed by the lower Court granting his application cannot be sustained. I would, therefore, accept the appeal, set aside the lower Court's order and direct that the petition of respondent 1, for adjudication as an insolvent be dismissed with costs in the trial Court. As the appellants were careless in drawing up their memorandum of appeal I would leave the parties to bear their own costs in this Court.

D.D. *Appeal accepted.*

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(16) [1926] 27 P. L. R. 422 (423).

(17) [1907] 142 P. R. 1907=86 P. W. R. 1907=48 P. L. R. 1908.

(18) [1916] 119 P. L. R. 1916=37 I. C. 193=114 P. W. R. 1916.

(19) [1920] 60 I. C. 463.

A. I. R. 1928 Lahore 209

JAI LAL, J.

Aya Ram Tola Ram—Decree-holder—Appellant.

v.

Joint family Hit Ram Bhoj Raj—Judgment-debtors—Respondents.

* Misc. First Appeal No 2704 of 1926 Decided on 6th May 1927, from order of Sr. Sub-Judge, Dera Ghazi Khan, D/- 14th August 1926.

(a) *Civil P. C., S.* 145—*Section applies where liability is incurred independently of the decree.*

Section 145 applies to cases where the liability of the surety is incurred independently of the decree and is not contained in or declared by the decree itself which is sought to be executed. In the latter case such a person becomes really a judgment-debtor and therefore becomes liable as such. [P 210 C 1 2]

Where in a suit for money a compromise was arrived at whereby one of the defendants was exonerated as defendant but he undertook as surety the liability of the decretal amount by charging certain property of his and a decree was passed accordingly.

Held : that the decree-holder was entitled in execution to proceed against the surety's property : *A. I. R.* 1926 *Cal.* 889; *A. I. R.* 1924 *Cal.* 645; *A. I.R.* 1922 *Cal.* 35, *Rel. on.* [P 212 C 1]

(b) *Civil P. C., O.* 34, R. 14—*Applicability.*

Rule 14, of O. 34 does not apply to the Punjab. [P 211 C 2]

Sardha Ram—for Appellant.

Badri Das—for Respondents.

Judgment.—The appellants Messrs. Aya Ram Tola Ram instituted a suit against the joint family firm of Rai Het Ram Bodh Raj for recovery of Rs. 1,14,449-8 principal and interest claimed to be due on account of commission agency dealings. It appears that Rai Sahib Dharu Lal, the contesting respondent, was alleged to be a partner in the defendant firm and a decree was claimed against him personally, but he contested his liability. The suit was finally compromised and a decree for Rs. 1,04,000, with future interest at 6 per cent per annum payable by instalments passed in accordance with the compromise by the Judicial Commissioner of Sind. The firm of Rai Het Ram Bodh Raj and one Bodh Raj were made liable for this amount. The following clauses of the written compromise which was incorporated in the decree must be mentioned to understand the present dispute:

(3) In case any two of the instalments are not paid on due date, the whole amount then due shall be recovered at once.

(4) That as security for the due payments of the said decree, the following immovable properties including the right title and interest of R. S. Dharu Lal, son of R. B. Het Ram are declared to be under the mortgage lien of the plaintiff :

(a) Agricuitural land measuring about 15,00 bighas etc.

(b) Agricultural land measuring about 300 bighas etc.

(b) 11/16th annas share in agricultural land measuring about 200 bighas.

Defendants Bodh Raj and R. S. Dharu Lal declare that the above lands are their property and are alienable and that they are unincumbered.

(5) That the plaintiffs are entitled to recover the decretal amount as also any instalment in default from the property of the said firm of Het Ram Bodh Raj, the property hereby mortgaged or from the defendant Bodh Raj personally. In the event of deficiency the plaintiffs are entitled to recover the amount due to them from the other joint family immovable property of the defendants Bodh Raj and R.S. Dharu Lal Het Ram except the residential house.

(6) That the defendant R. S. Dharu Lal is not a partner of the firm Rai Het Ram Bodh Raj and is not personally liable for the claim in suit but he has joined in this decree as surety in order to secure the due payment of the plaintiff's claim and to render his share to the joint family property liable for the plaintiffs' claim and has signed the application as such surety and for the said purpose.

(7) The suit against the defendant R. S. Dharu Lal is dismissed with no order as to costs but he continues as liable as surety as above provided to the extent of his right, title and interest in the joint family property referred to above.

I have set out in detail the above clauses in the decree because the question involved in this appeal depends upon the correct construction of the same with regard to the liability to sale in execution proceedings of R. S. Dharu Lal's interest in the property mentioned above.

It appears that default having been made in the payments of instalments by the firm of Het Ram Bodh Raj and Bodh Raj, the decree holders took out a certificate of nonsatisfaction to the Dera Ghazi Khan District where the property specified above is situated. When the decree holders sought to attach the interest of R. S. Dharu Lal in the property mentioned in the decree they were met with the various objections including one to the effect that R. S. Dharu Lal being only liable as a surety and merely to the extent of his interest in the property specified in the decree, his liability could not be enforced in execution proceedings but, if at all by a separate suit. This objection has been allowed by the learned Senior Sub-Judge

* A Letters Patent Appeal filed against this judgment was dismissed—Ed.

Dera Ghazi Khan, who declined to proceed against the interest of R. S. Dharu Lal, in execution proceedings. The decree-holder had consequently presented an appeal to this Court. The learned counsel for the appellant contends that the executing Court was not competent to go behind the decree and should have executed it in accordance with the conditions expressly mentioned therein. His case is that the liability of the respondent R. S. Dharu Lal was that of a surety and therefore he was liable to be proceeded against in execution under S. 145, Civil P. C. The section provides that where any person has become liable as surety for the performance of any decree or any part thereof, the decree may be executed against him to the extent to which he has rendered himself personally liable in the manner provided in the Civil Procedure Code for the execution of decrees and that such person shall for the purpose of appeal be deemed a party within the meaning of S. 47. The contention of the learned counsel apparently is that the respondent made himself personally liable and is therefore liable to be proceeded against under S. 145, Civil P.C.

The learned counsel for the appellant on the other hand contends that the operation of S. 145 is limited merely to the extent of the personal liability of the surety and that it does not permit the sale in execution proceedings of any immovable property charged and that the liability as against such property must be enforced in a regular suit. Another contention of the learned counsel was that though the property sought to be attached was comprised in the decree, still it could not be sold as it was not the subject matter of the suit in spite of the fact that the decree was by virtue of a compromise.

It seems to me that even if the contention of the counsel for the respondent is correct that the liability of a surety can be enforced under S. 145, Civil P. C. only in so far as he has made himself personally liable but not against any immovable property that he may have mortgaged to secure such liability. *Mahalashmi Bai* v. *Badan Singh* (1) is clearly an authority against this contention, still I consider that the present is not a case to which S. 145 has any application. This section in my opinion applies to cases where the liability of the surety is incurred independently of the decree and is not contained intor declared by the decree itself which is sought to be executed. In the latter case such a person becomes really a judgment-debtor and, therefore, becomes liable as such. I will not, therefore, express any definite opinion whether or not the operation of S. 145, Civil P. C., is limited to the enforcement in execution proceedings of the liability of a surety only to the extent of his personal liability and not against any property that he may have mortgaged as such surety.

The question then is whether under the circumstances mentioned above and having regard to the terms of the decree that I have already quoted, the interest of R. S. Dharu Lal in the properties mentioned in the decree can be attached and sold in execution proceedings or whether it is necessary for the decree-holder to institute a fresh suit under O. 34, Civil P. C., to enforce the lien against such property. As I have already stated I must hold that R. S. Dharu Lal is a judgment-debtor in this case. He was originally a defendant and there is no question that a decree could have been granted against him. It is in my opinion immaterial for the present purpose that under the terms of the decree he was held not to be a partner in the firm, but accepted the liability in another capacity. On the suit as framed the decree is within the four corners of the plaint except as regards the lien on the immovable property, but the lien was created by reason of a compromise. The real question is whether it is merely a declaratory decree so far as the lien on the immovable property is concerned or whether it is a decree which is capable of being executed against such property. That question has to be decided with reference to the intention of the parties to be gathered from the contents of the decree. In *Sukumari Debi* v. *Mangneeran Bhangar & Co.* (2) in a money suit a decree was granted on a compromise which provided that a security inter alia, of immovable property was to be furnished for the due performance of the decree and a clause was added in the following terms :

On failure to pay three consecutive instalments the whole amount of the decree to become payable. Decree-holders in such a case may execute the decree irrespective of their

(1) A. I. R. 1924 All. 105=45 All. 649.

(2) A. I. R. 1926 Cal. 889.

rights against the security and may also execute against the security.

The security was duly given by the wife of the judgment-debtor hypothecating immovable property. On default having been made in the payment of the instalments, a question arose in the execution proceedings whether the property hypothecated could be sold in such proceedings. The following remark occurs in the judgment of Rankin, J.:

> However, in this case the two parties concerned in this joint bond, viz., the defendant and his wife, charged different interests in the same property which it would be inconvenient and wasteful to realize separately by sales in different Courts and at different times. I see great difficulty in realizing this defendant's interests save by proceedings under S. 47 and as I think that both intended to agree that the matter should bs thrashed out in execution, I think the judgment of the learned Judge should be supported.

The consequence was that the property hypothecated was allowed to be sold in execution proceedings. Similarly in *Kashi Chandra* v. *Priyanath Bakshi* (3) in a suit to enforce a mortgage security a consent decree was passed which was to the following effect: The decree-holder would be entitled to receive from the judgment-debtor Rs. 4,000 on account of principal and Rs. 400 on account of costs. The aggregate sum of Rs. 4,400 was to be paid by annual instalments which were specified in the schedule and then the following condition was added:

> The dsfendants will pay to the plaintiffs Rs. 4,400 on account of the claim and costs as per instalments mentioned below. If default is made in payment of any one instalment the plaintiffs will then be entitled to realize the whole amount due for all instalments at one and the same time by taking out execution. The properties mortgaged shall remain dragged under the mortgage until the amount due for the last instalment has been paid.

Default having been made in the payment of the instalment the decree-holder ought to execute his decree by selling the property mortgaged, but was resisted by the judgment-debtor on the ground that R. 14, O. 34, Civil P. C., disentitled the decree-holder to enforce the liability in execution proceedings, it being contended that such liability could be enforced only by a regular suit to enforce the consent decree. This objection of the judgment-debtor was disallowed. It was held that as the decree provided that the decree-holder could realize the whole amount by taking out execution, therefore, he could sell the property mortgaged in execution proceedings and that O. 34, R. 14 was not applicable to the case. The reason for this conclusion was that it was the intention of the parties that if default were made by the judgment-debtor the decree-holder could be at liberty to take out execution against the mortgage properties which were to remain charged until the amount due for the last instalment had been paid, and, therefore, the authority of the decree-holder to take out execution extended both to the taking out of execution of the decree as a money decree and also against the hypothecated property The facts of that case are identical with those of this case, the only difference being that in the reported case the suit originally was to enforce mortgage security, while in the present case the suit was for a money-decree. The difference in my opinion is not material. It is to be observed that there also, as in this case, no decree in the form laid down in O. 34, had been granted and there was no express provision that the mortgaged property shall be sold in execution proceedings on a default by the judgment-debtor. It may be mentioned that R. 14, O. 34, does not apply to this Province.

Similarly in *Indramani Dasi* v. *Surendranath Mondal* (4), it was held that the holder of a decree for future maintenance in whose favour a charge on immovable property for the payment of the allowance settled is created by the decree is entitled to recover in execution without further suit, the allowance as it accrues due, and that it is not obligatory upon the decree-holder to have recourse to a suit to enforce the charge created by the decree. It was further held that R. 14, O. 34, Civil P. C., does not apply unless the decree obtained by the holder of the mortgage or charge falls within the description of a decree for payment of money in satisfaction of a claim arising under the mortgage or charge, and further that where a compromise decree provided that the decree-holder would be entitled to realize the amount by sale of the properties mentioned therein it is not open to the judgment-debtor to resile in execution proceedings and contend that notwithstanding the express provision of the decree the decree-holder must be driven to a separate suit.

(3) A. I. R. 1924 Cal. 645.

(4) A. I. R. 1922 Cal. 35.

I hold that the above authorities fully support the contention raised on behalf of the decree-holder that it was the intention of the parties to enforce the laibility of the property charged in execution proceedings, and that the executing Court should have proceeded with the execution of the decree as prayed by the decree-holder. I accept this appeal with costs throughout, set aside the order of the Senior Sub-Judge and remit the case to him to proceed with it in accordance with law.

D.D. *Case remitted.*

A. I. R. 1928 Lahore 212

HARRISON AND DALIP SINGH, JJ.

Jugal Das and *another*—Appellants.

v.

Mt. Jasodan Bai & others—Respondents.

First Appeal No. 711 of 1922, Decided on 18th May 1927.

(a) *Evidence Act, S. 114—A person going to another district is governed by personal law of the old district—Custom (Punjab).*

The ordinary presumption of law is that when a person leaves one district and goes into another where a different custom prevails, he carries his personal law with him and unless there is something to show that he had abandoned his personal law and had adopted the law of his new district, he will continue to be governed by the personal law of his old district. [P 213 C 2]

(b) *Custom (Punjab) — Succession of daughters to their father's property—Aroras of Jhang District are governed by custom.*

The Aroras of Jhang District are governed by custom in the matter of succession of daughters to their father's property : *A. I. R.* 1923 *Lah.* 448, *Foll.* [P 213 C 2]

(c) *Riwaj-i-am—Evidential value.*

A riwaj-i-am whether supported or unsupported by instances is a piece of evidence which if unrebutted is sufficient to decide the case : *A. I. R.* 1916 *P. C.* 129 and *A. I.* R. 1923 *P. C.* 70, *Foll.* [P 213 C 2]

(d) *Custom (Punjab)—Aroras of Jhang District — Married daughters are excluded by near collaterals from succeeding to their father's ancestral and nonancestral property.*

Among the Aroras of Jhang District near collaterals exclude married daughters entirely from succession to their deceased father's ancestral and non-ancestral property. [P 213 C 2]

G. C. Narang, Gobind Ram Khanna and *J. L. Kapur*—for Appellants.

M. S. Bhagat for *Badri Das, Ram Laul* and *Hem Raj*—for Respondents.

Judgment. — The plaintiff in this case, being the married daughter of a deceased Arora, sued her father's brothers and the unmarried daughters of her father for a declaration that she was a proprietor and possessor of 1/5th share of the immovable and moveable property left by her father according to Hindu law, by which the parties were governed. The plaintiff asserted that her father's brothers had no right to the property at all but were denying the plaintiff's right in the property. Hence the suit. The unmarried daughters, who are minors supported the plaintiff's case. The real contesting defendants are the plaintiff's father's brothers who contested that the parties were governed by custom and that though the family originally belonged to Mauza Hasan Khan in District Jhang yet the grandfather of the defendants had left Jhang and taken up his permanent abode in Dera Ismail Khan where the defendants and their brother, the plaintiff's father, had been born and married and had acquired property. Therefore, the defendants were governed by the custom of Dera Ismail Khan. They further contended that even according to the custom of the Jhang District they were entitled to succeed to the whole of the property, moveable, and immovable ancestral, on non-ancestral left by the plaintiff's father and that the plaintiff, a married daughter, had no kind of claim on the property. There was also a plea that certain money of which the plaintiff's father had died possessed really belonged to one of the defendants, his brothers. This plea was found unproved by the trial Court, and has not been raised before us.

The trial Court decreed the plaintiff's suit as regards the nonancestral property and dismissed it as regards the ancestral property holding that the defendants had proved a custom of the Jhang District by which collateral excluded married daughters in the succession to ancestral property but that there was no sufficient proof that they excluded married daughters with respect to nonancestral property. Defendants have appealed and the plaintiff has filed cross-objections.

The defendants, the plaintiff's father's brothers have contended that they have proved that the Aroras of Dera Ismail Khan are governed by custom by which a married daughter is excluded from all property left by her deceased father in the presence of near collaterals and an unmarried daughter will only hold pos-

session of the property until she is married or until her death. In the alternative they contend that at any rate even according to the Jhang custom the same result would follow. They rely on the riwaj-i-ams both of Dera Ismail Khan and of Jhang Districts and have further produced a good deal of oral evidence with respect to both districts supported in some cases by instances in which daughters were excluded by collaterals. On the other hand counsel for the plaintiff contends that the riwaj-i-ams are badly compiled, that they are far too vague and that they are unsupported by any instances and that, therefore, according to *Wazira* v. *Maryan* (1) and other rulings the value of such riwaj-i-ams is very small and that the oral evidence for the defendants is insufficient to prove custom both so far as ancestral and particularly so far as nonancestral properties are concerned.

The first question to be decided in this appeal is whether the parties are to be held governed by the custom of the Jhang District or of Dera Ismail Khan. The ordinary presumption of law is that when a person leaves one district and goes into another where a different custom prevails he carries his personal law with him and unless there is something to show that he had abandoned his personal law and had adopted the law of his district he will continue to be governed by the personal law of his old district. On the evidence led in this case there is no difference between the personal law of the Aroras of Jhang District and of Dera Ismail Khan District but we are unable to hold that it has been shown conclusively that the present family abandoned its personal law for that of the Aroras of Dera Ismail Khan. We, therefore, hold that the parties are governed by the law governing Aroras of the Jhang District.

The next question is whether the Aroras of Jhang District are governed by Hindu law or by custom. In our opinion the evidence clearly shows that they are governed by custom and not by Hindu law in certain matters regarding succession. As regards this point there is the oral evidence which is supported in the case of ancestral property by several instances. There is also the ruling reported as *Diyan* v. *Hira Nand* (2) and there is a statement in the riwaj-i-am that the Aroras follow custom and not Hindu law. There is hardly any rebuttal of all this evidence and we consider, therefore, that it is proved that the Aroras of Jhang District are governed by custom in the matter of succession of daughters to their father's property.

The next point that arises for decision is what is the custom with regard to the right of daughters to inherit their father's property and whether near collaterals exclude daughters. The riwaj-i-am of the district is in favour of the collaterals excluding married daughters both as to ancestral and nonancestral property. No doubt in certain rulings of this Court it has been held that a riwaj-i-am, when contrary to the general custom and not supported by instances has very little value. We are however clearly of opinion that the Privy Council rulings reported as *Beg* v. *Allah Ditta* (3) and *Balgobind* v. *Badri Prasad* (4) have now definitely laid down that a riwaj-i-am whether supported or unsupported by instances is a piece of evidence which if unrebutted is sufficient to decide the case. In the present case we have not only the riwaj-i-am but we also have a considerable amount of oral evidence to the effect that this is the custom of the Aroras and this oral evidence mentions certain instances. Standing by itself we would not have held that this oral evidence was sufficient to establish the case but coupled with the riwaj-i-am we consider that it is proved that among the Aroras of Jhang District near collaterals, as the present defendants are, exclude married daughters entirely from succession to their deceased father's ancestral and nonancestral property. It is unnecessary to discuss the various rulings which were cited as to the rights of females and the value of oral evidence of males with respect to females' rights of succession. It is sufficient to state that in this case the riwaj-i-am and the oral evidence unrebutted are sufficient to prove the defendants' case. We, therefore, accept the appeal of the defendants and dismiss the plaintiff's suit. In the circum-

(1) [1917] 84 P. R. 1917=3 P. L. R. 1918=42 I. C. 358=151 P. W. R. 1917.

(2) A. I. R. 1923 Lah. 448=4 Lah. 202.

(3) A. I. R. 1916 P. C. 129=44 Cal. 749=44 I. A. 89 (P. C.).

(4) A. I. R. 1923 P. C. 70=45 All. 413=26 O. C. 217=50 I. A. 196 (P. C.).

stances we leave the parties to bear their own costs throughout.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 214

FFORDE AND JAI LAL, JJ.

Gurdit Singh and *others*—Plaintiffs—Appellants.

v.

Kartar Singh and *others*—Defendants—Respondents.

First Appeal No. 2308 of 1922, Decided on 3rd May 1927.

(a) *Punjab Land Revenue Act* (17 *of* 1889)—*Sale of land in village—Suit for declaration that title to the plot of land in the village did not give to the purchaser an interest in the shamilat land of the village—Purchaser proving his interest to it by documentary evidence—Interest in the shamilat land had passed to the purchaser.*

Mere conveyance of land without expressly including an interest in the shamilat does not convey such an interest to purchaser of a land in a village.

But where the purchasers of some plot of land in a village, proved his title to such an interest by a copy of the deed of sale of 1849 and a fragment of the original deed, by a table of the proprietors of the village in question and by an entry in the record prepared at the Settlement of 1850 showing that the proprietors of the plots admittedly sold by the plaintiffs to the defendants in 1849 had attached to them a proportionate interest in the shamilat, *Held*: the purchasers overwhelmingly proved that the sale to them in 1849 of the plots in question carried with it a proportionate share in the shamilat land: *A. I. R.* 1924 *Lah.* 444 *Expl.* [P 214 C 2 ; P 215 C 1, 2]

(b) *Evidence Act S.* 32—*Pedigree containing recitals of ownership of land is admissible if such recitals are required by law to be entered—Evidence Act S.* 74.

If it can be shown that the law requires that entries dealing with ownership of land should be included in pedigree tables then such pedigree tables are properly part of the revenue records and constitute an entry in a public document which is prima facie evidence of the truth of its contents.

Mehr Chand Mahajan, and *Basant Krishna* for *G. S. Salariya* and *Nawal Kishore*—for Appellants.

Badri Das and *S. L. Puri* for *J. L. Kapur*—for Respondents.

Fforde, J.—The plaintiffs, who are proprietors of land in the village Nagar, Tahsil Phillaur, brought this suit for a declaration that a sale by them to the contesting defendants (who are also proprietors of the same village) of certain plots of land, did not carry with it the proportionate share of shamilat appurtenant to those plots. The learned trial Judge has held that the plaintiffs have failed to establish their contention, and that the defendants have affirmatively proved that in the conveyance of the plots in question a proportionate share of shamilat passed.

The onus of proving that no share in the shamilat was included in the original sale which took place in the year 1849, was placed upon the plaintiffs. The sole evidence which they produced to support their case consisted of an order dated the 12th October 1849 made by the Deputy Collector. In that order the Deputy Collector recited that the plots of land in question had in fact been sold to the defendants, but the order omits any mention of shamilat land having been conveyed with the respective plots. It is upon this omission that the plaintiffs rely to establish their contention. It has been argued for the plaintiffs that the mere conveyance of land without expressly including an interest in the shamilat does not convey such an interest. This no doubt is the law. The defendants, however, have taken upon themselves the onus of showing that in fact an interest in shamilat was expressly conveyed with the plots in question. To support their case they have produced three documents. Firstly, a copy of the deed of 1849 and a fragment of the original deed. The copy bears date 1866. It has been produced from proper custody, namely from the custody of the successor in-interest of the original vendees, and being more than 30 years old does not require proof of execution. Moreover, it appears to have been admitted in certain litigation in 1875, as it bears an endorsement to that effect. The defendants have not been able to produce any record of this document ever having been registered. It is possible that either the document was not registered or, if registered, the record of such registration has been lost. It may be remarked that the provisions in regard to registration of documents only came into force a few months prior to the date of the execution of the document in question. The copy was attested in accordance with the law which existed at that date and bears a proper certificate of attestation in accordance with the then existing procedure. I have no doubt whatsoever that this copy is a genuine copy of the original deed by

which the plots of land were conveyed. In this document the shamilat is conveyed with the plots in question.

The next document relied upon by the defendants is a table of the proprietors of the village in question. This pedigree-table is stated to be a copy of the settlement of 1885. It has been contended by the plaintiffs that this document has been proved to be a copy of the revenue records of that date, but this objection was not made during the trial. It was tendered in evidence as being such a copy, it was accepted by the Judge who decided this case as a genuine copy, and it is too late at this stage to contend that it has not been properly proved. I may mention in passing that the documentary evidence on both sides has not been proved in accordance with the proper procedure for proving documentary evidence. But neither party objected to the mode in which this evidence was tendered, and they cannot now raise any objection of this nature. This pedigree-table bears on it the following statement:

The tenure of the village being bhayachara ghair nukammal, sons of Tahl Singh, caste Jat Gila, got the property by means of sale, together with shamilat, from Gahl Singh, Daswanda Singh and Nihai Singh, father of the proprietors entered at khata Nos. 76, 80, 82 and 89.

The shamilat there referred to is the shamilat now in dispute. Mr. Nawal Kishore urges that the entry in this pedigree-table referring to the ownership of the property therein described is not admissible in evidence as it is extraneous to the matters which are required to be recorded in a pedigree-table, and he relies upon some dicta of Broadway, J., in *Wali Muhammad* v. *Muhammad Bakhsh* (1). It is apparent, however, on reading the case cited that the learned Judge did not decide that reference in a pedigree-table to the ownership of land was not admissible in evidence. What was decided was that such evidence, if admissible, could be attacked in any way in which an entry in a public document may be impeached. It cannot be disputed that a pedigree-table is properly a part of the revenue records and constitutes an entry in a public document which is prima facie evidence of the truth of its contents. If it can be shown that the law requires that entries dealing with ownership of land should be included in such pedigree-tables, then it is obvious that the facts stated in the entry are prima facie proved by the production of the document. Mr. Badri Das has pointed out that the rules for compiling these revenue records introduced by Mr. Princep some time between 1863 and 1885 provide for notes being added to pedigree-tables showing the area of land held and the tenure of such land. In Appendix 8 to the Edn. 3 of Douie's Settlement Manual the rules for the preparation of genealogical trees include a provision that in cases where an owner has lost his land whether by sale or by diluvion, but claims a share in the shamilat, this should be noted under his name in the genealogical tree. This rule follows the procedure laid down by Mr. Princep under the authority of S. 31, Punjab Land Revenue Act. I have no doubt that the entry in the present case which shows that the defendants are entitled to the shamilat attached to the plots sold was made in accordance with the regulations that existed at the time when this pedigree table was compiled.

The third document upon which the defendants rely is an entry in the record prepared at the settlement of 1850 showing that the proprietors of the plots admittedly sold by the plaintiffs to the defendants in 1849, had attached to them a proportionate interest in the shamilat. It seems to me that upon this documentary evidence the defendants have overwhelmingly proved that the sale to them in 1849 of the plots in question carried with it a proportionats share in the shamilat land. Agreeing as I do in the conclusion arrived at by the Court below I would dismiss this appeal with costs.

Jai Lal, J.—I agree.

S.J. *Appeal dismissed.*

(1) A. I. R. 1924 Lah 144=5 Lah. 84.

A. I. R. 1928 Lahore 215

JAI LAL, J.

Barkat Ali and *others*—Petitioners.

v.

Fattu and *others*—Respondents.

Civil Revn. Petn. No. 100 of 1927. Decided on 27th September 1927.

Civil P. C., O. 21, Rr 97 and 98—Obstruction to bailiff in delivery of possession to decree-holder—Court ordering possession to decree-holder and restraining obstructors on Bailiff's report—No application by decree-holder nor notice given to obstructors regarding investigation—Court has no jurisdiction to proceed with the enquiry.

Where a Bailiff was obstructed by certain persons in his attempt to give possession to the

decree-holder and a report was made by him to the Court describing the circumstances under which the possession could not be given to the decree-holder, and thereupon the Court, without any application by the decree-holder, and also without giving notice to the petitioners that it would investigate the matter, held apparently under O. 21, Rr. 97 and 98, Civil P. C., that the decree-holder was entitled to possession and that the obstructors should be restrained from offering any obstruction to the grant of possession to the decree-holder,

Held: that the Court, under the circumstances had no jurisdiction to proceed with the enquiry which resulted in an order under O. 21, R. 93, that the decree-holder be put in possession. [P 216 C 1]

Shamair Chand—for Petitioners.

Muhammad Munir—for Respondents.

Judgment.—In a decree awarding possession of immovable property to the decree-holder a warrant of possession was issued by the Court. The Bailiff was obstructed by certain persons in his attempt to give possession to the decree-holder and a report was made to the Court describing the circumstances under which the possession could not be given to the decree-holder. The Court thereupon sent a notice to the alleged obstructors to show cause why they should not be prosecuted, and, after recording some evidence, held apparently under O. 21, Rr. 97 and 98, Civil P. C., that the decree-holder was entitled to possession and that the obstructors should be restrained from offering any obstruction to the grant of possession to the decree-holder. This is a petition for revision of that order. It is contended that no application such as contemplated by O. 21, R. 97, Civil P. C, was made by the decree-holder and, secondly, that the Court never gave notice to the petitioners that it would investigate the matter as required by Rr. 97 and 98, O. 21, Civil P. C. There is force in this contention. The lower Court under the circumstances had no jurisdiction to proceed with the enquiry which resulted in an order under O. 21, R. 98, that the decree-holder be put in possession,

I accept this petition, set aside the order complained against and leave the parties to take what further steps they may be advised to take in the matter. The petitioners will have their costs against the respondent.

S.J. *Petition allowed.*

✻ A. I. R. 1928 Lahore 216

BROADWAY AND ZAFAR ALI, JJ.

Secretary of State for India—Petitioner.

v.

Tirath Ram and *others*—Respondents.

Misc. Appeal No. 2594 of 1924, Decided on 14th March 1927, for admission of appeal barred by limitation.

✻ (*a*) *Limitation Act, S. 5—Alteration of alteration proved to be known to party—Time cannot be extended on the ground that effect of law was not fully appreciated.*

While it might be permissible to regard a "mistake of law" as amounting to "sufficient cause" within the meaning of S. 5 in certain circumstances on the ground that an amendment of an Act was not fully appreciated by the Bar, it cannot be so regarded where the alteration of law is proved to be known to the party (even though it may be Government through its law officers) seeking to take advantage of the plea, especially when the delay is a long one. [P 218 C 1]

(*b*) *Limitation Act, S. 5—Misconstruing law is not sufficient cause.*

The words "sufficient cause" should receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant but the mere fact that an appellant has misconstrued one of the rules and by reason of such mistake has omitted to bring his appeal in time is not a sufficient ground for enlarging the time for appeal : 9 *Bom. L. R.* 893 and *City of Moscow Gas Co.* v. *International Financial Society* : (7 *Ch. D.* 241), *Rel. on.* [P 218 C 2]

Govt. Advocate—for Petitioner.

G. C. Narang—for Respondents.

Order.—By Notification No. 1669 G., dated 28th April 1921, the Government acquired 3 kanals 10 marlas of land situated in Amritsar. The persons interested in the land were : (a) Kanshi Ram to the extent of 1/6th ; (b) Roshan Lal to the extent of 1/6th and (c) Vatta Mal and Kidar Nath, sons of Chandar Bhan, to the extent of 2/3rds, who filed three separate objections to the amount of compensation allowed by the land acquisition officer. Three references were accordingly made to the District Judge of Amritsar which were registered as Suits Nos. 2, 3 and 4 of 1923 respectively.

On 10th July 1924, the leaned District Judge made his award, materially enhancing the amount payable by Government. This award was recorded in Suit No. 2 of 1923 (relating to Kanshi Ram's objections), and the following order was written in the other two suits ;

"See judgment in Suit No. 2 of 1923 decided to-day."

On 20th October 1924, three separate

appeals were filed on behalf of Government which were registered as :

Civil Appeal No.	2640 of 1924	Secretary of State v. Kanshi Ram
" "	" 2641 of 1924	" " v. Roshan Lal
" "	" 2642 of 1924	" " v. Vatta Mal and Kidar Nath

A copy of the award was attached to the memorandum of appeal in Civil Appeal No. 2640 of 1924 alone, a note being appended to the memorandum of appeals in the other two as follows :

Copy of the detailed judgment of the District Judge is with the connected appeal, *the Secretary of State* v. *Kanshi Ram*, filed to-day.

No objections were raised in the office and all three appeals were admitted to a hearing on 24th November 1924.

By Notification No. 3626-G dated 21st Dec. 1921, the Government acquired 28·13 acres of land in mauza Gujranwala and 52·98 acres of land in mouza Dhulla.

The persons interested in this land raised objections to the amount of compensation awarded by the land acquisition officer and ten separate references were accordingly made to the District Judge of Gujranwala. These references were separately registered as follows :

Land acquisition case No.	1 of 1924	Jahangiri Mal	v. Secy. of State for India in Council
" " "	2	" Ch. Mul Raj	v. " " " "
" " "	3	" Shrimiti Vidya Vati and S. B. S. Narain Singh	v. " " " "
" " "	5	" B. Bhagwan Dass	v. " " " "
" " "	6	" Ghulam Muhammad etc.	v. " " " "
" " "	7	" Pir Bakhsh, etc.	v. " " " "
" " "	8	" S. Balwant Singh. etc.	v. " " " "
" " "	9	" Shrimati Vidya Vati	v. " " " "
" " "	10	" Tirath Ram and Ganesh Dass	v. " " " "

Issues were settled separetely in each of these cases but, by consent of parties, all the evidence was recorded in L. A. Case No.1 of 1924 (*Jahagiri* v. *Secy. of State*).

The learned District Judge made his award on 1st July 1924, recording it in Land Acquisition Case No. 1 of 1924. In it, after dealing with the matters common to all the references, he dealt specifically with each. On the same date he recorded brief order on the record of other references to the following effect :

For reasons given in Land Acquisition Case No. 1 of 1924, decided to-day, I order, etc., etc.

On 8th October 1924 seven separate appeals were filed on behalf of the Government which were registered as :

Civil Appeal No.	2584 of 1924	Secretary of State	v. Shrimati Vidya Vati and another
" "	2594 "	" "	v. Tirath Ram Ganesh Das
" "	2595 "	" "	v. Bhagwan Das
" "	2596 "	" "	v. Shrimati Vidya Vati
" "	2597 "	" "	v. S. Rajwant Singh. etc.
" "	2598 "	" "	v. Ghulam Mohd, etc.
" "	2599 "	" "	v. Ch. Mul Raj

A copy of the award was attached to the memorandum of appeal in Civil Appeal No. 2584 of 1924. (The *Secretary of State* v. *Shrimati Vidya Vati* and *another*) and the following note appended to the memorandum of appeal in each of the six other appeals :

Copy of the detailed award of the District Judge is with the connected appeal "*The Secretary of State for India* v. *Shrimati Vidya Vati* and *another* " filed to-day.

No objection was taken to this course by the office and these six appeals, along with Civil Appeal No. 2584 of 1924, were admitted to a hearing on 14th November 1924.

On 18th May 1926, an application was made on behalf of Government in each of these eight appeals in which it was pointed out that the course adopted was in consonance with the past practice of the Court in such cases and that it had not been "generally appreciated by legal practitioners" that the effect of the amending Act (19 of 1921), S. 2, combined with O. 41, R. 1, Civil P. C.,

was to render the filing of a copy of the award obligatory in the case of each of the separate appeals.

A copy of the relevant award was attached to each application and it was prayed that the delay in filing the same might be condoned under S. 5, Lim. Act, on the ground that the reasons set out for the delay amounted to "sufficient cause."

The question for decision is whether the reasons given for the delay amount to such "sufficient cause" as would justify the application of S. 5, Lim. Act. Now

the reasons set out in each application for the delay are : (1) that the mistake was due to the past practice of the Court in such cases ; and (2) that the effect of the amending Act (19 of 1921) was not fully appreciated by the Bar.

There can be no doubt that in the past the practice of this Court was as alleged and in each of these cases no objection was raised by the office as to the procedure adopted. There is also authority for the proposition that "a mistake of law made in good faith" would justify the application of S. 5, Lim. Act, and in a similar application made in Civil Appeal No. 2585 of 1924 my learned brother Zafar Ali, J., and I exercised our discretion in favour of the appellant. Each case has, however, to be decided on its own circumstances, and the point now raised by the learned counsel for the various respondents was not raised or argued before us in that case.

It appears that the effect of the amendment made in S. 26, Land Acquisition Act (1 of 1894) by the amending Act (19 of 1921) was clearly set out by a Division Bench of this Court in *Mubarak Ali Shah* v. *Secretary of State* (1) as far back as 19th February 1925, on an objection taken by the learned Government advocate on behalf of the Secretary of State. Similar objections were taken on behalf of the Secretary of State in Civil Appeal No. 2096 of 1923 and Civil Appeal No. 113 of 1923.

Again, in *Nur Din* v. *Secretary of State* (2) this matter was considered on an objection taken for the Secretary of State who was then the respondent. It is thus evident that the Secretary of State must be credited with the knowledge of the alteration made in the law by the amending Act (19 of 1921), and it was very strongly urged by the counsel for the respondents that, while it might be permissible to regard a "mistake of law" as amounting to "sufficient cause" within the meaning of S. 5, Lim. Act, in certain circumstances, i. e., when the mistake of law was made in good faith it could not be so regarded in the present cases owing to the fact that the circumstances showed that the Secretary of State through its law officers was aware of the alteration in question as far back as 19th February 1925. It was further urged that the failure to move this Court under S. 5, Lim. Act, till over fourteen months had elapsed since the delivery of the judgment in *Mubarak Ali Shah* v. *Secretary of State* (1) showed such a complete want of "due care and attention" as amounted to negligence. In my judgment there is considerable force in this contention, for there can be no doubt that the Secretary of State through his law officers had discovered the result of the amendment made in Act 1 of 1894 by Act 19 of 1921, by 19th February 1925, for, as already stated, it was on an objection made by the Secretary of State setting out the said alteration that *Mubarak Ali Shah* v. *Secretary of State* (1) was decided. Even, therefore, if it would be permissible to condone a short delay on the grounds set out in these applications, it seems to me impossible to overlook a delay of over fourteen months after 19th February 1925.

It was urged that the personnel of the law officers of the Crown changed during this interval and that it would not be reasonable to expect one law officer to examine at once all appeals instituted by his predecessors on behalf of the Secretary of State prior to 19th February 1925, but the reaply to this contention is that the same rule must be applied to the Secretary of State as a litigant as would be applied to any other member of the public, and, as the Secretary of State as litigant clearly had knowledge of the alteration made by the amending Act 19 of 1921, he cannot escape the consequences by pleading a change in his legal advisers. Admitting that it might as a matter of fact take a little time for the law officers to move in the matter, it seems to be that the period of fourteen months cannot be but regarded as excessive. As already stated, this aspect of the case was not urged at the time of the hearing of the application in Civil Appeal No. 2585 of 1924, and while I would be prepared to condone the delay on the grounds advanced up to a certain point, I do not think that the delay in these cases of over fourteen months can be ignored,

It is to be borne in mind that the respondents have acquired valuable rights and, though S. 5, Lim. Act, undoubtedly gives the Court a discretion, it is a discretion which is to be exercised in a judicial manner. I think the words "sufficient cause" should receive

(1) A. I. R. 1925 Lah. 438=6 Lah. 218.
(2) A. I. R. 1927 Lah. 49=7 Lah. 539.

a liberal construction so as to advance substantial justice when no negligence, nor inaction nor want of bona fides is imputable to the appellant : *Emperor* v. *Shiva Adars* (3).

But, as pointed out in *City of Moscow Gas Co.* v. *International Financial Society* (4),

the mere fact that an appellant has misconstrued one of the rules, and by reason of such mistake has omitted to bring his appeal in time is not a sufficient ground for enlarging the time for appeal.

And again *In re Coles and Ravenshear* (5)

where through a mistake of course as to the effect of O. 58, R. 15 an appeal was not brought until after the expiration of the time thereby allowed for appealing, there was no sufficient ground for granting special leave to appeal.

In the present cases, while it may, with some show of reason be urged that the appellant was misled by the practice of the Court and that mistake of law was made in good faith up to 19th February 1925, I am unable to see that it can properly be urged that so long a period as fourteen months after the appellant had become aware of the mistake can be properly condoned. In these circumstances in my judgment these eight applications must be dismissed with costs.

Zafar Ali, J.—I agree.

D.D. *Applications dismissed.*

(3) [1907] 9 Bom. L. R. 893.
(4) [1878] 7 Ch. D. 241=47 L. J, Ch. 258=26 W. R. 272=37 L. T. 736.
(5) [1907] 1 K. B. 1=76 L. J. K. B. 27=23 T. L. R. 32=95 L. T. 750=51 S. J. 45.

A. I. R. 1928 Lahore 219

SHADI LAL, C. J., AND BHIDE, J.

Khushi Ram-Karam Chand — Petitioners.

v.

Commissioner of Income-tax, Punjab—Respondent.

Civil Misc. Ref. Nos. 549 and 550 of 1926, Decided on 22nd December 1927.

(a) *Income-tax Act* (11 *of* 1922), *Ss.* 22 (4) *and* 23 (3)—*Return submitted—Notices under Ss.* 22 (4) *and* 23 (2) *complied with—Summary assessment should not be enforced for subsequent default by issuing notice under S.* 22 (4).

When a man has submitted a return, has complied with the terms of a notice (if any) issued under S. 22 (4), Income-tax Act, and has further complied with the terms of a notice issued under S. 23 (2), he should not be subjected, for any subsequent default, to the drastic penalty of a summary assessment, which carries with it the further penalty of the loss of right to appeal, by issuing against him a notice under S. 22 (4) after the commencement of an inquiry under S. 23 (3) : *A. I. R.* 1927 *Lah.* 5, *Dist.* [P 220 C 2]

(b) *Income-tax Act* (1922), *Ss.* 22 (4) *and* 23 (3)—*Scope.*

No notice can be issued under S. 22 (4) when enquiry under S. 23 (3) has started [P 219 C 2]

(c) *Interpretation of Statutes—Fiscal enactment is to be construed in favour of a subject.*

It is a well-established rule of the interpretation of fiscal enactments that in case of doubt an interpretation which is more favourable to the subject is to be preferred. [P 220 C 2]

Mehr Chand Mahajan—for Petitioners.
D. C. Ralli—for Respondent.

Bhide, J.—Civil Miscellaneous (reference) No. 549, and Civil Miscellaneous (reference) No. 550 of 1926 being connected will be disposed of together.

On a memorandum issued by this Court, the Income-tax Commissioner has referred the following question of law for decision, viz., whether, in the circumstances stated below, the income-tax officer legally proceeded to assess the petitioners under S. 23 (4), and, therefore, no appeal lay to the Assistant Commissioner.

The petitioners are commission agents, admittedly carrying on three different businesses in Jullundur and Amritsar. Certain information received from Bombay led the income-tax officer, Jullundur, to believe that there was a fourth business of this firm carried on at Jullundur under the name "Karam Chand-Dina Nath." A notice under S. 22 (4), Income-tax Act, was issued to the firm to produce accounts of this business, but the petitioners failed to do so and stated that no such business existed during the year for which the assessments in the two references were made, viz., 1924-1925, and 1925-1926. The income-tax officer thereupon proceeded to make an assessment to the best of his judgment under S. 23 (4) on the ground that the petitioners had failed to comply with the terms of the notices issued under S. 22 (4). Appeals were filed and were rejected by the Assistant Commissioner on the ground that no appeal lay, the assessments being under S. 23 (4).

Two points have been urged on behalf of the petitioners, viz. (1), that the income-tax officer had no power to issue a notice under S. 22 (4) when inquiry had already started under S. 23 (3), and that the assessment should have been under

S. 23 (3), and not under S. 23 (4); (2) that as the accounts of the business asked for did not exist it cannot be said that there was any failure to comply with the terms of the notices issued under S. 22 (4). The petitioners appeared and stated that the accounts called for did not exist and it was impossible for the petitioners to do anything more to comply with the terms of the notices issued under S. 22 (4).

There is an important point of distinction between the facts of the two references which must be noted at the outset. The assessment for the year 1924-1925 was a supplementary one under S. 34, Income-tax Act, while that for the year 1925-1926 was an original assessment under S. 23 of that Act. For the purposes of the supplementary assessment, the income-tax officer had certainly power to issue a fresh notice under S. 22 (4) read with S. 34. As regards the assessment for the year 1925-1926, it was not disputed on behalf of the respondent that the notice under S. 22(4) was issued during the course of an inquiry under S. 23 (3), but it was contended that the powers conferred by S. 22 (4) are very wide and it was open to the income-tax officer to issue notice under that sub-section at any time during the course of the assessment. *Radha Krishan & Sons* v. *Income-tax Commissioner, Punjab* (1) was cited as an authority ; but that ruling only deals with the question whether an income-tax officer can call for accounts for the branch of a firm situated in a Native State. No authority directly in point has been cited ; but, on a careful consideration of the provisions of Ss. 22 and 23, the contention of the applicants, that a notice under S. 22 (4) could not be issued after the commencement of an inquiry under S. 23 (3), appears to us to be sound. S. 22 deals with "Return of Income," while S. 23 deals with "assessment." Under S. 22, the income-tax officer is authorized to call for a "Return of Income" and sub-S. (4) gives him power to call "such documents and accounts" as he may require. This is apparently intended to help the income-tax officer in deciding whether he will accept the return or proceed to make an inquiry under S. 23. If this were not so, there was no point in including the provision in a sub-section of S. 23. If the power could be exercised at any time, the provisions might have been expected to be embodied in a separate section (cf. e g., the provisions of S. 37). The wording of sub-S. (4), S. 23, also supports the same conclusion. That sub-section specifies three kinds of defaults, which authorize an income-tax officer to make a summary assessment, viz (1) ; failure to make a return under sub-S. (1) or (2), S. 22 (2) ; failure to comply with the terms of a notice issued under sub-S. 4, S. 22 ; and (3) failure to comply with all the terms of a notice issued under sub-S. (2), S. 23 after "having made a return." The words "having made a return" and the order in which the defaults are enumerated in S. 23 (4) indicate that a notice under S. 22 (4) precedes the notice and inquiry under S. 23. It is significant that sub-S. (4), S. 23 does not authorize a summary assessment in the case of a default under S. 23 (3). The natural inference is that the legislature did not intend that when a man has submitted a return, has complied with the terms of a notice (if any) issued under S. 22 (4) at that stage, and has further complied with the terms of a notice issued under S. 23 (2), he should be subjected for any subsequent default to the drastic penalty of a summary assessment which carries with it the further penalty of the loss of right to appeal. If it were held that an income-tax officer could issue a notice under S. 22 (4) even during the course of an inquiry under S. 23 (3), it would be easy enough in many cases for the income-tax officer to convert which is really a default under S. 23 (3) into a default under S. 22 (4) and proceed to assess summarily.

The income-tax officer has, of course, wide powers to call for any account books or other documentary evidence he may require under S. 23 (3) read with S. 37. But he does not appear to be entitled to make a summary assessment for failure to produce accounts at this stage. It is true that the wording of S. 22 (4) is somewhat wide, but it must be construed with reference to the context. It is also a well-established rule of the interpretation of fiscal enactments that, in case of doubt, an interpretation which is more favourable to the subject is to be preferred. On this principle also we think that the interpretation we have put on S. 23 (4) is justified.

(1) A. I. R. 1927 Lah. 5.

We accordingly hold that the income-tax officer did not act legally in issuing a notice under S. 22 (4) for the purposes of assessment for the year 1925-1926, and the notice issued being invalid, default in complying with its terms did not justify a summary assessment under S 23 (4). As regards the supplementary assessment for 1924-1925, the notice under S. 22 (4) was valid as pointed out already.

The applicants have contended that even if the notice was valid, there was no "failure" to comply with it within the meaning of sub-S. (4), S. 23 as the account books called for did not exist. But this contention involves a finding of fact The orders of the income-tax officer show that they were fully satisfied after inquiry that business on an extensive scale was carried on under the name Karam Chand, Dina Nath and that there was definite proof of the existence of accounts relating to that business: vide Exs. A and B attached to the reference. In view of this clear finding on the point, we do not feel justified in allowing this question to be reopened.

We answer the question of law referred to us in the affirmative with respect to the supplementary assessment for the year 1924-1925, and in the negative with respect to the assessment for the year 1925-1926. Applicants will get half the costs.

S.J. *Reference answered.*

A. I. R. 1928 Lahore 221

JAI LAL, J.

Mt. Jantan and *others*—Defendants—Appellants.

v.

Ahmad and *another* — Plaintiffs—Respondents.

Second Appeal No. 1485 of 1927, Decided on 7th November 1927, against order of Dist. Judge, Mianwali, D/- 8th February 1927.

(a) *Civil P. C., O. 7, R. 11 — Insufficiently stamped document — Opportunity should be given to pay the proper stamp — Proceedings following admission of insufficiently stamped document are not void — Court-fees Act, Ss. 12 (2) and 28.*

Provision of O. 7, R. 11, Civil P. C., read with S. 28, Court-fees Act, clearly implies that opportunity has to be given to the party concerned to pay the proper stamp, and it is on his failure to do so that the Court is entitled to decline to look at the document. If the Court accepts an insufficiently stamped plaint the proceedings which follow thereon are not void. Cl. (2), S. 12, Court-fees Act, also supports the view. [P 223 C 1, 2]

(b) *Hindu Law — Alienation by a female holding customary life interest — Suit by the reversioner to set aside the sale — Reversioner need not prove that the land was ancestral—All he should prove is that he is next heir.*

In a suit by the next heir to set aside an alienation by a female holder who has the customary life-interest in the estate, it is not ordinarily necessary for the plaintiff to aver or to prove that the land was ancestral. All that he has to prove, in order to establish his locus standi to maintain such a suit, is that he is the next heir to the estate; in other words, that if the female holder, the alienor, had not existed, he would have inherited the property. He would, under the circumstances, be entitled to sue to set aside an alienation even of land which is the self-acquired property of last male owner and, therefore, it is not necessary for the success of the suit that such property should have been held by the common ancestor of the plaintiff and last male owner. [P 223 C 2]

(c) *Punjab Court-fees Act, Sch. 2, Art. 22—"Ancestral land" means land held by common ancestor of claimant and the last male holder.*

The term "ancestral land," in Art. 22, Sch. 2, Court-fees Act, means land in respect of which, in order to enable the plaintiff to succeed, it is necessary for him to prove that the land was ancestral; in other words, that it was held by the common ancestor of himself and the last male owner. [P 223 C 2]

(d) *Civil P. C., O. 41, R. 22—Respondent can attack any decree passed against him by filing cross-objection.*

Order 41, R. 22 gives a right to a respondent to attack any decree which is passed against him by the lower Court by filing a cross-objection. [P 224 C 1]

S. R. Laul—for Appellants.

Judgment. — The respondents instituted a suit in the Court of the Senior Subordinate Judge, Mianwali, for a declaration that a sale by Mt. Jantan of land inherited by her from Muhammada, her son, was without consideration and necessity and, therefore, void against the rights of the plaintiffs who alleged that they were the heirs of Muhammada after the expiry of the life-interest of Mt. Jantan. An objection was raised by the defendants that proper Court-fee on the plaint had not been paid and it was pleaded that the sale was for consideration and necessity. On the merits the Senior Subordinate Judge held in favour of the plaintiffs, but on the question of Court-fee he was of opinion that a Court-fee stamp of Rs. 10 paid by the plaintiffs was insufficient and that the proper Court-fee was Rs. 20 under Art. 22, Sch. 2

Court-fees Act, which provides that a plaint or memorandum of appeal in a suit by a reversioner under the customary law for a declaration in respect of an alienation of ancestral land shall bear a Court-fee stamp of Rs. 20. The plaintiffs' contention was that their suit was not for a declaration in respect of an alienation of ancestral land and, therefore, under Art. 17 (3), Sch. 2, Court-fees Act, stamp payable was as in an ordinary suit for declaration. The learned Judge, decided all the issues framed in the case together and passed the following decree on 5th October 1927 :

I accordingly come to the conclusion that the alienation was without necessity and I grant the plaintiffs a decree with costs against the defendants declaring that the sale in dispute shall not affect the rights of the plaintiffs after the death of Mt. Jantan. The decree shall not take effect until the Court-fee has been made good. The requisite Court-fee should be put in on or before 20th October 1926.

This order was pronounced in the presence of the counsel for both parties. The deficiency in the Court-fee, as determined by the Senior Subordinate Judge not having been made good by the 20th October, the following note was made by the learned Judge below the decree :

Note.—Court-fee not paid as ordered. Decree shall not take effect.

Against the decree of 5th October the plaintiffs filed an appeal in the Court of the District Judge who held that an appeal lay to this Court because the order under appeal amounted to an order rejecting the plaint and that in either case an appeal lay to him. He held that the proper stamp on the plaint was Rs. 10 which amount having been already paid the order of the trial Court directing payment of additional Court-fee was illegal. He, therefore, accepted the appeal :

set aside the order of 20th October, " and ordered" that proper decree-sheet be prepared in accordance with law.

It appears, however, that the respondents before him had filed cross-objections. These the learned Judge declined to consider on the ground that the stage for filing cross-objections had not yet reached, that they (respondents)

can appeal against the order when a proper decree-sheet is prepared.

The defendants have filed this second appeal, but the plaintiffs did not appear before me, nor were they represented by counsel, and consequently I had to hear the appeal ex parte against them.

The first contention of the learned counsel, who appeared on behalf of the appellants, is that no appeal lay to the Court of the learned District Judge from the order dated 5th October 1926, and that the plaintiffs not having appealed from the order of 20th October were precluded from appealing against the previous order which had in effect been superseded by the later order. I may note that the plaintiffs' appeal was expressly against the order of 5th October, but the learned District Judge has set aside the order of 20th October. Still I do not see any force in the contention of the appellants. The decree of the Senior Subordinate Judge was conditional-that is the way in which the learned Judge himself interpreted it-and the condition not having been performed as directed, the decree ipso facto became inoperative. There was really no fresh order made on 20th October, but merely a note was made of the fact that the condition had not been performed, and the further note that the decree shall not come into operation under the circumstances was merely a surplusage. It was not, therefore, necessary for the plaintiffs to appeal against any order of the 20th October, because the note made by the Judge on that date ceased to have any effect when the District Judge accepted the plaintiffs' appeal and set aside the order of the 5th October 1926. Though the learned Judge has not expressly set aside that order, the whole of the judgment is to the effect that the finding of the Senior Subordinate Judge, that the Court-fee paid on the plaint was insufficient, was erroneous.

The learned counsel then relied on S. 12, Court-fees Act, in support of his argument that no appeal lay to the District Judge. The section provides that every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed and such decision shall be final as between the parties to the suit. But a proviso is added that where such question has been wrongly decided to the detriment of the revenue, a superior Court before whom such suit may come on appeal, reference or revision shall require the party concerned to pay the additional fee. In my opinion S. 12 does not apply

to the present case. My view is that that section merely bars an appeal where the dispute is about the proper valuation of the subject-matter of the suit and not where the question is which of the several articles of the Court-fees Act, applies to the facts stated in the plaint. In the first case it is more or less a question of fact that has to be determined by the Court and the legislature has laid it down that the decision of the Court in such matters shall be final. In the second case different considerations arise and the matter being purely one of law is capable of being examined by superior Courts at the instance of either party.

There is another aspect of this question. The order directing the payment of the additional Court-fee was incorporated in the decree. It was, therefore, an essential part of the decree and admittedly the decree was appealable to the District Judge. In other words, the decree being conditional on the performance of certain acts by the plaintiffs on the non-performance whereof it was to become void and the direction relating to the performance of such acts being illegal as held by the District Judge, the learned Judge had jurisdiction to adjudicate upon the legality or otherwise of the condition imposed.

At this stage it will be convenient to dispose of another argument that was put forward on behalf of the appellants. It was based on S. 28, Court-fees Act, which provides that no document which ought to bear a stamp under that Act shall be of any validity, unless and until it is properly stamped. The contention of the learned counsel was that the plaint being insufficiently stamped the decree passed thereon was void and consequently no appeal lay at the instance of the plaintiff. I confess I am unable to follow the argument. O. 7, R. 11, Civil P. C., clearly provides that if the plaint is written on paper insufficiently stamped, and the plaintiff on being required by the Court to supply the requisite stamp paper within a fixed time, fails to do so then the Court shall reject the plaint. This provision of the law read with S. 28, Court-fees Act, clearly implies that opportunity has to be given to the party concerned to pay the proper stamp and it is on his failure to do so that the Court is entitled to decline to look at the document. But I am unable to see that if the Court accepts an insufficiently stamped plaint the proceedings which follow thereon are void. Cl. (2), S. 12, Court-fees Act, also supports the view.

The real question that is to be considered in this appeal is whether the suit in this case was in respect of an alienation of ancestral land or whether it was one in which a mere declaration under Art. 17 (3), Court-fees Act, was prayed for. The question presents some difficulty, but after careful consideration I have arrived at the conclusion that the view of the learned District Judge is correct. In a suit by the next heir to set aside an alienation by a female holder who has the customary life-interest in the estate it is not ordinarily necessary for the plaintiff to aver or to prove that the land was ancestral. All that he has to prove in order to establish his locus standi to maintain such a suit, is that he is the next heir to the estate; in other words, that if the female holder, the alienor, had not existed, he would have inherited the property. He would, under the circumstances, be entitled to sue to set aside an alienation even of land which is the self-acquired property of last male owner and, therefore, it is not necessary for the success of the suit that such property should have been held by the common ancestor of the plaintiff and last male owner. In this sense the present suit is not to set aside the sale of ancestral land.

The trial Court, and before me the learned counsel for the appellants, laid great stress on the fact that the plaintiffs' counsel, when examined in Court, stated that the land in suit was ancestral. I have examined that statement and find that the learned counsel was careful to add that it was immaterial whether the land was ancestral or not. The term "ancestral land," therefore, in Art. 22, Sch. 2, Court-fees Act, means land in respect of which, in order to enable the plaintiff to succeed, it is necessary for him to prove that the land was ancestral; in other words, that it was held by the common ancestor of himself and the last male owner. This was not necessary in the present cases and I must hold, therefore, that the present suit is not in respect of the alienation of ancestral land.

The consequence is that the learned District Judge was right in holding that

the view of the Senior Subordinate Judge, that proper Court-fee on the plaint had not been paid, was erroneous. It may be mentioned that great inconvenience and confusion has been caused in this case owing to the fact that the Senior Subordinate Judge did not follow the usual practice of deciding the issue relating to the sufficiency or otherwise of the Court-fee before proceeding with the trial of the suit on its merits. I have grave doubts if he could pass a conditional decree under the circumstances.

In view of what I have stated it is not necessary for me to consider whether the plaintiffs had, as alleged by them, reasonable excuse for not paying the Court-fee within the time fixed by the trial Court. At the same time I consider that it was not necessary for the District Judge to order that a proper decree be prepared and that he could not decline to entertain the cross-objections of the respondents. O. 41, R. 22 Civil P. C., gives a right to a respondent to attack any decree which is passed against him by the lower Court by filing a cross-objection, and the learned District Judge could not take away such rights in the manner he has done. In his judgment the view of the trial Court with regard to the Court-fee was erroneous and, therefore, the order directing payment of the additional Court-fee became inoperative. There was, under the circumstances, no occasion to remand the case for the preparation of a proper decree. The plaintiffs were entitled to claim that, subject to the decision of the cross-objections, their suit should be decreed unconditionally and the respondents were entitled to an adjudication of their cross-objections.

I accept this appeal to this extent: that I remand the case to the District Judge with a direction to hear the cross-objections and then to pass a decree in favour of the plaintiffs or the defendants, as the case may be, after due consideration of the grounds taken by the respondents in their cross-objections. As the appellants have failed in the main grounds of appeal and the respondents have not appeared before me there will be no order as to costs of this appeal.

N.K. *Appeal partly accepted.*

A. I. R. 1928 Lahore 224

FFORDE AND AGHA HAIDAR, JJ.

Sanwal Das—Plaintiff—Appellant.

v.

Kuremal and *others*—Defendants—Respondents.

First Appeal No. 2509 of 1923, Decided on 15th November 1927, from decree of First Class Sub-Judge, Delhi, D/- 27th June 1923.

(a) *Hindu Law—Joint family—Presumption is that every Hindu family is joint—Onus is on the person alleging to prove that it is otherwise—Purchase of property in the name of one or other member of family is immaterial.*

The presumption of Hindu law is that every Hindu family is joint in food, worship and estate, and that a party who desires to establish the contrary must prove it: [22 *Cal.* 85 (*P. C.*), *Foll.*] If once the family is proved to be joint it is a matter of absolute indifference whether the name of one or the other member of the family appears in a particular document by which some property is purchased by the joint family. [P 226 C 1 & 2]

(b) *Hindu Law—Joint family property—Property earned by members of family working jointly is joint family property even if there is no nucleus of ancestral property.*

In the case of a joint Hindu family even if there is no nucleus of ancestral property but if two members of the family are joint in worship and live in commensality and carry on a business jointly and are treating that business as that and acquiring property with the proceeds of that business, that property would be deemed to be the joint family property: 32 *Bom.* 479; 10 *Bom. L. R.* 175, *Foll.*; *A. I. R.* 1926 *Bom.* 408, *Ref.*: 33 *All.* 677; 27 *M. L. J.* 677; *A. I. R.* 1926 *Nag.* 389 and *A. I. R.* 1927 *Mad.* 38, *Dist.* [P 227 C 2]

(c) *Contract Act, S.* 16—*To prove undne influence position to dominate the will must be proved even though the bargain is shown to be unconscionable.*

In order to prove undue influence by the dominating party on the other party it must, in the first place, be proved by the latter that the relations between the parties to each other are such that the other party is in a position to dominate its will. After this has been established, then the issue arises whether the contract has been induced by undue influence and when this issue has been determined the question of the onus probandi emerges, for if the transaction appears to be unconscionable, the burden of proving that the contract was not induced by undue influence lies upon the person who was in a position to dominate the will of the other. Even if the bargain is unconscionable the remedy under S. 16, Contract Act, does not come into view, until the initial fact of a position to dominate the will has been established: *A. I. R.* 1920 *P. C.* 65 and *A. I. R.* 1924 *P. C.* 60, *Foll.* [P 229 C 2]

Sardha Ram and *Mohammad Monier*—for Appellant.

Moti Sagar and *Shamair Chand*—for Respondents.

Agha Haidar, J.—This is an appeal from a decree of the learned Senior Subordinate Judge of Delhi dismissing the plaintiff's suit with costs. For the purpose of understanding this case it is necessary to give below a short pedigree :

Sita Ram (died 1893)

Nanak Chand (died 1904)	Gauri Mal (died 1888)
Sanwal Das (plaintiff)	Kure Mal (defendant)

The plaintiff came into Court on the allegation that, when his father, Nanak Chand, died, he was left an orphan aged five years only, his mother having died during the lifetime of his father ; that he was brought up by the wife of Bhana Mal, the son of his father's sister, and that he lived with her up to 1907, in which year the defendant brought him to his own house. Para. 4 of the plaint contains clear allegations that no ancestral property had been left by the grandfather Sita Ram ; that his father was separate from Kure Mal ; and that the property in dispute was the exclusive property of the plaintiff's father in which the defendant had no share or interest. The plaint goes on to say that in the year 1918, as a result of deception and misrepresentation by the defendant, the plaintiff was led to believe that the property in dispute was the joint family property of the parties and consequently the plaintiff was induced to execute the deed of partition dated 27th July 1918. The plaintiff's case is that the said deed of partition was obtained by the defendant when he was in a position to dominate the will of the plaintiff and held out threats to him that, unless the plaintiff executed the deed, he would be turned out of the family house penniless. There is also an allegation of fraud, and it is finally prayed that

> it may be declared that immovable property, ornaments, cash and household goods entered in list A attached to the plaint entirely belong to the plaintiff and that the deed of partition, dated 27th July 1918, is ineffectual and null and void as against the plaintiff.

There is also a further prayer about the rendition of account of moveable property including cash and ornaments, but the claim as to this relief was subsequently withdrawn under an order of the Court dated 6th April 1921, with liberty to bring a fresh suit.

The written statement is a lengthy rambling document, but substantially it comes to this : that the family of Nanak Chand and Gauri Mal was a joint Hindu family ; that they carried on joint business ; and that the property in suit was the joint family property, having been acquired with the help of joint family funds. It is also pleaded that the deed of partition, dated 27th July 1918, is a genuine document in that it was executed at the instance of the plaintiff and with the mutual free consent of the parties. The allegations of the plaintiff as regards fraud, misrepresentation, deception and undue influence are specifically controverted and it is further pleaded that the deed of partition was effected by the plaintiff after due deliberation and that it had actually been acted upon by the parties.

In appeal the learned counsel for the plaintiff-appellant, Mr. Sardha Ram, tried to shift his ground a little. While trying to establish the clear allegations contained in para. 4 of the plaint that the plaintiff's father was separate from Kure Mal and that no ancestral property was left by Sita Ram, the grandfather of the parties, the learned counsel attempted to put forward an alternative claim to the effect that, even if the family was a joint Hindu family, the property standing in the name of Nanak Chand was his separate and self-acquired property to which the rest of the family was not entitled. This line of argument was not open to the learned counsel, as it was an entirely new case which was not even foreshadowed either in the pleadings of the parties, or in the judgment of the Court below, or even in the grounds of appeal in this Court. However, the attempt in the very early stage of the arguments broke down and the appeal was argued on the pleadings of the parties and the issues framed thereupon.

Sanwal Das, the plaintiff, attained the age of majority, that is to say, 18 years, some time in the year 1915 and the partition did not take place until about three years afterwards. Kure Mal was undoubtedly looking after the property in suit on behalf of the plaintiff as well as on his own behalf according to the defendant's case, but after the death of his father it cannot be said that the plaintiff remained entirely under the tutelage and guardianship of Kure Mal.

The plaintiff himself admits that up to the year 1907, i. e., three years after his father's death, he lived in Bhana Mal's house ; but there is ample evidence on the record that the plaintiff in his younger days was a truant and used to fight with the defendant and would occasionally run away from Delhi to Meerut where his sister lived, so that it cannot be said that Kure Mal was the only person under whose guidance and protection the plaintiff lived. Kure Mal brought about the marriage of the plaintiff and after this marriage the plaintiff's father-in-law was also in a position to look after the plaintiff and safeguard his interests. The present suit was brought on 30th August 1920, that is to say, more than two years after the execution of the deed of partition. It is true that the plaintiff had a period of three years under the law within which he could bring a suit for the cancellation of the deed of partition, but this interval of more than two years is significant and throws some doubt at least upon the bona fides of the claim.

Now the crux of the case is whether the family of Nanak Chand was joint or separate. If it turns out that the family was joint then it would be open to the plaintiff to get the deed of partition set aside only if it could be shown that he was deprived of what was his own by fraud, deception or undue influence practised upon him by the defendant. The prdigree, as noted above, is a very simple affair. The presumption of Hindu law is that every Hindu family is joint in food, worship and estate, and that a party who desires to establish the contrary must prove it.

A number of documents are relied upon by the plaintiff in order to show that Nanak Chand acquired separate property and was, therefore, separate from the family. There are seven sale-deeds beginning from 1863 down to 1886. Five of these are in the name of Nanak Chand alone, while in two the name of Gauri Mal, the father of the defendant, also appears. Then there is a receipt dated 5th February 1886, executed by one Sagwa in favour of Nanak Chand, and there is further a deed of release, dated 26th July 1888, executed by one Mathra Das in favour of Nanak Chand. To this may be added a sale-certificate dated 2nd March 1903, also in the name Nanak Chand who was a decree-holder in the suit. These documents are not of much help to the plaintiff because, if once the family is proved to have been a joint Hindu family then it is a matter of absolute indifference whether the name name of one or the other member of the family appears in a particular document. We notice that in two of the documents at least, dated respectively 28th April 1873 and 1st March 1886, the name of Gauri Mal appears along with that of Nanak Chand. It may be mentioned here that in 1902, that is to say, while Nanak Chand was alive, four shops were purchased in the joint names of the plaintiff and the defendants, and again in 1908, after the death of Nanak Chand, three properties were purchased in the joint names of Kure Mal and the plaintiff. This is very significant and shows that, even in the lifetime of Nanak Chand, Kure Mal's name appeared as a purchaser along with the plaintiff, the only son of Nanak Chand, although, according to the plaintiff, Kure Mal was a man of no substance and was hardly likely to purchase any property. It need hardly be mentioned that all these properties, that is to say, the four shops purchased during the lifetime of Nanak Chand and the three properties purchased after the death of Nanak Chand, are included in the deed of partition.

Before discussing the oral evidence, which has been adduced on behalf of the parties, it may be mentioned that Nanak Chand was undoubtedly a man of considerable business capacity seeing that, according to both the parties, he was principally instrumental in immensely augmenting the family fortunes from very humble beginnings. He was a native of Delhi where the standard of an ordinary citizen's intelligence is fairly high and where plenty of legal talent was available for the purpose of obtaining legal advice. If Nanak Chand, who, according to the plaintiff himself, was a man of seventy at the time of his birth and died at the age of seventy-five, was really separate from the rest of the family and the sole owner of his fairly extensive property, then it does not stand to reason that he should not have consulted some lawyer and executed a will or a deed of gift giving away the whole of his property to his only son, the child of his old age. The mother of the plaintiff had died

about four years before the death of Nanak Chand. Nanak Chand must have known that the child, after his death, would be left an orphan with no one to protect him and his patrimony. Ordinary prudence required that he should have taken suitable steps to assure the future of his only son and his property. But he did nothing of the kind, for the simple reason that he treated the family as joint and the whole property as the ancestral joint family property.

A large number of witnesses were produced on behalf of the plaintiff in order to prove that Nanak Chand was separate from the family and carried on a separate business and that the property in dispute was his self-acquired property. But unfortunately for the plaintiff the evidence of some of his own witnesses goes a long way to prove the defendant's case. (The judgment then discussed the evidence and proceeded.) Having regard to all the evidence, both oral and documentary, and to the circumstances of the case, it appears that Sita Ram originally started the family business in a small way and that his son Nanak Chand, as a member of the joint Hindu family, considerably extended it.

On behalf of the plaintiff-appellant a number of authorities were cited in order to show that the burden lay upon the defendant in the circumstances of the case to prove that there was a nucleus of the family property in the hands of Nanak Chand and that the property, as we now see it, is traceable to that source. Mr. Sardha Ram relied on *Ram Kishen Das* v. *Tunda Mal* (1), *Kannammal* v. *Ramathilakammal* (2), and a number of other cases, e. g., *Birdichand Lalchand* v. *Popatlal* (3) and *Narayana* v. *Sesshamma* (4). It is necessary only to examine the case reported in *Ram Kishen Das* v. *Tunda Mal* (1), because the other three cases follow the law as laid down in that case. This case does not lay down anything new or original. It merely says, what is well known to every student of Hindu law, that there is no presumption that a joint Hindu family has any property, and that property found in the possession of any one member of the family cannot be presumed to be joint family property unless it is shown that the family as such possessed at least some property by means of which the property in suit could have been acquired.

Now, as already stated, there is ample evidence on the record which goes to show that the property, as we now see it, had its origin in the small gudar shop which Sita Ram, the grandfather of the parties, was carrying on and which prospered later on under the wise management of Nanak Chand, the father of the plaintiff. I may also observe, with due respect to the learned Judge who delivered the judgment in *Ram Kishen Das* v. *Tunda Mal* (1), that even if there is no nucleus of ancestral property, but we find two members of the family who are joint in worship and live in commensality and carry on a business jointly and treating that business as that and acquiring property with the proceeds of that business, that such property would be deemed to be the joint Hindu family property. In my humble judgment this proposition is in consonance with the genius and habits of mind of the vast majority of Hindus governed by the law of Mitakshara. I am supported in this view by the High authority of Mr. Justice Beaman, a very distinguished and learned Judge of the Bombay High Court, who, in *Karsondas Dharamsey* v. *Gangabai* (5), laid down that there was nothing either in practice or theory which excluded the possibility of members of the same family starting a family fortune holding it as members of a joint Hindu family, and thereby clothing it with all the legal qualities and incidents of joint family property. In *Laldas Naraindas* v. *Motibai* (6), it was held that, where a father and his sons acquire their property by their joint labours and are besides joint in food and worship, they must be regarded as having constituted a joint Hindu family even though there may have been no nucleus of property which has come down to the father from his father or grandfather or great-grandfather. For the formation of a coparcenary in Hindu law, such a nucleus is not absolutely necessary, provided the persons constituting it stand in the relation of father and son or other relation requisite for a coparcenary

(1) [1911] 33 All. 677=10 I. C. 543=8 A.L.J. 723.
(2) A. I. R. 1927 Mad. 38.
(3) A. I. R. 1926 Nag. 389.
(4) [1915] 27 M. L. J. 677=26 I. C. 33.
(5) [1908] 32 Bom. 479=10 Bom. L. R. 184.
(6) [1908] 10 Bom. L. R. 175.

system, and those persons, by living, messing and worshipping together, and throwing all the property acquired jointly into one common stock, manifest their intention to deal with one another and with outsiders as members of a coparcenary system under the Hindu law.

These two cases are cited with approval in a Division Bench case reported in *Haridas Narayandas* v. *Dev Kuvarbai* (7). In the present case we find that Nanak Chand purchased property in the joint names of himself and his cousin Gauri Mal in 1873 and 1886 and that Gauri Mal worked at the same shop with Nanak Chand. And when Nank Chand was getting old, property was purchased in the name of his only son and his nephew, the defendant Kure Mal who used also to work with him at his shop, and that, after the death of Nanak Chand, more property was purchased in the joint names of the parties. Thus we see that until the deed of partition was executed the whole family life of Sita Ram and his descendants was the life of a normal joint Hindu family in every respect. The plaintiff has given no evidence whatsoever to prove when and under what circumstances his father separated from the rest of the family. In the absence of such evidence the presumption continues that the joint family continued to exist up to the year 1918: vide *Prit Koer* v. *Mahadeo Pershad Singh* (8).

This being so, it was open to the plaintiff to have the family property partitioned. Now, the plaintiff's allegation, which he made for the first time in the witness-box, is as follows:

> Property of small value has been allotted to me and its value has been shown excessively in the deed. The defendant himself has taken superior property and of high value, though it has been shown in the deed as not valued much. The shops that have been shown as falling to my share are recorded to have two rooms, whereas in fact they have one room each.

He prefaced these observations by the statement that the partition-deed was obtained from him by undue influence and that he was forced to give his consent to the deed of partition by the threat that, unless he did so he would be turned out penniless. Apart from this eleventh-hour plea of the plaintiff there is no evidence on the record to show that the plaintiff was in any way cheated of defrauded when the shares were allotted under the deed of partition. The property was joint family property liable to partition at the instance of any one of the coparceners. The deed of partition was not a secret or mysterious affair. It was executed on 27th July 1918, and registered on 14th September 1918. It was attested by no less than ten marginal witnesses. Hashmat Ullah (P. W. 14), the scribe of the document, states:

> I wrote the partition deed. Drafts of this deed were made six months before. The parties got the drafts made. Sanwal Das's two relations of Meerut approved of the drafts and then the deed was drawn up. I got it registered also. No objection was preferred by either party at registration.

No serious attempt was made during the cross-examination of this witness to show that what he had stated as regards the careful preparation of the deed was not true. The three other marginal witnesses namely, Brij Lal (P. W. 8), Muhammad Inam Ullah (P. W. 11) and Ram Gopal (P. W. 10), have been examined on behalf of the plaintiff and no questions have been put to them on his behalf to suggest that the plaintiff was not a free agent at the time when he executed this document and had it registered. In this connexion I may as well deal with the plea of fraud, undue influence and misrepresentation, etc. As regards "fraud" beyond the mention of the word 'fraud' in one of the concluding paragraphs of the plaint there is no evidence on the record to show that any fraud whatsoever was practised upon the plaintiff. The partition seems to be fair and square and, at any rate, nothing has been shown that the division of the property in suit was in any way unfair or unjust. Reliance was placed upon S. 16, Contract Act, on behalf on the plaintiff, and it was argued that the plaintiff having been for some time under the guardianship of the defendant it may be taken that the latter was in a position to dominate the will of the plaintiff and, therefore, it lay upon the defendant to prove that the document represented an honest transaction and that in default of such proof it may be taken that the deed of partition was obtained by the exercise of undue influence. As already stated the plaintiff had attained his majority about three years before the deed of partition. It is true

(7) A. I. R. 1926 Bom. 408=50 Bom. 443.
(8) [1895] 22 Cal. 85=21 I. A. 134=6 Sar. 485 (P. C.).

that he lived with the defendant; but off and on he used to go to Gurgaon and Meerut and lived with his relations. For several years, at least, he had been brought up in the house of Bhana Mal, the son of the plaintiff's father's sister, and after his marriage he had his wife's relations whose presence is deposed to by some of the witnesses at the time of the execution of the deed of partition. We may thus take it that the plaintiff at the time of the deed in suit was dealing with the defendant at arm's length. No such relationship is proved to have existed between the defendant and the plaintiff which would show that the defendant was in a position to dominate the will of the plaintiff. The argument of the learned counsel for the defendant was unsound when he contended that, when once it is proved that a party was in a position to dominate the will of another, then the burden of proof lies upon that party to prove that the transaction was not the result of undue influence. Whatever may have been the state of the law on the subject before, we have the weighty pronouncement of their Lordships of the Privy Council in two recent cases reported respectively in *Poosathurai* v. *Kannappa Chettiar* (9) and *Raghunath Prasad* v. *Sarju Prasad* (10). In the former case Lord Shaw observed that

> undue influence is not established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it. Up to that point "influence" alone has been made out. Such influence may be used wisely, judiciously and helpfully. But, whether by the law of India or the law of England, more than mere influence must be proved so as to render influence in the language of the law "undue." It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid. And where the relation of influence, as above set forth, has been established, and the second thing is also made clear, viz: that the bargain is with the "influencer" and in itself unconscionable, then the person in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously advised in the independence of a free agent.

In *Reghunath Prasad* v. *Sarju Prasad* (10) the same noble and learned Lord observed that by S. 16, Contract Act (as amended by Act 6 of 1899), three matters are dealt with. In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. After this has been established then the issue arises whether the contract has been induced by undue influence and that when this issue has been determined the question of the onus probandi emerges; for, if the transaction appears to be unconscionable, the burden of proving that the contract was not induced by undue influence lies upon the person who was in a position to dominate the will of the other. Even though the bargain is unconscionable the remedy under S. 16, Contract Act, does not come into view, until the initial fact of a position to dominate the will has been established.

In the light of these authoritative pronouncements of law no difficulty arises as regards the interpretation of S. 16, Contract Act. In the present case it was for the plaintiff to prove that the defendant was in a position to dominate the will. He had further to prove that the contract was obtained by undue influence and that it was on the face of it an unconcionable transaction. After proving these various matters, the burden of proving which lay upon the plaintiff, it would have been for the defendant to prove that no undue influence was exercised. The evidence in the case was discussed at very considerable length by the learned counsel on behalf of the parties and it cannot be said that any foundation whatsoever has been laid by the plaintiff for the application of the doctrine of undue influence to the transaction in suit. Therefore, the deed of partition cannot be challenged on the ground of undue influence as set forth by the plaintiff. Thus, from whatever point of view the case may be looked at, the plaintiff has failed to establish his claim. I would accordingly dismiss the plaintiff's appeal with costs throughout.

Fforde, J.—I agree.

S.J. *Appeal dismissed.*

(9) A. I. R. 1920 P. C. 65=48 Mad. 546=47 I. A. 1 (P. C.).

(10) A. I. R. 1924 P. C. 60=3 Pat. 279=51 I. A. 101.

* A. I. R. 1928 Lahore 230

BROADWAY AND ZAFAR ALI, JJ.

Emperor—Petitioner.

v.

Gian Singh—Accused—Respondent.

Criminal Revn. Petn. No. 1693 of 1927, Decided on 14th October 1927, from order of Sess. Judge, Ambala, D/- 13th November 1926.

* (a) *Penal Code, Ss.352 and 353—Police official assaulted not in a public place, but in a private place where he had been deputed by his superiors in lawful discharge of his duties—Offence committed falls under S. 353, I. P. C., and not S. 352—Police Act, Ss. 22, 23 and 31.*

Where a police officer was deputed in a private place to control the traffic on the road leading from that private place to the public road and he was assaulted while so discharging his duty,

Held: the police officer was acting in the lawful discharge of his duty and the accused was guilty of an offence under S.353.[P 232 C 1]

(b) *Criminal P. C., S. 342—Non compliance—Appellate Court may not interfere in revision but must do so in appeal.*

The provisions of the Criminal Procedure Code in respect of examination of an accused a second time after the conclusion of the prosecution evidence are undoubtedly mandatory, and in appeal the appellate Court is bound to order a retrial from the point at which the Magistrate had failed to carry out the procedure laid down: *A.I.R.* 1926 *Lah.* 551; 1 *P.R.* 1918; and *A. I. R.* 1921 *Bom.* 374; *Ref.* But in the case of a revision, the Court of revision is not bound to interfere, especially when no prejudice is caused tc the accused.. [P 231 C 2]

(c) *Criminal P. C., S. 417—Appeal.*

Change of conviction from Penal Code, S. 353, to one under S. 352 does not amount to acquittal under S. 353 and no appeal lies: *A. I. R.* 1927 *Lah.* 369, *Foll.* [P 231 C 1]

Carden Noad—for the Crown.

Barkat Ali—for Respondent.

Broadway, J.—On 28th August 1926, Sir Alexander Muddiman gave a garden party at his house, Peterhoff, Simla, at which Their Excellencies the Viceroy and Lady Irwin were to be present. As is usual on these occasions the Superintendent of Police made arrangements for the control of traffic along the road and within the precincts of Peterhoff itself. The gate leading into Peterhoff appears to have been a narrow one through which only one rickshaw could pass at a time, Sergeant Devine, a head constable and four constables had been detailed to supservise and carry out the arrangements necessary for the proper control of the traffic and to see that everything was done peaceably and in order. Having regard to the narrowness of the entrance of the gate Sergeant Devine ascertained from Sir Alexander Muddiman whether the rickshaws should be parked in the grounds of Peterhoff or outside, and was informed that there was not sufficient accommodation for the parking arrangements in Peterhoff and that it would be necessary to have them parked outside. Accordingly it was arranged by Sergeant Devine that, after a certain number of rickshaws had passed through the gate and their occupants had alighted, they should be passed out as quickly as possible.

In accordance with these arrangements, when a certain number of rickshaws had emptied, a constable was sent by Sergeant Devine to direct the coolies to take them out and park them as arranged on the roadside. The constable returned and reported that the mate in charge of one of the rickshaws refused to take his rickshaw out and had been insolent and had abused him. Thereupon Sergeant Devine went to the spot and placing his hand on the shoulder of the mate in question directed him to take his rickshaw out. The mate, instead of doing so, snatched the light cane that Sergeant Devine had under his left arm and with it struck the Sergeant, at the same time asking him whether he could not see who he was. Sergeant Devine promptly had him turned out with the aid of the other policemen. The mate struggled and in the struggle kicked at and struck Sergeant Devine. He was ultimately turned out and the rickshaw placed in its proper position outside. He refused to give his name, saying that the name of the Commander-in-Chief would be sufficient. It later transpired that this man was the mate in charge of the rickshaw belonging to His Excellency the Commander-in-Chief. Proceedings were instituted against this man, whose name is Gian Singh, and he was convicted of an offence under S. 353, I. P. C., and sentenced to three months' rigorous imprisonment. He appealed to the learned Sessions Judge of Ambala who came to the conclusion that, inasmuch as Peterhoff was not a place of public resort, the obstruction to Sergeant Devine was not an offence, and holding that S. 353 was inapplicable convicted Gian Singh under S. 352, I. P. C., and sentenced him to the term of imprisonment he had then undergone, about 15

days, and to the payment of a fine of Rs. 25.

Against the decision of the learned Sessions Judge the Crown has preferred an appeal under S. 417, Criminal P C., urging that the offence committed by Gian Singh fell within the purview of S. 353, I. P. C., and asking that it should be so recorded and the sentence imposed by the trial Magistrate restored. At the hearing the learned Government Advocate pointed out that the intention with which this appeal had been filed was not so much to get the sentence passed on Gian Singh enhanced as to get a definite ruling as to whether the offence committed by him fell within S. 353, I. P. C., or not. It was urged that, having regard to S, 31, Police Act, Peterhoff was, on this particular occasion, a place of public resort and further that, in any event, the control of traffic within the precincts of Peterhoff grounds should be treated as ancillary to the control of traffic along the road inasmuch as the congestion or block of traffic on the road leading from Peterhoff to the main public road would necessarily result in a block on the road itself. It was further contended that, having regard to the provisions of Ss 22 and 23, Police Act, the order of the Superintendent of Police, deputing Sergeant Devine and his subordinates to attend the garden party in their capacity as police officers, was a lawful one, and: any interference with them in the lawful discharge of their duty would fall within the purview of S. 353, I. P. C.

Mr. Barkat Ali, on behalf of Gian Singh raised a preliminary point to the effect that the appeal was incompetent inasmuch as there had been no acquittal under S. 353, and reliance was placed inter alia on *Fazal Khan* v. *Emperor* (1). Having regard to that authority I consider that the objection is valid and that the appeal was not competent. At the same time I consider that the learned Government Advocate's request, that the appeal should, in these circumstances, be treated as a petition for revision under S. 439, was fair and proper and we have treated this as a petition for revision.

Next Mr. Barkat Ali contended that, as a revision, he was entitled to examine the record to satisfy us that, on the merits, his client had committed no offence at all. It is not necessary to enter into the details of the evidence. In my judgment there can be no doubt at all that Gian Singh had a very inflated opinion of his own importance as the mate in charge of the rickshaw of a very high official and that the story told by the witnesses for the prosecution is true. Indeed, Mr Barkat Ali did not attempt to refer to the defence evidence which has only to be read to be discarded.

He next urged that the entire trial was vitiated owing to the fact that Gian Singh had not been examined a second time after the conclusion of the prosecution evidence, and he referred to various authorities, as, for instance, *Lachhman Singh* v. *Emperor* (2), *Girja Nandan Singh* v. *National Insurance & Banking Co. Ltd.* (3) and *Emperor* v. *Fernandez* (4), etc There is no doubt that these authorities support Mr. Barkat Ali's contention and the provisions of the Criminal Procedure Code in this behalf are undoubtedly mandatory. Nevertheless I do not think it necessary to interfere in this case on that ground, although, had it been an appeal that was before us, I might have felt bound to order a retrial from the point at which the Magistrate had failed to carry out the procedure laid down. Being a revision, it seems to me, despite the illegality, I am not bound to interfere. It was pointed out in *Jiwani* v. *Nathu Mal* (5), a case cited by Mr. Barkat Ali himself that, sitting as a Court of revision, this Court is not bound to interfere even in the case of an illegality committed by the Court below. That was a decision of a Single Judge. In *Allah Diya* v. *Emperor*, a Division Bench, consisting of Sir William Clark, Chief Judge, and Mr. Lal Chand, both of them eminent Judges of the Chief Court, laid down that the controlling power of the Court under S. 439, Criminal P. C., being by its terms entirely discretionary, the Court is not bound on revision to set aside a conviction in every case in which an illegality has been committed, especially where no prejudice is shown to have been caused by such illegality. Mr. Barkat Ali was unable to show that his client was in any way prejudiced by the omission referred to in this case, and

(1) A. I. R. 1927 Lah. 369=3 Lah. 136.

(2) A. I. R. 1926 Lah. 551=7 Lah. 564.
(3) [1918] 1 P. R. 1918=44 I. C. 139.
(4) A. I. R. 1921 Bom. 374=45 Bom. 672.
(5) [1910] 19 P. W. R. 1910=61 P. L. R. 1910 =5 I. C. 890=26 P. R. 1910.

I, therefore, decline to interfere on this ground.

Turning to the question raised by the Crown: I am of opinion that the view contended for by Mr. Carden Noad is correct. I am not prepared to accede to the argument that Peterhoff was on that particular date a place of public resort, but, having regard to the provisions of Ss. 22 and 23, read with S. 31, Police Act, I am of opinion that the Superintendent of Police, in passing the orders he did, deputing Sergeant Devine and his subordinates to Peterhoff on that date, was acting lawfully and that Sergeant Devine, in arranging for the control of traffic not only on the road immediately below Peterhoff, but also along the road leading to Peterhoff and within its precincts, was acting in the lawful discharge of the duty that he was lawfully bound to carry out. There are many duties performed by the police force which are not specifically provided for by the Police Act itself, but the maintenance of law and order and the control of traffic along public roads, as well as roads leading to such public roads, is to my mind an essential part of the functions of the police. I would, therefore, accept this petition for revision and setting aside, the order of the learned Sessions Judge convicting Gian Singh under S. 352, I. P. C., restore that of the learned Magistrate and convict Gian Singh of an offence under S. 353, I. P. C. Having regard to the time that has elapsed, and to the fact that Gian Singh has served a certain amount of imprisonment and has paid the fine imposed by the learned Sessions Judge, I do not think it necessary to enhance the sentence.

Zafar Ali, J.—I agree.

S.J. *Petition accepted.*

A. I. R. 1928 Lahore 232

SHADI LAL, C. J., AND AGHA HAIDAR, J.

Naurang Rai—Petitioner.

v.

Kidar Nath and *another*—Respondents.

Criminal Revn. No. 1826 of 1926, Decided on 16th January 1928, reported by Dist. Magistrate, Delhi, D/- 7th December 1926.

Criminal P. C., S. 345 (2)—Offences governed by S. 345 (2), Criminal P. C., cannot be compromised without the permission of the Court before whom the case is pending—Penal Code, S. 420.

In cases governed by S. 345 (2), Criminal P. C., the permission of the Court before which a prosecution is pending is essential before the case can be validly compounded, and so no effect can be given to a compromise as a plea in bar of conviction unless the Court has given its sanction. Without the sanction of the Court, the so-called compromise arrived at between the parties, outside the Court, is of no legal effect and cannot be taken cognizance of by any Court dealing with the offence: 41 *Mad.* 685, *Rel on.*: 39 *Mad.* 946, *Dist.* [P 234 C 1 & 2]

Shamair Chand—for Petitioner.

Kishan Dayal—for Respondents.

Order of Reference

The proceedings are forwarded for revision on the following grounds:

This has been entered as an application to me for revision under Ss. 437 and 435, Criminal P. C. It should, however, in my opinion, be under Ss. 435 and 438.

The point at issue before me is one of some little interest. Since the alleged offence for which accused is on his trial is under S. 420, I. P. C., his counsel admits that, even if a compromise has been effected out of Court for due consideration, the Court has a right under S. 345 (2), Criminal P. C., to refuse to permit the compromise. But he goes on to argue that, if, as in this instance, it be alleged that during the trial of the case a compromise was made for due consideration and that the complainant has resiled from such compromise, then the Court, if it would have been prepared to permit such compromise, has a right to hold an enquiry and to record evidence as to whether the parties actually came to some such agreement out of Court or not.

This is a position which I cannot accept, but he he has succeeded in convincing the lower Court, as the Magistrate's order shows.

In my opinion that order shows some confusion of thought, and the Magistrate has been misled by quotation of rulings which have bearing only on cases of compromise under S, 345 (1), Criminal P. C., i. e., when the Court has no voice in the matter. In the particular case under consideration, when the charge is under S. 420, I, P. C., and any compromise must be under S. 345 (2), Criminal P. C., there can be nothing in the way of compromise which can be held to be legally binding on either party (much less to

warrant enquiry and recording of evidence in proof of it) unless or until an application for permission to compromise under S. 345 (2) is made by the parties to the Court. And in any case the Magistrate when he writes in his order

> if the circumstances under which compromise was arrived at allow, the Court has no option but to accord sanction and assent to the factum of compromise,

is definitely wrong, in so far as a compromise under S. 345 (2), Criminal P. C., is concerned. At least that is my view and interpretation of the law which I submit for the consideration of the Hon'ble High Court.

This case has been dragging on since September 1925, in the Courts of two Magistrates, and there have been lamentable delays for one reason or another. I may note that the 1st Magistrate, as the record shows, definitely decided against the allegation of a compromise having been effected, but the defence, arguing that the case is being tried de novo by the 2nd Magistrate, have succeeded in convincing the latter that their allegation merits enquiry.

Accordingly under S. 438, Criminal P. C., I report the case for the orders of the Hon'ble High Court, with my recommendation that the Magistrate's order of November last be reversed and and he be directed to try out this already unduly protracted case without further ado and to bring it to a speedy conclusion.

Order

Shadi Lal, C. J.—The rule laid down in *Mohammad Kanni Rowther* v. *Inayathalla Sahib* (1), is to the effect that a composition arrived at between the parties to a compoundable offence mentioned in S. 345 (1), Criminal P. C., is complete as soon as it is made; and that, if one of the parties subsequently resiles from the composition, it is competent to the Court to take evidence as to the factum of the composition and give effect to it if it is found to have been entered into. The question for determination is whether the same rule is applicable to a composition in respect of an offence mentioned in S. 345 (2), Criminal P. C., which can be compounded only with the permission of the Court. The learned counsel on both sides have expressed their inability to cite any judgment on this point, and I consider that the matter should be decided authoritatively by a Division Bench.

I accordingly refer the case to a Division Bench and direct that an early date be fixed for hearing.

(1) [1916] 39 Mad. 946=2 M. L. W. 1200=31 I. C. 819=18 M. L. T. 602.

Order of the High Court

Aga Haidar, J.—A complaint under S. 420, I. P. C., was filed on 20th September 1925, by Naurang Rai (complainant) against Kidar Nath and Shiv Parshad. On 10th December 1925, an application was put in by Kidar Nath and Shiv Parshad asking the Magistrate, in whose Court the complaint was pending that permission to enter into a compromise be accorded and the applicants be discharged, on the basis of a certain alleged compromise which had been arrived at between the parties after the institution of the complaint. The learned Magistrate under his order dated 8th November 1926, directed the applicants (the accused)

> to produce complete evidence, oral or documentary in proof of the factum of the compromise.

The order of the Magistrate cannot be called a model of lucidity and parts of it are not easily intelligible.

The complainant applied in revision to the learned District Magistrate who has expressed the opinion that, in view of the fact that the complaint related to an offence under S. 420, I. P. C., there could not be a compromise which would be legally binding upon the parties unless and until an application for permission to compromise under S. 345 (2) was made by the parties to the Court; and that there was, therefore, no warrant for ordering an inquiry into the factum of the compromise. The learned District Magistrate has accordingly reported the case for the orders of this Court with a recommendation that the Magistrate's order dated 8th November 1926, be reversed and that he be directed to try the case on its merits.

The reference came up before one of the members constituting the present Bench who, under an order dated 25th February 1927, referred the case to a Division Bench. The matter has now come before us for disposal.

Section 345, Criminal P. C., is divided into two sub-sections. Sub-S. (1) deals with certain offences punishable under the sections of the Indian Penal Code

which are specified therein, and it is provided that offences falling under these sections may be compounded by persons mentioned in Col. 3. Sub-S. (2) contains a list of certain other sections of the Indian Penal Code, and its provides that the offences punishable under those sections can be compounded by the persons mentioned in Col. 3 only with the permission of the Court before which a prosecution for any of those offences is pending. S. 420, I. P. C., with which the accused persons were charged in the present case, comes under S. 345 (2), Criminal P. C. It may be taken as settled law that S. 345, Criminal P. C., is exhaustive on the subject of the composition of offences mentioned therein. There is a case reported in *Mahomed Kanni Rowther* v. *Pattani Inayathalla Sahib* (1), in which it was laid down that, if the parties to a criminal case pending in a criminal Court arrive at a compromise outside the Court and one of the parties resiles from it, it is competent to the Court to enquire whether or not the parties had settled their dispute, and if it finds that there has been a valid composition, the Court should pass an order of acquittal. In other words, the jurisdiction of the Court to go on with the trial of the case comes to an end when the parties have arrived at a valid compromise, vide *Murray* v. *Queen-Empress* (2) and *Imperator* v. *Mulo* (3). The reasoning of *Mahomed Kanni Rowther* v. *Pattani Inayathalla Sahib* (1), which was a case under S. 345 (1), Criminal P. C., is perfectly clear. Under sub-S. (1), S. 345, Criminal P. C., as soon as the parties have arrived at a compromise, the Magistrate has nothing more to do except to record a judgment of acquittal.

The case of S. 345 (2), Criminal P. C., is different and is not covered by any direct authority. In cases governed by this sub-section the permission of the Court before which a prosecution is pending is essential before the case can be validly compounded. The Magistrate, when the parties have come to a compromise, has to perform the judicial act of deciding whether in the interests of justice the parties should be allowed to compromise the offence with which the accused is charged. In *Kumaraswami Chetty* v. *Kuppuswami Chetty* (4), Abdul Rahim, J., who had delivered the principal judgment in *Mahomed Kanni Rowther* v. *Pattani Inayathalla Sahib* (1), referring to the cases coming under S. 345 (2), Criminal P. C, observed that the operation of the composition in these cases is necessarily suspended until the Court sanctions it. In other words, no effect can be given to a compromise as a plea in bar of conviction in cases covered by Cl. 2 unless the Court has given its sanction. Without the sanction of the Court, the so-called compromise arrived at between the parties, outside the Court, is of no legal effect and cannot be taken cognizance of by any Court dealing with the offence. The jurisdiction of the Court to try the case on the merits remains unaffected, and there is no rule of law, based either upon the express language of the legislature or deducible from any general principles which would enable the Court in a case falling under sub-S. (2), S. 345, Criminal P. C., to order an enquiry into the factum of compromise alleged by one of the parties and denied by the other.

This being so, we accept the recommendation of the learned District Magistrate and quash the order passed by the learned trying Magistrate dated 8th November 1926, and direct him to dispose of the case pending before him on its merits.

S.J. *Order quashed.*

(2) [1894] 21 Cal. 103.
(3) [1913] 6 S. L. R. 284=19 I. C. 948=14 Cr. L. J. 292.
(4) [1918] 41 Mad. 685=34 M. L. J. 217=44 I. C. 583=(1918) M. W. N. 493.

A. I. R. 1928 Lahore 234

ZAFAR ALI, J.

Indian Merchants Bank, Ltd., in Liquidation—Appellant.

v.

Jogindra Singh — Objector—Respondent.

Misc. First Appeal No. 729 of 1927 Decided on 6th December 1927, from order of Addl. Dist. Judge, Amritsar, D/- 17th January 1927.

(a) *Companies Act (7 of 1913), S. 158—Membership subject to certain condition—Condition not fulfilled—Person does not become member.*

A person who agrees to be a member of the company on some condition does not become a member if the condition is not fulfilled and cannot be placed on the list of contributories.

[P 235 C 1]

(b) *Companies Act (7 of 1913), S. 38—Civil Court has jurisdiction.*

The jurisdiction of civil Courts to decide questions falling within the purview of S. 38 is not excluded: *A. I. R.* 1922 *All.* 258, *Rel. on.* [P 235 C 1]

Madan Gopal—for Appellant.

Shamair Chand—for Respondent.

Judgment.—This is an appeal by the Official Liquidator of the Indian Merchants Bank Ltd., Amritsar, against an order of the Additional District Judge of Amritsar, refusing to place on the list of contributories the name of Bawa Jogendra Singh, respondent.

The order is based on the finding that Jogindra Singh's application for shares was subject to a condition which was accepted by the Board of Directors but was not fulfilled and that Jogindra Singh had obtained an ex-parte decree against the bank for a refund of the money that he had paid with his application for shares. The alleged condition was that a branch of the bank would be opened at Muktsar for 12 months. A branch was opened but was closed after one month. One of the late directors of the bank appeared in the witness box and deposed that the condition set up by the respondent had been agreed upon. There was no evidence in rebuttal. So the finding that the alleged condition precedent was proved cannot be interfered with. Further there was a decree of a civil Court based upon that condition. The Official Liquidator, however, contends that the civil Court had no jurisdiction in the matter and refers to S 38, Companies Act, in support of his contention. But that section does not exclude from the jurisdiction of ordinary civil Courts a suit of the class in question. In *Union Indian Sugar Mills* v. *Jai Deo* (1) it was held on a construction of S. 38, Companies Act 1913, that the District Judge is not obliged to decide a question of title raised in a proceeding before him under this section. This indicates that the jurisdiction of civil Courts to decide questions falling within the purview of S. 8 is not excluded. The decree in question though ex parte is binding on the bank, and the Official Liquidator is not competent to impugn it. This being so the appeal fails, and is dismissed with costs.

S.J. *Appeal dismissed.*

(1) A. I. R. 1922 All. 258=44 All. 151.

A. I. R. 1928 Lahore 235

ZAFAR ALI, J.

Mt. Ram Rakhi — Defendant—Petitioner,

v.

Brij Bhushan and *others*—Plaintiffs—Respondents.

Appeal No. 495 of 1927, Decided on 16th December 1927, from order of Dist. Judge, Ludhiana, D/- 31st August 1927.

Hindu Law—Joint family—Compromise by a Hindu father as manager in good faith is binding on infant sons.

Compromise made by Hindu father as the manager of the joint family in good faith is binding upon his sons unless it is proved that the father did not act bona fide in making it: *A. I. R.* 1927 *Lah.* 620, *Foll.* [P 236 C 1]

Shamair Chand—for Petitioner.

Badri Das—for Respondents.

Judgment.—The defendant petitioner Mt. Ram Rakhi by name, is the widow of the late Rai Sahib Lala Kundan Lal who, on 2nd November 1926, executed the will by which he bequeathed certain property to his son Mohan Lal, pleader, and Rs. 61,000 to his wife Mt Ram Rakhi. Shortly after his death Mt. Ram Rakhi applied for probate of the will. Mohan Lal, who is her stepson, opposed this application and instituted a suit for a declaration that the will was invalid. The dispute between the widow and Mohan Lal ended in a compromise according to which Mt. Ram Rakhi paid him Rs. 25,000 which he pocketed and withdrew his objection to the will. But soon after this settlement the suit (which is still pending) was instituted on behalf of the two infant sons of Mohan Lal to avoid the will as well as the compromise made by him. An application was filed along with the plaint for a temporary injunction under O. 39, R. 1, Civil P. C., to restrain the widow from withdrawing the moneys that were deposited by her husband in the Punjab National Bank and the Sahukara Bank respectively for payment to her. The trial Court refused this application but on appeal the learned District Judge has granted the temporary injunction prayed for.

The widow seeks revision of this order, and her learned counsel, Mr. Shamair Chand contends that the learned District Judge had no jurisdiction to make that order without recording a finding to the effect that the infant plaintiffs had a

prima facie case. He argues that, as held by a Division Bench of this Court in *Maya Wanti* v. *Salig Ram* (1) the infant plaintiffs are bound by the compromise made by their father unless it was proved that the latter did not act bona fide in making it. In that case also a compromise was made by a Hindu father and it was contested by his sons. A Division Bench of this High Court observed as follows:

> It has been repeatedly laid down that a settlement of a doubtful claim by the father as the manager of the joint family entered into in good faith is binding upon his sons.

In the present case it is to be decided whether the plaintiffs are entitled to contest the compromise made by their father on the ground that it was not made bona fide. In the peculiar circumstances under which the suit has been instituted I am of opinion that the temporary injunction under O. 39, R. 1, Civil P. C., should not have been granted without recording a finding as to whether there is a bona fide contention between the parties and the plaintiffs have a prima facie case. The moneys in the two banks amount to Rs. 40,000 and not to Rs. 61,000 as stated in the judgment of the learned District Judge. There is nothing to indicate that the widow will waste this large amount or would be able to withold them if the plaintiffs should succeed in their suit. I, therefore, accept this petition for revision and set aside the order of the Court below. The plaintiff will pay the petitioner's costs in this Court.

S.J. *Revision accepted.*

(1) A. I. R. 1927 Lah. 620.

A. I. R. 1928 Lahore 236

ZAFAR ALI, J.

Indian Merchants Bank, Ltd. — Appellant.

Anup Chand—Objector—Respondent.

Misc. First Appeal No. 1416 of 1927, Decided on 2nd December 1927, from order of Addl. Dist. Judge, Amritsar, D/- 28th February 1927.

(a) *Companies Act* (7 *of* 1913), *Ss.* 158, *and* 159— *Conditionat application for shares — Condition not fulfilled—Company going into liquidation before allotment of the shares—Person does not become member.*

If an application for shares is subject to a condition precedent, the applicant incurs no liability if the condition remains unfulfilled, more so when the company goes into liquidation before any share have been allotted to him : 54 *P. R.* 1915, *Foll.* [P 236 C 2]

(b) *Evidence Act. S.* 91—*Oral evidence is admissible in proof of condition contained in document when it is in possession of opposite party and he denies the existence of the condition.*

Oral evidence is admissible to prove a condition reduced to writing in a document, where the opposite party is in possession of the document and denies the existence of such a condition. [P 237 C 1]

Durga Das—for Appellant.

Ram Chand Manchanda—for Respondent.

Judgment.—This is an appeal under the Companies Act of 1913 against an order accepting an objection and relieving the objector of all liabilities as a share-holder of a bank. The objector was Lala Anup Chand, Advocate of Montgomery who had made an application for 100 shares of the Indian Merchants Bank Limited, but the bank went into liquidation before any shares had been allotted to him. He asserted that if he was given by the managing agent of the bank an assurance that a branch of the bank would be opend at Montgomery or Pakpattan and that he would be appointed a director thereof he would buy 100 shares and that his application for 100 shares was on that assurance. He claimed that he did not become the shareholder because the condition subject to which the application for shares was made was not fulfilled. He was corroborated on this point by the managing agent and two witnesses before whom the agreement had been made. No attempt was made to rebut that evidence The law is clear that if an application for shares is subject to a condition precedent the applicant incurs no liabilities if the condition remains unfulfilled. In this connexion the following may be cited : *Peara Singh* v. *Peshawar Bank Ltd.* (1) :

> I admit the correctness of the proposition of law and there is ample authority in English law in support of it that if a condition is precedent and has not been performed and its per-

(1) [1915] 54 P. R 1915=22 P. L. R. 1915=28 I. C. 53=235 P. W. R. 1915.

formance has not been waived the applicant for shares will not be a contributory. The finding in this case that there was a condition precedent is based on good evidence and cannot be interfered with.

The argument that no oral evidence was admissible in proof of the alleged condition because it was stated that it had been reduced to writing and the writing was not called for nor produced, is also untenable. The writing was in possession of the adverse party and from the nature of the case that party must have known that it will be required to produce it. As the said party denied the very existence of the condition it could not be expected that it would have produced the writing if, called upon to do so. The appeal fails and I dismiss it with costs.

S.J. *Appeal dismissed.*

A. I. R. 1928 Lahore 237 (1)

DALIP SINGH, J.

Thakar Singh—Applicant—Appellant.

v.

Hardi Singh and *others*—Creditors—Respondents.

Misc. First Appeal No. 1242 of 1927, Decided on 4th November 1927, from order of Addl. Dist. Judge, Gurdaspur, D/- 14th February 1927.

Provincial Insolvency Act, S. 10—The fact of insolvent's father being rich is not sufficient to prove his ability to pay—Full inquiry into the capacity or otherwise must be held.

What insolvent has to show is that prima facie his debts are more than Rs. 500 and that he is unable to pay the same. The fact that his father is a rich man, or that his father allows him to cultivate certain land is not sufficient to show that he can pay the debts alleged to be due by him. Insolvency Court must make a full enquiry and take evidence as to the existence of the debts, and as to the capacity of the insolvent to pay or not to pay these debts. [P 237 C 2]

Bodh Raj Sahni—for Appellant.

Judgment.—Thakar Singh, appellant, applied to be declared insolvent and the learned District Judge rejected his application holding that he was capable of paying his debts. There is absolutely no evidence on the record either of the existence of the debts or of his ability to pay or not to pay. The appellant, however, put in a list in which he asserted that his debts amounted in all to Rs. 1,635 and his assets were only Rs. 15. Four creditors contested this application alleging that two of the so-called creditors, namely, Nos. 5 and 7, were relatives of the debtor and were not really creditors at all. They did not, however, challenge the assertion about their own debts and these debts are by themselves sufficient to justify a petition in insolvency, as they amount to Rs. 955 in all. The assets of the petitioner are the Rs. 15 worth of articles that he states in his petition plus the fact that he is cultivating 7 ghumaons which evidently have been given to him by his father for this purpose. There is no evidence to show that the income of the 7 ghumaons is in one year sufficient to pay off all these debts.

I, therefore, accept the appeal and remand the case back to the District Judge for decision after a full enquiry and evidence taken as to the existence of the debts, and as to the capacity of the appellant to pay or not to pay these debts. It must be borne in mind that if the appellant is concealing any property, that may be taken into account when the question of his discharge comes up and if he has any property the income from which can be realized by him that income can be attached and the Court can see whether that is sufficient to pay off the debts. All that the would-be insolvent has to show is that prima facie his debts are more than Rs. 500 and that he is unable to pay the same. The fact that his father is a rich man, or that his father allows him to cultivate 7 ghumaons of land is not sufficient to show that he can pay the debts alleged due by him, or even the unchallenged debts without further evidence.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 237 (2)

BROADWAY, J.

Tara Chand—Applicant—Petitioner.

v.

Harnam Singh and *another*—Opposite Party—Respondents.

Civil Revn. Petn. No. 395 of 1927, Decided on 28th October 1927, from order of Dist. Judge, Amritsar, D/- 27-3-1927.

Trust Act (2 of 1882), Ss. 61 and 49—Petition by the beneficiary requesting the District Court

to order trustee to deposit certain trust money in a particular bank—Application cannot be dealt with summarily—Proper suit must be instituted.

A beneficiary has a right to compel a trustee to perform any particular act or to restrain him from committing any contemplated or probable breach of trust, but he cannot move the Court under S. 61 in a summary manner.

Where the beneficiary requested the Court by a petition to order the trustee to deposit certain trust money in the Imperial Bank of Amritsar or otherwise to invest it in some approved securities :

Held: that the District Judge had no juisdiction to interfere with the discretion of the trustee except on a properly instituted suit : *Civil Revn. No.* 864 *of* 1926, *Foll.* [P 238 C 1]

J. M. Mackey—for Petitioner.

Dev Raj Sawhney—for Respondents.

Judgment.—Tara Chand, minor, acting through his mother Mt. Gujri, moved the District Judge of Amritsar under Ss. 61/49, Trusts Act 2, 1882, asking that Sardar Harnam Singh, a trustee, should be ordered to deposit certain trust money in the Imperial Bank of Amritsar or otherwise to invest it in some approved securities. The learned District Judge held that he had no jurisdiction to interfere with the discretion of the trustee except on a properly instituted suit and the petition was dismissed.

Against this order of dismissal the minor, through his mother, has come to this Court in revision, and it has been urged that the District Judge had jurisdiction. It was pointed out that under S. 49, Trusts Act, the District Judge, as the principal civil Court of original jurisdiction in Amritsar, was empowered to control the discretionary powers conferred on a trustee on suitable occasions arising and that the District Judge could function on a petition. In this view I am unable to agree. S. 49 appears in Ch. V and deals with disabilities of trustees. This section gives the District Judge power to control the actions of a trustee when it becomes necessary to do so. In the following Ch VI provision is made for the rights and the liabilities of beneficiaries and under S. 61 it has been enacted that a beneficiary has a right to compel a trustee to perform any particular act or to restrain him from committing any contemplated or probable breach of trust. The learned counsel who appeared for the petitioner admitted that the beneficiary could not move the Court under S. 61 in a summary manner. In my judgment the view taken by the learned District Judge is correct and is in consonance with Civil Revision No. 864 of 1926, decided by Mr Justice Coldstream on the 30th November 1926.

I, therefore, dismiss this petition with costs.

N.K. *Petition dismissed.*

A. I. R. 1928 Lahore 238

TEK CHAND AND BHIDE, JJ.

Jalmeja Singh—Plaintiff—Appellant.

v.

Mt. Askaur and *others*—Defendants—Respondents.

Second Appeal No. 389 of 1923, Decided on 7th January 1928, from decree of Dist. Judge, Amritsar, D/- 23rd January 1923.

Civil P. C., O. 2, R. 2—Different causes of action—Mortgaged land owned by different cosharers—All cosharers except one selling the whole land—Suit to pre-empt the whole land by the remaining cosharer but excluding his share—Subsequent suit for redemption in respect of that share is not barred.

The provisions of O. 2, R. 2, Civil P. C., only require that a suit shall include the whole of the claim with respect to one and the same cause of action and not that every suit shall include every claim of every cause of action which the plaintiff may have against the defendant at the time.

Certain land which was subject to a mortgage was jointly mutated in favour of the plaintiff and defendants as the reversioners of *A*. Subsequently defendants sold the whole of the land including the plaintiff's share to another person. The plaintiff instituted a pre-emption suit with respect to the share of the cosharers, but excluded his own share from the suit on the specific allegation that tho cosharers had no authority to transfer his share and the sale with respect to his share was, therefore, void. The pre-emption suit succeeded. Then plaintiff sued for redemption of the land.

Held: that the suit was not barred under O. 2, R. 2: 8 *Mad.* 520 and 41 *I. A.* 142 (*P. C.*). *Foll.*; 37 *All.* 529, *Dist.* [P 239 C 1]

Mool Chand—for Appellant.

Gokal Chand Narang—for Respondents.

Bhide, J.—This second appeal arises out of a suit for redemption of mortgage which has been dismissed by the lower Courts as barred by the provisions of O. 2, R. 2, Civil P. C. The land in dispute formed a portion of a holding of about 221 kanals of land which belonged to one Jawala Singh and was mortgaged by him to Sardarni Basant Kaur by a registered deed dated 19th May 1888.

On the death of Jawala Singh the land was jointly mutated in favour of the plaintiff and defendants 2—5 as the reversioners of Jawala Singh. Subsequently defendants 2—5 sold the whole of the land including the plaintiff's share to defendant 1. The plaintiff instituted a pre-emption suit with respect to the share of the cosharers, namely, defendants 2—5, but excluded his own share from the suit on the specific allegation that the cosharers had no authority to transfer his share, and the sale with respect to his share was, therefore, void, the pre-emption suit succeeded. The present suit for redemption was instituted on the 23rd February 1920. The confention of defendant 1 in the present suit was that the suit was barred by the provisions of O. 2, R. 2, Civil P. C., inasmuch as at the time when the plaintiffs instituted the pre-emption suit he had a right to sue for cancellation of the sale with respect to his own share and sue for redemption of the mortgage. This contention appears to us to be wholly erroneous. The sale of the plaintiff's share by defendants 2 to 5 being unauthorized (a fact which was not disputed in the pre-emption suit) we do not see why it was necessary at all for the plaintiff to sue for cancellation of the sale of his own share at that time. The cause of action, moreover, on which the present suit is based, is distinct from that in the pre-emption suit. "Cause of action" has been defined as a bundle of essential facts which a plaintiff has to prove in order to establish his claim : *Musayakeb* v. *Mani Lal* (1). Now, the essential facts which a plaintiff had to prove in a pre-emption suit are obviously different to those which he has to establish in a suit for redemption of a mortgage. The provisions of O. 2, R. 2, Civil P. C., only require that a suit shall include the whole of the claim with respect to one and the same cause of action and not that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant at the time : (see *Pittapur Raja* v. *Surya Row* (2) and *Saminathan Chetty* v. *Palaniappa Chetty* (3).

(1) [1905] 29 Bom. 368=7 Bom. L. R. 20.
(2) [1885] 8 Mad. 520=12 I. A. 116 (P. C.).
(3) [1914] 41 I. A. 142=26 I. C. 228=18 C. W. N. 617 (P. C.).

The learned counsel for the respondents has cited *Sahodra Bibi* v. *Bageshri* (4) and attempted to support the decision of the lower Courts on the ground that the plaintiff was bound to sue for pre-emption of the whole of the property sold, although he alleged that the sale with respect to his own share was void. The present case is distinguishable from the ruling cited as it was not disputed by the defendants in the previous suit that the sale of the plaintiffs' share was unauthorized and, therefore, void ; but, even apart from this the contention seems to have no bearing on the issue now before us. The plea that, the plaintiff ought to have sued for pre-emption of the whole of the land sold, might have been at best a good defence to the pre-emption suit, but it cannot bar the present suit for redemption of a mortgage which, as pointed out above, is based on a different cause of action.

We accordingly accept the appeal and, setting aside the orders of the lower Courts, remand the case for decision of the remaining issues. The stamp on appeal will be refunded. Costs will follow the final decision.

S.J. *Case remanded.*

(4) [1915] 37 All. 529=29 I. C. 1000=13 A. L. J. 711.

A. I. R. 1928 Lahore 239

SHADI LAL, C. J., AND AGHA HAIDAR, J

Randhir Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1124 of 1927, Decided on 13th January 1928, from order of Sess. Judge, Gujranwala, D/- 23rd May 1927.

Arms Act (9 *of* 1918), *Ss.* 27 *and* 19—*Swordstick is not a kirpan.*

A swordstick is a weapon different from a kirpan. The two expressions cannot be regarded as synonymous, and so the possession of a swordstick by a Sikh is not exempted by S. 27 of the Arms Act: *A. I. R.* 1924 *Lah.* 600, *Ref.* [P 240 C 1]

Niamat Rai—for Petitioner.

Anant Ram Khosla—for the Crown.

Shadi Lal, C. J.—The petitioner, Randhir Singh, has been convicted under S. 19, Arms Act (11 of 1878), and has been sentenced to suffer rigorous imprisonment for six months. It is common ground that, on 23rd February 1927,

Randhir Singh was found in possession of a large swordstick, but it is contended that he was protected by the notification issued by the Governor-General in Council under S. 27, Arms Act, which excludes kirpans possessed or carried by Sikhs from the operation of the prohibitions and directions contained in that Act.

The petitioner is undoubtedly a Sikh, but the question for determination is whether a swordstick, which he was admittedly carrying on 23rd February 1927, can be held to be a kirpan within the meaning of the notification. To this question our answer is in the negative. We are aware of the ruling in *Hari Singh* v. *Crown* (1), where a Division Bench of this Court held that the word "kirpan" means a sword, but we cannot accede to the contention that it is wide enough to include a swordstick. A swordstick is a weapon different from a kirpan, and the two expressions cannot be regarded as synonymous.

It is significant that in the Court of trial Magistrate no such contention was put forward on behalf of the accused, and that before the learned Sessions Judge it was admitted that the conviction under S. 19 was justified, but it was urged that the sentence be reduced. This prayer was accepted by the learned Sessions Judge, and the sentence of one year's rigorous imprisonment imposed by the trial Court was reduced to that of six months imprisonment.

We are of opinion that the petitioner has been rightly convicted; but, considering that he was released on bail by the learned Judge who admitted the case, we accept the application for revision so far as to reduce the period of imprisonment to that already undergone.

S.J. *Sentence reduced.*

(1) A. I. R. 1924 Lah. 600=5 Lah. 308.

A. I. R. 1928 Lahore 240

ZAFAR ALI, J.

Mangal Sain—Objector—Appellant.

v.

Indian Merchants Bank, Amritsar—Plaintiff—Respondent.

Misc. First Appeal No. 727 of 1927, Decided on 6th December 1927, from order of Addl. Dist. Judge, Amritsar, D/- 15th December 1926.

(a) *Companies Act* (7 *of* 1913), *S.* 55—*Member cannot surrender his share and company cannot accept the surrender except as forfeiture.*

The principle applicable to cases of surrender is that a surrender is good if it amounts to a forfeiture. It is not open to shareholder to surrender at will his share and it is not open to a company to accept surrender of shares unless the act of the company can be brought within the rules relating to forfeiture of shares. To hold that a company can by a resolution of its directors accept surrender of shares would be to allow a company to reduce its capital at its pleasure : *A. I. R.* 1924 *Mad.* 703 and *Bellerby* v. *Rowland Marwood's Steamship Co. Ld.* (1902) 2 *Ch.* 14, *Foll. In re Natal Investment Co.*(1870) 5 *Ch. App.* 22, *Dist.* [P 241 C 2]

(b) *Company—Shareholder whose shares are forfeited ceases to be member but not one surrendering shares.*

A share-holder whose shares are forfeited ceases to be a member but a share-holder who surrenders his share does not cease to be a member. [P 241 C 2]

Badri Dass—for Appellant.

Ram Lal Anand—for Respondent.

Judgment.—The Official Liquidator of the "Indian Merchants Bank, Limited Amritsar, having placed on the list of contributories the name of Mangal Sen, Chumandi Lal Natha Singh and Jas Ram, every one of them filed objections to the effect that he had ceased to be a member of the company and was not liable to contribute as he had surrendered his shares and the Board of Directors had accepted the surrender which it was competent to do under R. 43 of the Articles of Association. The Court below overruled this objection on the general ground that the "surrenders (acceptance of the "surrenders ?) of the objectors' partly paid-up shares (shares ?) and for (?) forfeiture of their allotment money (moneys ?) by the Head Board of Directors was (were) unnecessary and ultra vires as it was in substance a reduction by the company of the shares at the price (?) of discharging the shareholders from further liability to calls.' The objectors have appealed against the above order separately.

The law on the subject is thus reviewed and discussed by Devadoss, J. in *Mirza Ahmad In re* (1).

Granting for argument's sake that the resolution is according to the rules, I am unable to accept the contention that the surrender of shares is permitted by law so as to enable the Directors of the Company to reduce its capital.

Rule 118 (5) gives powers to the directors to accept surrender of shares by

(1) A. I. R. 1924 Mad. 703.

shareholders; but this power which is an unusual power, granting that it is valid, is subject to restrictions; Table A of the Companies Act does not contain any clauses empowering any company to accept surrender of shares. The Companies Act permits forfeiture of shares on certain grounds; but to give an unlimited or wide power to a company to accept surrender of share is, I think, opposed to the principle that a company cannot buy its own shares and to the principle that a company can reduce its capital only with the permission of the Court and on such terms and conditions as it may impose. The power given by R. 118 (5) is very wide. It is in these terms:

> to accept from any member on such terms and conditions as shall be agreed a surrender of his shares or stock or part thereof.

Whatever might have been the view as regards the power of a company to accept surrender of shares, I think it is well settled now that a company cannot exercise wide powers of accepting a surrender. It can only accept a surrender under conditions and limitations under which shares can be forfeited. Reliance is placed upon *Snell's* case *In re Natal Investment Co.* (2). In that case Sir G. M. Griffard, Lord Justice, held that the surrender of shares by Snell was valid. The main reason for the learned Lord Justice holding that Snell's surrender was valid was that his name was not entered on the register of shareholders and that no specific shares were allotted to him though for purposes of the Act he was a shareholder. He found that the substance of the transaction was that both parties were offering to sever their connexion with each other and that the Articles of Association contained a power to cancel shares and that there was nothing in the form preventing the parties from carrying out their intention. *Snell's* case (2) cannot be considered to be good law in view of the decision of the Court of appeal in *Bellerby* v. *Rowland and Marwood's Steamship Co. Ltd.* (3) at p. 32. Cozens Hardy, L. J., lays down the law thus :

> Every surrender of shares, whether fully paid or not, involves a reduction of capital, which is unlawful, except when sanctioned by the Court under the Companies Act of 1867 and 1877. Forfeiture is statutory exception, and is the only exception. For I regard a surrender under circumstances which would justify a forfeiture, as merely equivalent to a forfeiture.

Collins, M. R. quotes with approval the following observation of the learned Master of the Rolls in *In re Dronfield Silkstone Coal Co.* (4).

> There is no reference in the Act to surrenders of shares ; but these have been admitted by the Courts, upon the principle, as I understand it that they have practically the same effect as forfeiture, the main difference being that the one is a proceeding in invitum, and the other a proceeding taken with the assent of the shareholders who is unable to retain and pay future calls on the shares.

The principle, therefore, applicable to cases of surrender is that a surrender is good if it amounts to a forfeiture. It is not open to shareholder to surrender at will his share, especially when he has to meet future calls and it is not open to a company to accept surrender of shares unless the act of the company can be brought within the rules relating to forfeitures of shares. To hold that a company can by a resolution of its directors accept surrender of shares would be to allow a company to reduce its capital at its pleasure.

In the present case also there was a rule empowering the directors to accept surrenders of shares but according to the general principles: (1) that a surrender of shares involves a reduction of the capital; and (2) that the capital of a company cannot be reduced but by leave of the Court, no surrender can be lawfully accepted but under circumstances which would justify a forfeiture. There is nothing to indicate that the surrenders of shares by the objectors were accepted under such circumstances. According to the Companies Act a shareholder ceases to be a member whose shares are forfeited. It is nowhere laid down that a shareholder who surrenders his share ceases to be a member. It cannot, therefore, be said that the objectors ceased to be members as contemplated by S. 156, Contract Act. I therefore dismiss the appeal with costs.

S.J. *Appeal dismissed.*

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(2) [1870] 5 Ch. 22=18 W. R. 30=21 L.T. 445.
(3) [1902] 2 Ch. 14=71 L. J. Ch. 541=50 W. R. 566=86 L. T. 671=9 Manson 291=18 T. L. R. 582.
(4) [1881] 17 Ch. D. 76=50 L. J. Ch. 387=29 W. R. 768=44 L. T. 361.

* A. I. R. 1928 Lahore 242

TEK CHAND, J.

Mt. Bal Kaur and *others*—Plaintiffs—Appellants.

v.

Mt. Har Kaur and *others*—Defendants—Respondents.

Second Appeal No. 951 of 1927, Decided on 15th November 1927, from decree of Dist. Judge, Amritsar, D/- 6th January 1927.

(a) *Hindu Law—An alienation made by one of the co-widows has no legal effect after her death.*

When two co-widows succeed as co-heirs to the estate of their husband, they take it as joint tenants with rights of survivorship and of equal beneficial enjoyment, and an alienation made by one of such co-widows has no legal effect after her death. [P 242 C 2]

(b) *Hindu Law—Daughter can maintain a declaratory suit regarding an alienation effected by her stepmother.*

A daughter can maintain a declaratory suit regarding an alienation effected by her stepmother. On the death of the stepmother the property will descend to the heirs of her husband and his daughter is under Hindu law entitled to succeed to it. She is, therefore, his reversioner and has got a locus standi to contest the alienation made by her stepmother. [P 243 C 1]

* (c) *Limitation Act, Art.* 120—*Daughter's sons are not immediate reversioners of their grandmother—Their suit for declaration is governed by Art.* 120.

Daughter's sons are under Hindu law not entitled to succeed in the lifetime of their mother and, therefore, are not the immediate reversioners of their grand mother. Their suit for declaration that an alienation by their grand-mother is not binding on them is governed by Art. 120 : 15 *P. R.* 1916, *Ref.* [P 243 C 2]

Amir Chand—for Appellants.

Mehr Chand Mahajan and *Jai Gopal Sethu*—for Respondents.

Judgment.—One Kishan Chand, a Khatri of Amritsar,died sonless many years ago, leaving him surviving two widows Mt. Bishen Devi and Mt. Har Kaur (defendant 1) and two daughters by Bishan Devi mamed Mt. Bal Kaur (plaintiff 1) and Mt. Ram Kaur (plaintiff 3). One of the properties left by the deceased was a shop which was jointly taken possession of by both the widows Mt. Bishan Devi and Mt. Har Kaur. On 19th April 1912 Mt. Bishan Devi made a gift of her half-share in the shop to her daughters Mt. Bal Kuar and Mt. Ram Kaur and their sons Om Parkash (plaintiff 2) and Gopal Das (plaintiff 4), Mt. Bishan Devi, died soon after on 9th June 1912.

The other widow, Mt. Har Kaur, sold the whole of the shop to Ghulam Jilani, defendant 2, on 16th December 1916. There have been subsequent alienations of this shop and it now stands in the name of Kishan Chand defendant 5. On 8th October 1925 the present suit was instituted by the two daughters of Mt. Bishen Devi and the two sons of these daughters claiming (a) possession of one half of the shop which had been gifted to the plaintiffs by Mt. Bishan Devi on 19th April 1912; and (b) a declaration that the sale of the other half by Mt. Har Kaur dated 16th December 1916 shall not affect the reversionary rights of the plaintiffs after her death. The suit was decreed by the trial Court but has been dismissed by the learned District Judge.

On second appeal, the first point urged by Mr. Amin Chand for the appellants is that the plaintiffs are entitled to a decree for possession of one-half of the shop which had been gifted to them by Mt. Bishen Devi. He contends, and in my opinion rightly, that the finding of the learned District Judge, that possession of the gifted portion of the shop did not pass to the donees in 1912, is a very confused one and has not been arrived at after a discussion of the oral and documentary evidence on the record. If the decision of this part of the case had turned on this point alone, it would have been necessary for this Court to set aside the finding and to order a remand or to go into the evidence itself and record an independent finding. But the plaintiffs' claim for possession of this portion of the shop must fail on the short ground that Mt. Bishan Devi had no power to make a valid gift of it to the appellants. On Kishan Chand's death the shop was taken possession of by the two widows jointly as co-heirs. The proposition of Hindu Law is firmly established that when two co-widows succeed as co-heirs to the estate of their husband they take it as joint tenants with rights of survivorship and of equal beneficial enjoyment, and an alienation made by one of such co-widows has no legal effect after her death. Even if it was a fact that the donees had got possession of Mt. Bishan Devi's half-share in 1912, that fact alone would not make the gift valid, especially when they, according to their learned counsel, lost possession in 1916 at the latest. The gift was, therefore, invalid and the plain-

tiffs' claim for immediate possession on the basis of this gift fails. It follows from what has been stated above that on Mt. Bishan Devi's death in 1912 Mt. Har Kaur entered into possession of the whole of the shop on the usual widow's estate. It is not denied for the respondents that her rights in the shop were limited and she could sell it only for legal necessity. The reversioners would, therefore, be entitled to claim a declaration that the sale of 1916 was ineffectual against their interests. The learned District Judge has, however, declined to grant the plaintiffs a declaration holding:

(a) that plaintiffs 1 and 3, being the step-daughters of Mt. Har Kaur, had no locus standi to sue; and

(b) that plaintiffs 2 and 4, not being the immediate reversioners, had six years to sue for a declaration under Art. 120, and not having sued within that period their claim was time barred.

As to (a): Mr. Mehr Chand, for the respondents admits that he is unable to support the view of the learned District Judge that the daughters could not maintain a declaratory suit regarding an alienation effected by their stepmother. He frankly concedes that on the death of Mt. Har Kaur the property would descend to the heirs of her husband Kishan Chand and that Mt. Bal Kaur and Mt. Ram Kaur being his daughters are under Hindu law entitled to succeed to it. They are, therefore, his reversioners and have got a locus standi to contest the alienation made by their stepmother Mt. Har Kaur. The finding of the District Judge on this point must be reversed, but before the plaintiffs can get a decree it must be found that the alienation was not for necessity. As the learned District Judge has not given any finding on this issue, the case must go back to him for this purpose.

As regards the claim of the daughter's sons (plaintiffs 2 and 4) the learned District Judge has held that it was barred by time under Art. 120. Mr. Amin Chand for the appellants contends that the claim of these plaintiffs is also within time under Art. 125. But that article applies only to a suit for a declaration by the immediate reversioners of the female alienor; see *Mt. Thakri* v. *Mt. Ganeshi* (1). The daughters' sons are under Hindu law not entitled to succeed in the lifetime of their mothers (plaintiffs 1 and 3) and, therefore, are not the immediate reversioners of the alienor. Their suit for declaration is governed by Art. 120, and in clearly time barred.

I, therefore, dismiss the appeal of plaintiff 2 (Om Parkash) and plaintiff 4 (Gopal Das), but accept that of plaintiff 1 (Mt. Bal Kaur) and plaintiff 3 (Mt. Ram Kaur) holding that they can maintain a suit for declaration that the sale of the whole of the shop by Mt. Har Kaur shall not affect their reversionary rights after her death, and setting aside the decree of the lower appellate Court, so far as these appellants are concerned, remand the case under O. 41, R. 23, for decision in accordance with law. Having regard to all the circumstances of the case the parties shall bear their own costs of the litigation hitherto incurred.

N.K. *Case remanded.*

(1) [1916] 15 P. R. 1916=38 I. C. 161=198 P. W. R. 1915.

A. I. R. 1928 Lahore 243

TEK CHAND, J.

Parman Ram—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1717 of 1927, Decided on 13th January 1928, from order of Dist. Magistrate, Muzaffargarh, D/- 2nd September 1927.

Criminal P. C., S. 107—Mere enmity between parties is not sufficient—It must be proved that a breach of the peace is imminent.

Mere existence of enmity between the persons of factions is no ground for instituting proceedings under S. 107 against one or both the parties. In order to bring a case within that section it must be established that a breach of the peace is imminent. [P 244 C 1, 2]

Nand Lal—for Petitioner.

Judgment.—The petitioner Parman Ram has been bound down under S. 107, Criminal P. C., and ordered to execute a bond in the sum of Rs. 1,000 to keep the peace for one year, or in default to undergo simple imprisonment for the same period. His appeal has been dismissed by the learned District Magistrate, Muzaffargarh, and he has come up to this Court on the revision side.

The allegations against the petitioner are that he has been carrying on a liaison with one Mt. Bhirawan, the wife of Fazal who is a tenant of his; that Fazal

had been conniving at the conduct of his wife; that lately Mt. Bhirawan had formed an intrigue with one Sardara and that the petitioner, in order to keep Sardara away from the woman had instigated Ramzan chowkidar, to make a false complaint to the police that Sardara and his cousins were men of bad character and ought to be proceeded against under S. 110, Criminal P. C. The complaint made by Ramzan was found to be baseless by the police who reported that it had been made at the instance of the petitioner with a view to keep Sardara away from the woman. On this suspicion proceedings under S. 107, Criminal P. C., were started against the petitioner.

It is obvious that the above allegations, even if true, are wholly insufficient to justify action being taken against the petitioner under S. 107. The trial Magistrate has stated that if security be not taken from the petitioner there is a danger of his administering poison to Sardara and his cousin Fazil. I have gone through the record and cannot find any suggestion by any of the prosecution witnesses that there is apprehension of poison being administered to Sardara. The evidence, in fact, wholly falls short of showing that there was any likelihood of a breach of the peace. The learned District Magistrate has relied on the evidence of Ahmad Yar Khan, Sub-Inspector (P. W. 1), Raushan Ali, lambardar (P. W. 2), and Ghulam Yasin (P. W. 3). But none of them deposes to any incident from which it might be inferred that there was danger of a breach of the peace. The fourth witness, Amir Shah, instead of supporting the case for the prosecution has given evidence in favour of the defence.

The mere fact that the petitioner's intrigue with the wife of his tenant had been interrupted by her transferring her affection to Sardara and that the petitioner had instigated the chowkidar to institute a false complaint against the said Sardara cannot justify the petitioner being put on security. It has been pointed out over and over again by this and the other Courts that the mere existence of enmity between the persons or factions is no ground for instituting proceedings under S. 107 against one or both the parties. In order to bring a case within that section it must be established that a breach of the peace is imminent On the present record I can find nothing to warrant such an apprehension.

The procedure adopted by the trial Court is defective in several particulars, but I do not think it necessary to advert to it as the petition must succeed on the merits. I, accordingly, accept the petition, set aside the order of the Courts below and discharge the petitioner from his bond.

S.J. *Petition accepted.*

A. I. R. 1928 Lahore 244

TEK CHAND, J.

Mt. Atma Devi—Plaintiff—Petitioner.

v.

Mt. Shib Devi—Defendant—Respondent.

Civil Revn. No. 368 of 1927, Decided on 23rd November 1927, from order of Addl. Dist. Judge, Amritsar, D/- 18th January 1927.

(a) *Civil P. C., Ss. 151 and 152—First application for amendment of decree dismissed on merits—Subsequent application for substantially the same relief is ordinarily barred—Civil P. C., S. 11.*

A Court is competent to entertain successive applications for amendment of clerical or arithmetical mistakes in judgments or decrees and a decision on a prior application of this kind does not operate as res judicata in subsequent applications, but if an application for amendment has been heard and disposed of on the merits, the Court will not, except in exceptional circumstances, entertain a subsequent application for substantially the same relief: 39 *Cal.* 265, *Foll.* [P 245 C 1]

(b) *Power-of-attorney—Authority to prefer appeal to High Court includes power to prefer revision.*

The power to prefer an appeal to the High Court must be liberally interpreted and it must be held that it includes the power to prefer petition for revision. [P 245 C 1]

Charan Singh—for Petitioner.

Din Dayal Kapur—for Respondent.

Judgment.—This is a petition for revision of an order dismissing an application under Ss. 152 and 151, Civil P. C., for amendment of certain alleged clerical and arithmetical mistakes in the judgment and decree passed in favour of the plaintiff in 1922 on foot of a mortgage.

For the respondents two preliminary objections are raised. Firstly, it is contended that this petition for revision had not been properly instituted as Sobhi Charan Singh, Advocate, who filed the petition as the mukhtar khas of the petitioner had not been authorized in the

mukhtarnama to institute a petition for revision. I have referred to the mukhtarnama which is on the record and find that it authorized the mukhtar to prefer an appeal to this Court. Technically speaking the power to prefer a revision is not specifically given in the mukhtarnama but, in my opinion, the power to prefer an appeal to this Court must be liberally interpreted and it must be held that Sodhi Charan Singh was competent to lodge a petition for revision. I, therefore, overrule this objection.

Secondly, it is objected that an application for correction of the alleged clerical and arithmetical mistakes was presented by the petitioner on 18th November 1924, and after notice to the respondent was dismissed on the merits on 11th December 1924. In these circumstances it is contended that another application for substantially the same relief is not competent. I have heard the learned counsel for both parties in respect of the alleged arithmetical mistakes which are stated to have accidentally crept in the judgment and have also examined the application for amendment, dated 18th November 1924, above referred to. In my opinion the two applications are substantially the same and in view of the decision of the previous application and the long delay in presenting the present application the lower Court was justified in dismissing it. As laid down in *Langat Singh* v. *Janki Koer* (1), a Court is competent to entertain successive applications for amendment of clerical or arithmetical mistakes in judgments or decrees and a decision on a prior application of this kind does not operate as res judicata in subsequent applications, but if an application for amendment has been heard and disposed of on the merits, the Court will not, except in exceptional circumstances, entertain a subsequent application for substantially the same relief. In my opinion no such exceptional circumstances are made out in this case.

I, therefore, hold that the order of the lower Court was correct and dismiss the petition for revision. Having regard to all the circumstances of the case, however, I would leave the parties to bear their own costs in both the Courts.

S.J. *Petition dismissed.*

(1) [1912] 39 Cal 235=12 I. C. 151=14 C. L. J 481.

A. I. R. 1928 Lahore 245

Special Bench

FFORDE, ADDISON AND COLDSTREAM, JJ.

Lajpat Rai—Petitioner.

v.

Emperor—Opposite Party.

Criminal Case No. 5 of 1927, Decided on 20th March 1928, for setting aside order of Governor-in-Council D/- 2nd May 1927.

Criminal P. C., S. 99-A—Crown must prove possibility of conviction under S. 153-A, I. P. C.

In order to justify forfeiture under S. 99-A it is necessary for the Government to satisfy the Court that on the evidence produced by the prosecution a conviction could have been had under S. 153-A, I. P. C. [P 246 C 2]

Ram Lal Anand—for Petitioner

Carden Noad—for the Crown.

Fforde, J.—This is an application by Lala Lajpat Rai, proprietor of Messrs. Lajpat Rai & Sons, Book-sellers, Lohari Gate, Lahore, under the provisions of S. 99-B, Criminal P. C., asking that an order of the Governor-in-Council dated 2nd May 1927, whereby a certain book entitled "Khun-i-Darvesh Urf Shahid Sanyasi" was forfeited, be set aside and that the copies forfeited be directed to be returned to the petitioner. The learned Government Advocate on the one side, and the petitioner's counsel on the other, were given time within which to produce evidence in the form of affidavits to show on the one hand the wrongful intent of the petitioner in publishing this book, and on the other hand to rebut such intent.

On behalf of the Crown a certain number of persons have put their signatures to typed documents, which are in a common form, in which they purport to state that they have read the book in question and that it is such as would create hatred, contempt and enmity between Hindus and Muslims. Although these affidavits are in English some of the signatures of the alleged deponents are in vernacular, and I may say at once that evidence in this shape is of no value whatsoever. The learned Government Advocate has frankly and quite properly admitted that the evidence of malicious intent is to be found, if anywhere, in the book itself.

Mr. Ram Lal Anand has put in an affidavit sworn to by the son of the deceased petitioner in which he states that 2,000

copies of the book in question were printed on 1st March 1927, for the Urdu Edition and 2,000 for the Hindi edition and that with the exception of 500 copies all have been sold out. He states that the publication elicited no protest whatever from any quarter, nor was any article written against it in any newspaper, nor was it condemned at any meeting. This statement has not been controverted, and there is no allegation in the affidavits filed on behalf of the Crown that the book in question was the subject of any demonstration or that it excited any communal feeling whatsoever.

The question for us to decide is whether there is inherent evidence in the work itself of an intent in the mind of the writer to promote, or attempt to promote feelings of enmity or hatred between Hindus and Musalmans. It is alleged by Mr. Ram Lal that the object of the writer was to write a life of the late Swami Shradha Nand, and in doing so to preach love of country and promote Hindu-Muslim unity. He says that the book throughout shows this intent and that nowhere is the Muslim religion, or the leader of that faith, criticized in intemperate language, or indeed at all. He says that any criticizms in the book directed against persons of the Muslim faith are against those who do not act up to the true faith of Islam. The book is written in a lofty and dignified style and contains many passages of literary excellence and, indeed, beauty, which even the bald official translation has not quite destroyed, and there is nothing in the language of the work of an objectionable nature except in one or two sentences. In these passages the language is certainly bitter and scathing, but Mr. Ram Lal argues that it is directed against some Muhammadan Journals which are alleged in the play to be attacking the Shudhi work of Swami Shradha Nand, and he points out that the Muslim community as a whole is nowhere attacked. In fact the Muslim religion is praised throughout the work and the murderer of the Swami is alleged to have been incited to his act by the devil.

Having been taken through this work by Mr. Ram Lal and having listened to his extremely able argument, I am unable to hold that from the nature of the work itself it has been established that the intention of the writer was to promote, or attempt to promote, feelings of enmity or hatred between the two communities. I do not think there is any need to refer to the law on the subject. In order to justify forfeiture under S. 99-A, Criminal P. C., it is necessary for the Government Advocate to satisfy the Court that on the evidence produced by the prosecution a conviction could have been had under S. 153-A, I. P. C. In my judgment the evidence produced, which in effect consists of the book itself, would not be sufficient to justify such a conviction.

We have been referred to *Chakravarti* v. *Emperor* (1), which has been followed by this Court in the "Vartman" case* with approval, and I need only say that the principles laid down by Rankin, J., (now Chief Justice) appear to me to be entirely sound. Having come to the conclusion that the Crown has failed to establish that the writer of this work had been actuated by that malicious intent which it is necessary to prove by extrinsic evidence, or to infer from the nature of the work itself, I would accept the application of the petitioner and set aside the order of forfeiture. I would give applicant his costs. Counsel's fees will be measured at Rs. 250.

Addison, J.—I concur.

Coldstream, J.—After carefully considering this case I do not find it certainly established by the evidence that the intention of the applicant in writing the book under consideration or any part of it was to promote feelings of enmity or hatred between different classes of His Majesty's subjects. For that reason I concur in the order which it is proposed to pass.

D.D. *Order set aside.*

(1) A. I. R. 1926 Cal. 1133=54 Cal. 59.
* [A. I. R. 1927 Lah. 594—Ed.]

A. I. R. 1928 Lahore 246

ZAFAR ALI, J.

Nur Din—Plaintiff—Appellant.

v.

Allah Ditta and *others*—Defendants—Respondents.

Second Appeal No. 441 of 1927, Decided on 18th November 1927, from decree of Addl. Dist. Judge, Lahore, D/- 12th November 1926.

Contract Act, S. 134—Legal representatives of the principal debtor not brought on record —Surety is discharged.

Where the principal debtor is discharged due to failure to bring his representatives on record the surety for the debtor is also discharged. [P 247 1]

Badri Nath—for Appellant.

M. R. Wali—for Respondent.

Judgment. — According to the bond sued one Charagh Din was the principal debtor and Nur Ilahi and Allah Ditta were his sureties. One of the sureties died and the obligee brought a suit against the principal debtor and the surety who was alive, and the sons of the other, to recover his bond debt. The principal debtor also died during the pendency of the suit but his death was not brought to the notice of the trial Court and that Court eventually passed a decree against all the defendants. On appeal by one of them it was argued that the decree against the principal debtor was a nullity, having been passed after his death without bringing his legal representatives on the record that as the suit has abated against the principal debtor by the omission of the plaintiff the sureties were discharged. The learned Additional District Judge, who heard the appeal accepted this contention and dismissed the suit.

The plaintiff has come up to this Court in second appeal and it is argued on his behalf that though the suit had abated as against the principal debtor the sureties were not discharged. The principle of law applicable to the case is embodied in S. 134, Contract Act (9 of 1872). The relevant portion of the section runs thus :

The surety is discharged * * by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Now the legal consequence of the omission on the part of the creditor to bring the legal representatives of the principal debtor on the record was that he (the creditor) had no remedy left against his representatives, that is to say, they were discharged. The section is so clear that no other interpretation can be placed upon it.

I, therefore, dismiss the appeal with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 247

BROADWAY AND JAI LAL, JJ.

Pira and *others*—Defendants—Appellants.

v.

Fatta and *another*—Plaintiff—Respondents.

First Appeal No. 2436 of 1923, Decided on 24th November 1927, from decree of Senior Sub-Judge, Jhang, D/- 9th July 1923.

Custom (Punjab)—Chelas and Sials of village Chela—A sonless proprietor can alienate only for necessity.

Chelas and Sials of village Chela are governed by the ordinary custom prevailing in the province that a sonless proprietor can only alienate his property for necessity. [P 248 C 2]

Muhammad Munir, Anant. Ram and *Shiv Charan Das* for *Mr. Jagan Nath Aggarwal*—for Appellants.

Broadway, J.—One Naman a Chela of mauza Chela in the district of Jhang on 11th March 1921, mortgaged 114 kanals 7 marlas of land to Khan Bahadur Nawab Maula Dad Khan, Honorary Magistrate, and one Hidayat. The mortgage was not to be redeemed for 30 years and the charge on the property was to the extent of Rs. 1,000.

On 30th March 1921, Naman executed a sale-deed by which he sold the same land, that had been mortgaged, to Lohla, Walli, Pathana and Ghulam Hussain for Rs. 3,500. The vendees undertook to redeem the mortgage when it became redeemable, that is, after 30 years. On 2nd May 1922, one Fatta, a first cousin of Naman, instituted a suit against the mortgagees and vendees challenging both the mortgage and the sale on the ground that the property mortgaged and sold was ancestral, that both the sale and mortgage had been without consideration and for no necessity and praying for a declaration to the effect that the sale and mortgage would not affect his reversionary rights on the death of Nawan. The alienees joined in contesting the suit. They denied that the property was ancestral, pleaded full consideration and valid necessity and also urged that inasmuch as the tribal bond in this village had been broken Naman had an unrestricted right to alienate his property.

The trial Court held that the property was ancestral, that the tribal bond had indeed been broken, nevertheless, on the evidence Naman was governed by custom

and that he being a sonless proprietor his right to alienate was restricted. On the question of consideration it was found that only Rs. 600 of the mortgage consideration appeared to have passed and there was no necessity for that or any other amount. The plaintiff was accordingly granted a decree.

Against this decree the mortgagees and vendees have preferred this joint appeal and Mr. Muhammad Munir has taken us through the relevant portions of the record with meticulous care. It has been urged that the evidence on the record did not warrant the conclusion that the property was ancestral; further that inasmuch as it had been found that the tribal bond had been broken, the unrestricted right to alienate should have been recognized. Finally, it was urged that at least Rs. 600 out of the Rs. 1,000 which formed the consideration for the mortgage should have been allowed as being for necessity on the ground that it, at any rate, was a previous debt.

Now the evidence with regard to the ancestral nature of the property appears to me to be conclusive. The history of the village shows that it was founded by one Chela and that the village was called after his name. It is true that the case was not very well handled in the Court below by the various counsel concerned with the result that it became necessary to examine the kanungo more than once. Taking his evidence as a whole, as Mr. Muhammad Munir says we ought to do, the impression left on my mind is that according to the revenue-papers Chela is undoubtedly the ancestor of the plaintiff Fatta and the alienor Naman and as Chela owned the entire village. I see no reason to differ from the conclusion arrived at by the Senior Subordinate Judge that the property in suit is ancestral qua the plaintiff.

Next it was urged that as the tribal bond had been broken the presumption of a restricted right to alienate had been rebutted. That appears to have been fully recognized by the learned Senior Subordinate Judge who has clearly come to his conclusion in this part of the case on the evidence led by the plaintiff. A large number of sales and mortgages nearly 300 in all appear to have been effected within the last 35 years and it is these sales and mortgages which account to a large extent for the heterogenous state of the village. The learned Senior Subordinate Judge points out in his judgment that none of these sales and mortgages were shown to have been effected by sonless proprietors in the presence of any collaterals. I have asked Mr. Muhammad Munir to select out of the long list of alienations one which could be said to have been effected by a sonless proprietor but Mr. Muhammad Munir very frankly and very properly admitted that it was impossible for him to do so. On the other hand, the plaintiff has led oral evidence consisting of members of the same tribe, and, in some instances, family, who agree in asserting that they, Chelas and Sials, in this village are governed by the ordinary custom prevailing in the province and that a sonless proprietor can only alienate his property for necessity. After an examination of this evidence which includes two instances proved up to this Court in 1900 and 1917 I find myself in agreement with the learned Senior Subordinate Judge and hold that these Chela and Sials are not allowed to alienate their ancestral propeary except for necessity. It should, of course, be understood that I am confining my finding to sonless proprietors.

As to the question of the allowance of Rs. 600 it appears that Rs. 600 were claimed by Lohla to whom this amount was to be paid by the Nawab Sahib when he executed the mortgage. Curiously enough, it is this very Lohla who is one of the vendees when the sale-deed was executed 20 days later. Having regard to all these circumstances, I am afraid I must agree with the learned Senior Subordinate Judge in thinking that the whole of this transaction, mortgage and sale included, is a highly suspicious one. Lohla's debt, in my opinion, cannot be traced as a just antecedent debt, and as it has not been proved to be separately for necessity, I do not think we can interfere with the decision of the Court below. I would, therefore, dismiss this appeal, but, as there has been no representation on the other side, without costs.

Jai Lal, J.—I agree.

N.K. *Appeal dismissed.*

* A. I. R. 1928 Lahore 249

ADDISON, J.

Babu Singh — Decree-holder — Appellant.

v.

S. Gurbakhsh Singh—Respondent.

First Appeal No. 1000 of 1927, Decided on 27th September 1927, from order of Senior Sub-Judge, Amritsar.

(a) *Civil P. C., O. 21, R. 69, and O. 21, R. 84 —Court sale not within the precincts of Court —Officer conducting sale adjourning it to a further date and on that date closing auction for reporting some matter to the executing Court—Auction cannot be said to have been closed.*

A Court sale was fixed for the 23rd August 1920 and as no bid was obtained on that day, it was continued to the 24th, when certain bids were obtained. It was again continued to the 25th when the last bid was one of Rs. 4,200 made by the decree-holder. The sale, however, was continued till the morning of the 26th at the request of the judgment-debtor. That day the last bid was of Rs. 4,450, but when the property was going to be knocked down to the purchaser, he refused to sign his bid and said he withdrew from it. He also refused to deposit one-fourth of the amount of his bid. The nazir who was auctioning the property, reported the matter to the executing Court for orders,

Held: that the officer conducting the sale had discretion to adjourn it to the 26th and that he, when he adjourned the sale, did not close the auction but stopped it for reporting the matter for the orders of the executing Court. [P 249 C 2]

Had the executing Court given an order to the effect that the property be resold forthwith under O. 21, R. 84, Civil P. C., the original purchaser would have been liable for the deficiency on the resale under O. 21, R. 71 (obiter). [P 249 C 2]

(b) Civil P. C., O. 21, R. 71—Appeal.

Order regarding liability of defaulting purchaser to pay the deficit on resale, is one in execution and is appealable : *A. I. R. 1922 All. 200 (F.B.), Foll.* [P 249 C 2]

Shamair Chand—for Appellant.

Gokal Chand Narang—for Respondent.

Judgment.—The decree-holder appellant attached certain immovable property of his judgment-debtors and the auction sale was fixed for 23rd August 1926. On that day no bid was obtained and the sale was continued to the 24th when certain bids were obtained. It was again continued to the 25th when the last bid was one of Rs. 4,200 made by the decree-holder. The sale, however, was continued till the morning of the 26th at the request of the judgment-debtor. That day the last bid was of Rs. 4,450, by one Gurbakhsh Singh, a vakil of this Court. When the property was going to be knocked down to him, however, he refused to sign his bid and said he withdrew from it. He also refused to deposit one-fourth of the amount of his bid. The nazir who was auctioning the property did not close the sale, but reported the matter to the executing Court for orders. The Court, instead of ordering a resale forthwith at the risk of Gurbakhsh Singh, commenced the usual dilatory investigation. On the 2nd of October it ordered a resale to take place after a fresh proclamation and the property was sold to the decree-holder for Rs. 4,025 on the 17th November. Before the executing Court Gurbakhsh Singh admitted that he gave the bid but explained that he withdrew it, this of course being no explanation. The executing Court refused to make him pay the difference of price amounting to Rs. 425, on the ground that the auctioneer should not have adjourned the sale till the 26th, and on a further ground that the auctioneer should have proceeded with the sale and should not have concluded the auction. Against this decision the judgment-debtors and decree-holder have appealed.

Both the reasons given by the executing Court are wrong. The sale was not conducted in or within the precincts of the Court-house and the officer conducting it had discretion to adjourn the sale to the 26th under O. 21, R. 69, Civil P. C. Further, the officer conducting the sale did not close the auction, but reported the matter for the orders of the executing Court and it gave no order as it should have done. The order it should have given was that the property be resold forthwith under O. 21, R. 84, Civil P. C. Unfortunately this appeal cannot, however, be accepted as the resale did not take place forthwith within the meaning of O. 21, R. 84. If it had, Gurbakhsh Singh would have been liable for the deficiency on the resale under O. 21, R. 71, Civil P. C.

It was contended that no appeal lay. This is clearly wrong, as it was held in the Full Bench Allahabad case, *Sita Ram* v. *Janki Ram* (1), that such an order was appealable. In that case the highest bidder failed to deposit 25 per cent of the

(1) A. I. R. 1922 All. 200=44 All. 266 (F. B.)

purchase money, and in consequence the property was resold next day. It was held that the resale had been held forthwith within the meaning of O. 21, R. 84, Civil P. C., and the first purchaser was liable to make good the deficiency of the purchase money. In the present case the officer conducting the sale could have gone on with the resale, but instead of doing so he reported the matter to the executing Court which also could have passed the necessary order for resale forthwith. Had this been done Gurbakhsh Singh could have been held liable. He seems to have been trying to raise the bid made by the decree-holder, and when the decree-holder did not give another bid he promptly refused to ratify his own bid by depositing the 25 per cent. Such conduct of a vakil of this Court is most regrettable. For the reasons given, however, I dismiss this appeal but leave parties to bear their own costs.

S.J. *Appeal dismissed.*

** A. I. R. 1928 Lahore 250

TEK CHAND AND AGHA HAIDAR, JJ.

Zinda and *others*—Defendants—Appellants.

Mt. Roshnai and *another* — Plaintiff and Defendant—Respondents.

First Appeal No. 604 of 1923, Decided on 6th January 1928, from decree of Sr. Sub-Judge, Shahpur, D/- 1st Feb. 1923.

(a) *Limitation Act, S. 6—Medical evidence is not of much help in determining age.*

Medical evidence in cases of age of a party to a suit which falls to be decided for purposes of limitation cannot throw much light because from its very nature it is based on conjectures only and it cannot possibly be looked upon for the purposes of determining with precision the exact age of a particular person. In cases when limitation is pleaded in defence, a difference of even a single day settles the fate of the case one way or the other, and no doctor, however conscientious and competent he may be, can give the precise age of a person so as to enable the Court to determine the exact date of that person's birth. [P 252 C 2 ; P 253 C 1]

(b) *Mahomedan law—Minor—Alienation by de facto guardian is void.*

A person who is not under the law authorized to transfer a minor's property cannot give a valid title to the transferee of such property and the transfer effected by a person who thus arrogates to himself the functions of a lawful guardian is absolutely void and of no legal effect : *A. I. R.* 1918 *P. C.* 11, *Foll.* [P 253 C 1]

**(c) *Adverse Possession—Mortgagor and mortgagee—Purchaser of equity under invalid sale prematurely redeeming property—He cannot claim to hold adversely against mortgagor.*

Where a mortgagee is let into possession, his position is to some extent of a trustee and he is bound to protect the interests of the mortgagor and to prevent any invasion of his rights by a stranger. If the mortgagee by neglect or collusion allows any person to come into possession of the property, for instance a purchaser of equity of redemption under an invalid sale, there will be no invasion of the rights of the mortgagor and when the time for redemption comes, he will be entitled to treat the stranger as a trespasser and the stranger's right by adverse possession against the mortgagor will not commence unless and until the mortgagor had sought to exercise the right of redemption and redeemed the property ; *A. I. R.* 1923 *Pat.* 592, *Foll.* [P 255 C 1]

A mortgaged his property for a fixed term of 18 years. Subsequently after *A's* death and during the minority of his son, *B* acting as guardian sold the property to *C* who under a mutual understanding with the mortgagees was allowed to redeem prematurely and was let into possession of the mortgaged property.

Held : that no plea of adverse possession can be successfully raised by *C* against *A's* son on the strength of his possession of the mortgaged property : (124 *P. R.* 1883, *Foll.*) ; The adverse possession, if at all, can be said to commence after the term of 18 years: 4 *Cal.* 327 and 27 *Bom.* 43, *Rel. on.* [P 256 C 1]

(d) *Contract Act, S. 64—Sale of minor's property by guardian set aside as void—Benefits received by minor should be returned.*

When a sale of a minor's property by his de facto guardian is set aside, the minor must return to the vendee the amount of benefit received by him thereunder : *A. I. R.* 1925 *Bom.* 9 and 52 *P. R.* 1904, *Ref.* [P 256 C 2]

Moti Sagar and *Nanak Chand*—for Appellants.

Mukand Lal and *Shambu Lal Puri*—for Respondents.

Agha Haidar, J.—This appeal arises out of a suit for possession of land measuring 292½ kanals detailed and described in the plaint. The Court below decreed the plaintiff's suit. The defendants-appellants have come up in appeal to this Court.

The fact are briefly these : The plaintiff is the son of one Muhammada. On 21st September 1897, Muhammada had mortgaged with possession 443 kanals of land to one Gurdit Singh for a sum of Rs. 183. On 21st October 1899, Muhammada mortgaged the same land in favour of two persons, namely, Mohar Singh and Sukha Singh, for Rs. 766 out of which Rs. 530 were to bear interest at 1% per mensem. As regards the

remaining sum of Rs. 236 the mortgagees were let into possession and the interest on this sum was to be paid by the mortgagees realizing the income of the land. The mortgagees under the terms of the mortgage were to pay the sum of Rs. 290 to Gurdit Singh in satisfaction of the previous mortgage. This mortgage of 21st October 1899 was for a fixed term of 18 years and contains a distinct provision to the effect that the mortgagor shall have no power to redeem the land before the expiry of the fixed term. Muhammada died some time after the execution of this mortgage leaving him surviving his son, Allah Yar, who was an infant of very tender years at the time and his widow, Mt. Bakhtawar. One Raja, son of Allah Dad, was the maternal uncle of the infant, Allah Yar. He professed to be the lawful guardian of Allah Yar, minor, and in that capacity, on 15th April 1908, he executed a sale-deed of the property in suit (292½ kanals) in favour of Ziada, son of Dadu, defendant 1, and Raja who is represented in the present suit by defendants 2 and 3. This sale-deed is Ex. P. 11.

After reciting that the property of the minor was heavily encumbered and was in fact in the possession of Aya Singh, son of Mohar Singh, and Harnam Singh, son of Sukha Singh, mortgagees, it goes on to say that it would be to the interest of the minor if the property in suit were sold so that a portion of the property subject to the prior mortgage may become free from encumbrance and be available for the maintenance of the minor. It is further provided in this document that it shall be the duty of the vendees to redeem the entire mortgaged land measuring 443½ kanals from Aya Singh and Harnam Singh, the previous mortgagees, either privately or through Court and to obtain proprietary possession of the land retaining 292½ kanals for themselves and delivering possession of the remainder, i. e., "151 kanals" to the minor Allah Yar. This sale-deed was for a sum of Rs. 3,000, and the details of the consideration as given at the foot of the document are as follows :

To be paid by the vendees to Aya Singh, etc., sons of Mohar Singh and Harnam Singh, etc., sons of Sukha Singh Sadana, residents of Vijh, previous mortgagees, from whom 443¾ (?) kanals of land (mortgaged) will be redeemed out of the said land 292½ kanals (sold) will come into proprietary possession of the vendees and possession of the remaining redeemed land will be delivered to the said minor.... Rs. 1,300.

To be paid by the vendees to Tara Chand, son of Mutwala Ram Nangpal, resident of Vijh, on account of mortgage money for the mortgaged land attached to Pindiwala well and unsecured debt. (A receipt for the redemption money and the debt discharged due by the father of the minors, will be secured), ... Rs. 575.

Received a rukka from Raja vendee and Umar Bakhsh son of Zaida, vendee, in the name of Zaida, vendee, the money due under the rukka being payable on demand ... ... Rs. 550.

Received on account of registration expenses ... ... Rs. 50

To be received in cash before the Sub-Registrar, Shahpur ... ... Rs. 525

There is a receipt dated 26th October 1908 (Ex. D. 7), which is printed at p. 15 of the record. In this receipt the prior mortgagees, that is to say, the representatives of Mohar Singh and Sukha Singh, after referring to the mortgage of 21st October 1899, state that the total amount due under the said mortgage came to Rs. 2,900. They further say that the money due from Allah Yar, minor, to them on calculation came to Rs. 562 on account of profits of harvests for the remaining nine years and Rs. 572 on account of interest up to date. Out of this total sum of Rs. 1,134 they acknowledge having received Rs. 599 from certain other persons not parties to the suit, and as regards the remaining amount they admit having received Rs. 1,300 from Zaida, etc., vendees of the land in suit, and at the end of the document they state that the mortgaged land has been released.

The present suit was brought by Allah Yar on 8th November 1920 for possession of 292½ kanals of land on the allegation that the sale-deed of 15th April 1908, was executed by Raja, defendant 4, his maternal uncle, in favour of defendant 1, and his brother Raja, the ancestor of defendants 2 and 3, without any legal authority and that the sale was effected without any valid necessity or benefit to the minor. In para. 5 of the plaint the plaintiff alleges that the land in suit, together with other land was under possessory mortgage with Mohar Singh and Sukha Singh for 18 years, i. e., up to 31st October 1917, and that, therefore, the cause of action accrued to the plaintiff after 31st October 1917. There is a further allegation that the plaintiff at the date of the suit was 20½ years old and, therefore, the suit was within time.

A written statement was filed by Zaida, the original vendee, and Amir, the son of the other vendee Raja, the brother of Zaida. First and foremost it is pleaded that the suit was barred by time. There is the further plea that the sale was for the benefit of the minor and for valid necessity and that the land in suit, together with other land, i. e. 443½ kanals, was mortgaged with the sons of Mohar Singh, etc., for a certain period, so that the plaintiff had no right to redeem the said land before 31st October 1917. It was also urged that at the time of the sale the plaintiff had no means of livelihood and that some other land was redeemed from one Tara Chand, mortgagee, and made over to the plaintiff.

The trial Court held that the plaintiff was born in Phagan Sambat 1956 (i. e. 1899), and that the suit having been brought in November 1920 the plaintiff was under 21 years of age at the date of the suit. It further found that, as the mortgage could not be redeemed till 21st October 1917, the plaintiff could not sue for possession till the expiry of the period of 18 years, counted from 21st October 1899, and that, therefore, on this ground also the suit was within limitation. It also held that neither under the Mahomedan law nor under the riwaj-i-am Raja, the maternal uncle of the plaintiff, had any authority to sell the minor's property and that the sale was, therefore, void and of no effect. At the conclusion of his judgment the learned Senior Subordinate Judge observed that the plaintiff was entitled to get a decree for possession of the land in suit, so far as the sale-deed Ex. P-11 was concerned, free from all payment, and finished off his judgment by the cryptic remark that, having regard to the provisions of Ss. 38 and 41, Specific Relief Act, the vendees are entitled to claim that the parties should be relegated to the position which they held on 15th April 1908 before the sale-deed was executed.

This last observation also forms an intergral part of the decree in the suit.

The plaintiff has not sought to challenge these remarks in this Court either by way of appeal or by filing cross-objections. However, in order to avoid future disputes and litigation between the parties I shall give effect in the operative part of this judgment to what appears to me to be the meaning of these remarks of the learned Senior Subordinate Judge. The defendants who have come up in appeal to this Court have raised various pleas in their memorandum.

The first point urged by the defendants-appellants was that the finding of the learned Judge as to the age of Allah Yar, the respondent, was erroneous. The learned counsel invited our attention to the various entries in the birth and death registers. These entries briefly show that Muhammada, the father of the plaintiff, had a son born to him on 14th September 1895, and that this son died on 28th November 1895. Then there are two other entries printed at pp. 11 and 12 of the paper-book respectively, which show that one son was born to Muhammada on 1st December 1896, and another son was born to him on 20th February 1898. We have also two more entries recording the birth of a daughter to Muhammada on 29th July 1901, and finally the death of Muhammada on 7th May 1903. The case for the defendants is that Allah Yar is one of those two sons whose births are recorded on 1st December 1896, and 20th February 1898. Mt. Bakhtawar (P. W. 1), the mother of the plaintiff, was examined in the case. Apart from the fact that this lady was particularly interested in the success of her son's suit, her statement, when examined carefully, does not appear to be convincing.

There is other oral evidence of the usual type which does not carry the case for the plaintiff any further. They are two medical witnesses: Dr. L. Francis (P. W. 4) and Dr. R.E. Murray (P. W. 6). The former says that the plaintiff is not more than 23 years and not less than 21 and that most probably the witness would place him between 22 and 23 rather than 21 and 22. Dr. Murray, Civil Surgeon, says that the age of the plaintiff in his opinion was anything between 20 and 22 years. The medical evidence in these cases cannot throw much light because from its very nature it is based on conjectures only and we cannot possibly look to it for the purposes of determining with precision the exact age of a particular person. It is obvious that in cases when limitation is pleaded in defence, a difference of even a single day settles the fate of the case one way or the other, and no doctor, however conscientious and competent he may be, can give the precise age of a person so as

to enable the Court to determine the exact date of that person's birth. In support of the extracts from the birth and death registers mentioned above, the defendants have produced Lala Roshan Lal (D. W. 1). His evidence to a certain extent supports the defendants' plea, though the witness had to admit that omissions of births and deaths are generally noticed by him in these registers. The learned counsel for the respondent, criticized the evidence afforded by the extracts from the birth and death registers in the light of the concluding remark in the evidence of D. W. 1, Lala Roshan Lal, contending that this evidence does not determine the age of the plaintiff with any degree of exactitude. But the onus was on him to prove that the suit was within time, and on a consideration of the whole evidence on the record on this point I am of opinion that that burden has not been discharged. This being so, it follows that the plaintiff has not been able to establish that he was under 21 years at the date of the institution of the suit.

Having regard to the Privy Council ruling reported in *Imambandi* v. *Mutsaddi* (1), the term "de facto guardian" which had been introduced in some decisions of the various Courts in this country, loses all its significance and their Lordships have laid down once and for all that a person who is not under the law authorized to transfer a minor's property, cannot give a valid title to the transferee of such property and that the transfer effected by a person who thus arrogates to himself the functions of a lawful guardian is absolutely void and of no legal effect. The sale-deed dated 15th April 1908, executed by Raja, defendant 4, of the property belonging to the plaintiff was, therefore, void, but since the plaintiff did not bring his suit for possession within three years of his attainment of majority, defendants 1 to 3 plead that they had acquired title by adverse possession. Their case is that they redeemed the mortgage some time in the Rabi of 1908, soon after the sale-deed and that as the present suit was brought on 8th November 1920, they had completed 12 years of adverse possession. Now let us examine the evidence on this point a little more closely. The receipt (Ex. D-7) is dated 26th October 1908. As already stated, the concluding portion of that document contains the words that "the mortgage has been released." Therefore, if we were to calculate the period of limitation exactly from 26th October, then there is no doubt that on 26th October 1920 the defendants completed their 12 years adverse possession. But the matter is not so simple. We have the evidence of D. W. 4, Aya Singh, son of Mohar Singh, who was one of the mortgagees under the mortgage dated 21st October 1899. He says that the land in suit was mortgaged with him for Rs.1,300 and that he received the amount from Amir Khan, the father of defendant 2, as per receipt of 30th June 1908. He further says that the possession of the land was made over to the defendants since Sawani 1908 and that he gave up connexion in June 1908.

Now, it is perfectly clear that there is no receipt on the record dated 30th June 1908. The only receipt to which this witness could possibly have been referring is the one dated 26th October 1908, (Ex. D-7) and it must have been with reference to this receipt when he stated that he gave up possession in June 1908. This is undoubtedly a mistake and the witness must have been really referring to the receipt of 26th October 1908 Furthermore, the witness makes a very vague remark that the possession of the land was made over to the defendants since Sawani 1908. Another witness named Jiwan (D. W. 5) also repeats the same remark that the Sawani of 1908, was reaped by the defendants. There is another witness, Jiwan Singh Patwari, who was examined on interrogatories, He also says in his examination-in-chief that the defendants purchased the land in Rabi 1908 and possession was taken in Kharif; in other words the defendants were in possession in Kharif 1908 and harvested the produce for that Fasal. He further repeats in an answer put to him in cross interrogatories that he remembers from his personal knowledge that the defendants harvested the produce for Kharif 1908. Now the expression "Sawani" or "Kharif"1908 is very vague.It might mean any period between October 1908 and January 1909, so that it is impossible to determine with any degree of certainty the exact date on which the possession of defendants 1 to 3 commenced. We further

(1) A. I. R. 1918 P. C. 11=45 Cal. 878=45 I.A. 73 (P. C.).

observe as a matter of common experience that it was not to be expected that the prior mortgagees would deliver possession to the vendees (defendants 1 to 3) before receiving from them the amount due under the mortgage in their favour. Furthermore there is only a very short interval of 13 days between 26th October 1908 and 8th November 1908, so that in order to succeed in their plea the defendants must satisfy the Court that their adverse possession did as a matter of fact commence on some date between 26th October 1908, and 8th November 1908. I am not satisfied that the mere statement that the defendants-vendees took possession of the land in suit in Sawani of Kharif 1908 is sufficient to justify the Court in coming to the conclusion that the defendants' possession commenced at any time between the two dates just mentioned.

But even assuming for the sake of argument that the possession of the defendants continued as a matter of fact for the full period of 12 years counting from 26th October 1908, there is a further difficulty in the way of the defendants. As already stated, the mortgage in favour of Mohar Singh and Sukha Singh, dated 21st October 1899 (Ex. P-1) clearly recited that the term of the mortgage had been fixed as 18 years and that the mortgagor shall have no power to redeem the land before the expiry of the fixed term. The defendants themselves in their written statement, apparently unconsciously, try to make capital of this condition in the mortgage-deed by pleading that the plaintiff had no right to redeem the said land before 31st October 1917. Now, if the plaintiff mortgagor could not redeem the mortgage of 1899 before 21st October 1917, can it be said that the defendants who, as a result of mutual understanding between themselves and the successors-in-title of Mohar Singh and Sukha Singh, managed to redeem the mortgage by paying the sum of Rs. 1,300 on 26th October 1908, defeat the plaintiff by raising against him the plea of adverse possession; in other words, is it open to defendants 1 to 3 in the circumstances of the case to raise the plea that they had acquired full proprietary rights in the equity of redemption by 12 years' adverse possession? I must say that the question is not free from difficulty.

The learned counsel for the defendants-appellants relied upon the case of *Munia Goundan* v. *Ramasami Chetty* (2). The facts of this case are briefly these: There were two Hindu brothers who mortgaged their lands jointly in 1892. In 1897 one of the brothers sold the entire equity of redemption to *D* who redeemed the lands and obtained possession in 1898. The other brother sold his interest in the lands in 1910 to the plaintiff who instituted a suit in 1912 to redeem his half-share in the property on payment of half the mortgage-debt. It was pleaded by *D* that the suit was barred by limitation. Mr. Justice Oldfield applied Art. 126, Lim. Act, and held the suit to be barred. Mr. Justice Sadasiva Ayyar held that the suit was barred under the provisions of Art. 144, Lim. Act, as well. In that case which was a second appeal it had been found by the lower appellate Court that from the date of his purchase defendant 2 had the animus to claim title as the sole owner of the equity of redemption and that he was a charge holder and not a mortgagee after redemption and, therefore, after 12 years his possession matured into ownership. The case was thus decided on the finding of fact that the possession of defendant 2 had been obtained from the very beginning under an assertion of exclusive title. Assuming that this case was correctly decided, as to which I express no opinion, in the present case, having regard to the materials on the record, it cannot be said that the contesting defendants 1 to 3 did, as a matter of fact, assert an exclusive title in themselves and if so, then on what date?

We were also referred to the case of *Jiwa Khan* v. *Lakhmi Chand* (3), and I must confess that I do not see how this case has any relevancy to the facts of the present case. If anything, the judgment contains observations against the appellants' contention. It is laid down in that judgment that

> where a mortgagee has once got possession of the mortgaged property as mortgagee, he cannot alter the nature of his possession by a mere assertion, or by a wrongful decree, or by getting himself recorded in the register of mutations as owner, nor can the original character of the possession as mortgagee be changed by the assertion of an absolute purchase of the property

(2) [1918] 41 Mad. 650=34 M. L. J. 528=8 M. L. W. 28=45 I. C. 867=(1918) M.W.N. 448.

(3) [1911] 232 P. L. R. 1911=11 I.C. 429=146 P. W. R. 1911.

unless the alleged purchase is valid and binding.

In the present case defendants 1 to 3 had stepped into the shoes of the mortgagees by redeeming the mortgage of 1899 and by claiming proprietary title through purchase from Raja, the so-called de facto guardian of the minor Allah Yar, they could not possibly improve their position.

The case reported as *Shamrao Darekar* v. *Mahamad Amin* (4), was also relied upon by the learned counsel for the appellant. In that case there was a difference of opinion between the two learned Judges of the Bombay High Court, namely Hayward and Beaman, JJ. There are certain observations in the judgment of Beaman, J., which go to show that when one of the mortgagors redeemed property and then mortgaged it to a third party, the third party had acquired title by adverse possession against the other co-mortgagor, the mortgage being a possessory one. Hayward, J., did not accept the view of law and held that without the knowledge that adverse title was being claimed against the comortgagor no adverse title could be claimed against him. The case was referred to Scott, C J., and the learned Chief Justice agreed with the view of law expressed by Hayward, J. In the present case the plaintiff was undoubtedly a minor at the date of the sale in favour of the defendants and he could not possibly be fixed with the notice of any adverse possession by defendants 1 to 3.

On behalf of the plaintiff-respondent reliance was placed on a case reported as *Binanand Sawase* v. *Thuroo Mahto*. (*A. I. R.* 1923 *Pat.* 592). In this case it was laid down that where a mortgagee is let into possession, his position is to some extent that of a trustee and that he is bound to protect the interests of the mortgagor and to prevent any invasion of his rights by a stranger. If the mortgagee by neglect or collusion allowed any person to come into possession of the property, there will be no invasion of the rights of the mortgagor, and when the time for redemption comes, he will be entitled to treat the stranger as a trespasser and the stranger's right by adverse possession against the mortgagor will not commence unless and until the mortgagor had sought to exercise his right of redemption and redeemed the property.

(4) [1912] 14 Bom. L. R. 314=15 I. C. 500.

With this proposition of law I entirely agree. The mortgage for 1899 was for a fixed term of 18 years and the contesting defendants themselves admitted that it was not open to the plaintiff mortgagor to seek redemption before the expiry of the fixed term. And if as a result of any mutual understanding between the defendants and the mortgagees the defendants were allowed to redeem prematurely and were let into possession of the mortgaged property, it cannot in any way prejudice the rights of the plaintiffs and no plea of adverse possession can be successfully raised by the defendants against the plaintiffs on the strength of their possession of the mortgaged property. There is a very informing judgment of the Chief Court of the Punjab reported as *Azim* v. *Mahmud* (5). In that case a certain field was mortgaged. It was redeemed by a third party, more than 12 years before the suit for possession was brought by the plaintiff, who represented the mortgagor. It was held by Rattigan and Barkley, JJ., (Elsmie. J., dissenting) that the defendant who redeemed the mortgage knew that the land was mortgaged, and having obtained possession by redeeming the mortgage he was in the position of the assignee of the the mortgagee and it was immaterial whether or not the defendant at the time of redeeming the mortgage claimed to be himself the owner of the property. This view of law is substantially the same as that arrived at independently by the learned Judges of the Patna High Court in the case noted above, and is binding upon me. To hold otherwise would open a door of fraud, as it would be possible for an outsider to collude with the mortgagee in possession and after paying the mortgage money to the mortgagee, take possession of the mortgaged property and after the expiry of the period of 12 years to raise the plea of adverse possession against the mortgagor.

I may also quote here the case of *Tarabai Ramrao* v. *Dattaram Govindbhai* (6). The learned Chief Justice in that case observed that in the case of a possessory mortgage, when possession has been delivered to the mortgagee, a trespasser obtaining possession may hold adversely to the mortgagee, but not to

(5) [1883] 124 P. R. 1883.
(6) A. I. R. 1925 Bom. 465=49 Bom. 539.

the mortgagor. And the present defendants 1 to 3 were not in a better position than a mere trespasser at the time when they took possession *qua* the mortgagor. In the present case, however, I treat the defendants as the assignees of the original mortgagees and since the plaintiff could not redeem the mortgage and obtain possession of the property until the 21st October 1917, it cannot be said that defendants 1 to 3 had acquired by adverse possession under their sale-deed dated 15th April 1908. The adverse possession, if at all, could only commence after the 21st October 1917, and as the present suit was brought on 8th November 1920, it cannot be said that it was barred by 12 years adverse possession.

I may in this connexion refer to the classical judgment of Markby, J., in the case of *Bejoy Chunder Banerjee* v. *Kalli Prosonno Mookerjee* (7). There the learned Judge laid down that

> by adverse possession is meant possession by a person holding the land, on his own part, of some person other than the true owner, the true owner having a right to immediate possession.

These words, as pointed out by Mr. Justice Batty in the case of *Tarabai* v. *Vankatrao* (8), are of capital importance and express a well-known rule which is conveyed in the maxim *contra non valentem agere non currit prescriptio*, that is to say:

> Prescription does not run against a man during the time when he is not entitled to immediate possession.

This proposition of the law is a direct authority in favour of the plaintiff who was not entitled to immediate possession during the period of 18 years fixed under the mortgage of 1899, and therefore, no act of the defendants, the assignees from the mortgagees, could constitute adverse possession as against the right of the mortgagor, the plaintiff in the present suit. In view of these findings the plea of adverse possession raised on behalf of the defendants fails.

Now, the question remains as to the terms on which the plaintiff is entitled to obtain possession of the land in suit. There cannot be any doubt that as a result of the sale-deed, dated 15th April 1908, the plaintiff had been considerably benefited. He obtained actual possession over 151 kanals free, from encumbrances and has been enjoying the income of that land ever since. The receipt Ex. D-7 conclusively proves the payment of Rs. 1,300 by the vendees-defendants 1 to 3, the representatives of the mortgagees Mohar Singh and Suka Singh. We have also the evidence of Tara Chand, D. W. 3, who admits that some land which he held as a mortgagee was redeemed from him by Raja and Ziada, that is to say, the vendees, and that the plaintiff has ever since been in possession of the land thus redeemed. He also stated that the mortgage-deed was returned to the plaintiff's maternal uncle and mother at the time of redemption. Therefore, the plaintiff is bound to pay this sum of Rs. 575 to defendants 1 to 3 seeing that he has fully benefited by it. The other items of Rs. 550, Rs. 50 and Rs. 525 have not been proved and cannot be allowed to the defendants. There is the further fact that, soon after the sale-deed in dispute, the plaintiff obtained possession of an area of 151 kanals which represents the difference between 443½ kanals and 292½ kanals and has been enjoying the income of the same ever since free from all encumbrance. The plaintiff is bound to pay to the defendants the equivalent of the produce of the land which he has been appropriating and enjoying since he obtained possession as a result of the redemption in Kharif 1908. Muhammad Usaf, Special Kanungo, D. W. 8, has been examined on behalf of the defendants. He has worked out the amount of the profits derived by the plaintiff since Kharif 1908 till Rabi 1922. This sum comes to Rs. 4,239, and no attempt has been made on behalf of the plaintiff-respondent to challenge its correctness. That the plaintiff is liable to make good to the defendants the amount representing the actual benefit that he has derived from the sale is supported by authority: vide *Hanamgowda Shidgowda* v. *Irgowda Shivgowda* (9) and *Allah Dad* v. *Budha* (10).

Having regard to all the circumstances of the case, and bearing in mind the remark of the learned Senior Subordinate Judge in the concluding portion of his judgment where he observes that the parties should be relegated to the position which they held on or before the sale-deed was executed, I order that the

(7) [1879] 4 Cal. 327 (329).
(8) 1903] 27 Bom. 43 (51)=4 Bom. L. R. 721.
(9) A. I. R. 1925 Bom. 9=48 Bom. 654.
(10) [1904] 52 P. R. 1904=85 P. L. R. 1904.

plaintiff is entitled to obtain possession of 292½ kanals in suit on payment of Rs. 1,300 plus Rs. 575 plus Rs. 4,239, total Rs. 6,114, to defendants 1 to 3. With these observations I dismiss the appeal. The parties will bear their own costs throughout.

Tek Chand, J.—I agree in the conclusion arrived at by my learned brother.

D.D. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 257

HARRISON AND DALIP SINGH, JJ.

Hazara Singh and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 593 of 1927, Decided on 10th December 1927, from order of Addl. Sess. Judge, Sialkot at Lahore, D/- 26th April 1927.

* (a) *Criminal P. C., S. 162—Statement of approver before pardon—Accused can ask for copy.*

Statement made by an approver to the police before he is tendered a pardon, is a previous statement of a witness and it can be used either to corroborate him or to contradict him under the ordinary provisions of the Evidence Act and therefore the accused is entitled to have a copy of such statement. [P 257 C 2]

(b) *Criminal P. C., S. 172—Statements of persons are not covered.*

Section 172 does not apply in any way to the statements of persons and certainly does not override the provisions of the Evidence Act. [P 258 C 1]

(c) *Criminal P. C., S. 162—Copy of statement wrongly refused—Procedure indicated.*

Where the lower Court wrongly refuses to furnish a copy of prior statement of a witness, the proper course in appeal is that counsel should be furnished with a copy of the statement and any contradictions between that statement and those made in Court by the witness should be taken as left unexplained by him. [P 258 C 1]

Each case must be decided on its own facts and the extent of the prejudice to the accused in each case must determine whether the trial should be held altogether vitiated or whether the defect can be remedied by following the procedure indicated above: *A. I. R.* 1927 *Cal.* 644 and *A.I.R.* 1927 *Nag.* 24, *Cons.* [P 258 C 1]

* (d) *Criminal P. C., S. 162—Omissions in statement in Court and previous statement are not necessarily to be treated as contradictions.*

Where an accused is not allowed to cross-examine a witness with reference to certain omissions in his statement to the police and statement in Court, it must be left to the Court in each particular case to decide whether the omission amounts to a contradiction or not: *A. I. R.* 1926 *Pat.* 382, *Diss. from.* [P 258 C 1]

Iftikhar Ali—for Appellants.

Des Raj Swahney—for the Crown.

Dalip Singh, J.—Ten persons were sent up for trial by the learned Sessions Judge under S. 396, I. P. C. Three, namely, Jammun, Santa Singh and Umar Joyia, have been acquitted. All the others were convicted under S 396 and were sentenced as follows: Kammun, Diwan Singh and Rahim Bakhsh each to transportation for life and Hazara Singh, Labh Singh, Chanan Singh and Imam Din, each to ten years' rigorous imprisonment including three months' solitary confinement. Kammun has not appealed. All the others have appealed and we have heard Mr. Iftikar Ali for Diwan Singh, Hazara Singh, Labh Singh and Rahim Bakhsh, and Mr. Dhanraj Shah for Chanan Singh. Imam Din has appealed through jail.

The prosecution relied on the statement of Saddar Din who was an approver in this case, and have also led evidence to corroborate his statement. The alleged dacoity was committed on the night of the 4th/5th January 1925, in the house of Ram Chand, petition-writer in the village of Kotli Nowshera, Sialkot District. The dacoits when retreating were pursued by the villagers and one of the pursuers named Haveli was shot dead. This dacoity was one of a number committed during the year 1925-26 under the leadership of Kammun, a notorious dacoit who has already been sentenced to death in another case and whose appeal in that case has been dismissed. Saddar Din, approver, is a relation of Kammun and admittedly was great friend with him.

The first point taken by Mr. Iftikhar Ali was that the learned Sessions Judge had refused to allow the accused the statement made by the approver to the police before he was tendered a pardon. The learned Sessions Judge held that this statement was made by the approver as an accused person and not as a witness, and that, therefore S. 162, Criminal P. C., did not apply to the case. In my opinion the case is covered by S. 162, but even if the learned Sessions Judge were correct in holding that this statement was not within S. 162, Criminal P. C., it would be a previous statement of a witness and it could be used either to corroborate him or to contradict him under the ordinary provisions of the

Evidence Act. Counsel for the Crown has relied on S. 172, Criminal P. C., as barring this statement. I do not think that S. 172 applies in any way to the statements of persons, and certainly does not override the provisions of the Evidence Act. I, therefore, think that the statement should not have been refused in evidence. In these circumstances we hold that counsel should be furnished with a copy of the statement and any contradictions between this statement and those made in Court by the approver should be taken as left unexplained by the approver. Counsel has contended on the authority of *A. I. R.* 1927 *Cal.* 644 and *A. I. R.* 1927 *Nagpur* 24 that the trial was vitiated by the learned Sessions Judge's refusal to supply the accused with a copy of the statement and allow cross-examination of the approver with reference to that statement. We consider, however, that each case must be decided on its own facts and the extent of the prejudice to the accused in each case must determine whether the trial should be held altogether vitiated or whether the defect can be remedied by following the procedure that has been indicated above. In this case we are of opinion that the contradictions and differences did not so gravely prejudice the accused as to necessitate the setting aside of the trial. The matter of course might be otherwise, had the trial been a jury trial, but on this point I express no opinion.

A further objection was taken by counsel for the appellants that he was not allowed to cross-examine Ganpat (P. W. 11) with reference to certain omissions in his statement to the police and his statement in Court. It was contended by the authority of *Iltaf Khan* v. *Emperor* (1), that all omissions are contradictions. I am not prepared to subscribe, with all respect to the learned Judges, to the proposition that all omissions are contradictions. Here again it must be left to the Court in each particular case to decide whether the omission in question amounts to a contradiction or not. For instance, if a witness has stated that a certain number of persons effected an entry into a house but has not stated the mode in which they effected the entry, such an omission cannot ordinarily be held to be a contradiction. On the other hand, if a witness has stated that three persons were beating another person and later said about the same incident that four persons were beating that person such an addition or omission of the fourth person from the original statement would, in my opinion, be a contradiction. I have of course taken extreme cases to illustrate my meaning. There must be numerous cases falling between the extreme cases described above in which opinions might vary as to whether the case was one of contradiction or merely of omission. In this particular case Ganpat had omitted to state in his first statement to the police that he had joined in the pursuit of the dacoits when they retreated from the village. While I am not prepared to hold that Ganpat has in Court told a lie in stating that he did pursue the retreating dacoits along with other villagers, I consider that, in view of the fact that he did not mention this originally to the police, his statement on the point must be received with caution and his evidence as to indentification of certain persons during the course of this pursuit must similarly be received with the greatest caution. I am, however, of opinion that this error on the part of the learned Sessions Judge is not sufficient to vitiate the trial and here again we decided to allow counsel to follow the same procedure and to compare the statements made to the police and in Court, and take all contradictions, if any, as left unexplained by Ganpat. This is the most favourable way of treating the matter so far as the accused are concerned and I do not see that they have any complaint to make to this course in the circumstances of this case. (The judgment then discussed other matters not material for the report and dismissed the appeals of Imam Din and Chanan Singh and accepted those of other appellants.)

Harrison, J.—I agree.

D.D. *Appeals partly allowed.*

(1) A. I. R. 1926 Pat. 362=5 Pat. 346.

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* A. I. R. 1928 Lahore 258

ZAFAR ALI, J.

Firm Partap Singh Pardhan Singh—Defendants—Appellants.

v.

Firm Bhai Mewa Singh Jodha Singh—Decree-holder—Respondent.

Mis. First Appeal No. 1475 of 1927, Decided on 28th November 1927.

* *Provincial Insolvency Act, Ss.* 28 (2) *and* 31—*Execution proceedings.*

No proceedings in execution can be started against an insolvent judgment-debtor unless the judgment-creditor has obtained leave of the insolvency Court to commence such proceedings even when protection order has been refused : 39 *Mad.* 689 and 12 *Bur. L. T.* 218, *Rel. on.* [P 259 C 2]

Gullu Ram—for Appellants.

H. C. Kumar—for Respondent.

Judgment. — Under the Provincial Insolvency Act of 1907, when a debtor was adjudged an insolvent he ordinarily became immune from arrest. This immunity was taken away by the Provincial Insolvency Act of 1920 and according to that Act he could be arrested in execution of a decree, unless he should obtain a protection order under S. 31 of that Act. But the question is whether a decree-holder is competent to take out execution against the person of an insolvent judgment-debtor without obtaining leave of the insolvency Court. In the present case it is admitted that the insolvency Court has refused the insolvent's petition for a protection order but the decree-holder has not yet obtained permission to execute his decree by arrest of the insolvent. According to Cl. (2), S. 28, Provincial Insolvency Act, 1920

no creditor shall, during the pendency of the insolvency proceedings, commence any suit or other legal proceedings (against the insolvent) except with the leave of the insolvency Court.

An execution proceeding is a legal proceeding and it was the first application for execution that the judgment-creditor made after having obtained the decree that he sought to execute. He thus commenced a legal proceeding but without the leave of the insolvency Court. The language of Cl. (2), S. 28, Provincial Insolvency Act of 1920, is almost the same as that of S. 17, Presidency Towns Insolvency Act 1909. A Division Bench of the Madras High Court held in *C. A. Easwara Aiyar* v. *K. Govindarajulu Naidu* (1) that in view of the provision of S. 17, Presidency Towns Insolvency Act when a person is adjudicated insolvent, creditors seeking any remedy against him must apply to get leave for that purpose. Another case in point is *Thakurdeen* v. *J. Dubay* (2), where it was held that the words "other legal proceedings" in S. 17, Presidency Towns Insolvency Act, include an application for arrest in execution of a decree and that, therefore, no such application can be made against an insolvent after an order of adjudication has been made except with the leave of the insolvency Court.

I, therefore, set aside the order of arrest passed against the insolvent judgment-debtor by the Court below and direct that no proceedings in execution be taken against him unless the judgment-creditor should obtain leave of the insolvency Court to commence such proceedings. The parties to bear their own costs in this Court.

D.D. *Order set aside.*

(1) [1915] 39 Mad. 689=31 I. C. 192.
(2) [1920] 12 Bur. L. T. 218=55 I. C. 250.

** A. I. R. 1928 Lahore 259

SHADI LAL, C. J., AND AGHA HAIDAR, J.

Muhammada—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 601 of 1927, Decided on 26th January 1928, from order of Sess. Judge, Ferozepur, D/- 21st March 1927.

** *Penal Code, S.* 211—*Proceedings started under S.* 211 *against a false complainant—Person complained against not tried in Court—Offence committed is not one regarding any proceeding in Court—Criminal P. C., S.* 195, (1) (*b*).

Where the person at whose instance proceedings under S. 211, Penal Code, are initiated against a false complainant, is never charged in any Court, nor is he ever put upon his trial before any Magistrate, nor were any proceedings taken against him before the Court in which another person who was alleged by the false complainant to be his accomplice was involved, it cannot be said that the offence under S. 211, Penal Code, was an offence which was committed in or in relation to any proceeding in Court, though another person against whom also false complaint was made in the same transaction is tried in Court : *A. I. R.* 1924 *All.* 779, *Foll* ; 19 *P. R.* 1917 *Cr.* and 34 *All.* 522, *no longer good law*: 43 *Cal.* 1152 and 44 *Cal.* 650, *Ref. to.* [P 262 C 2]

Amolak Ram Kapur for *Nandlal*—for Petitioner.

Raj Kishan for *Government Advocate*—for the Crown.

Order of Reference

Tek Chand, J.— Muhammada, petitioner, made a report at the police station, Ferozepore, on 26th July 1925 that he w asin the Ferozepore hospital on that

night attending on his sister, who was an indoor patient there, when one Nihal Singh came into the compound with a takwa in his hand intending to murder his sister ; that Nihal Singh was accompanied by Raushan Beg and Ahmad Din, who were the expectant heirs of his sister and who had instigated him to commit the crime, and that he was able to catch Nihal Singh alone, his companions having run away. The police after enquiry found that the story as given by Muhammada was false. They took no action against Raushan Beg or Ahmad Din, but challaned Nihal Singh under the Arms Act for being in unlawful possession of the takwa. He was, however, acquitted by the Court.

On 16th January 1926 Raushan Beg lodged a complaint under S. 211, I. P. C., against Muhammada for having made a false charge against him. Muhammada was tried by the Magistrate, 1st Class Ferozepore, and found guilty under S. 211 and sentenced to undergo rigorous imprisonment for four months' and pay a fine of Rs. 100. His appeal to the Sessions Court having been unsuccessful, he has preferred a revision to this Court.

The first point taken on his behalf is that the learned Sessions Judge has not discussed the evidence on the record nor has he written a proper judgment in accordance with law and, therefore, the case should be sent back to him for redecision. There is no doubt that the discussion of the evidence in the judgment of the learned Sessions Judge is not as full as it might have been. I, however, see no reason to remand the case. I have allowed the petitioner's counsel to address me at length on the merits and to read to me the portions of the evidence on which he wished to rely. After examining the evidence and considering counsel's arguments I am of opinion that the petitioner has been rightly convicted under S. 211, I. P. C. There was no justification for him to make a false charge against Raushan Beg and Ahmad Din and his sole object in making the report seems to have been to intentionally harass and injure these persons who were the expectant heirs of his sister, and with whom they do not appear to have been on good terms.

It was next argued that the proceedings in this case were void ab initio and illegal, inasmuch as they were not initiated on a complaint in writing made by the Court which tried Nihal Singh as required by S 195(b), Criminal P. C. The learned Public Prosecutor replied that S. 195 does not apply as the police challaned Nihal Singh only and not Raushan Beg or Ahmad Din, and the case of the latter was never before any Court and, therefore, it cannot be said that, so far as these persons are concerned the alleged offence was committed in, or in relation to, any proceedings in a Court. There is, however, a Single Bench decision of the Chief Court reported as *Emperor* v. *Gurditta* (1) which fully supports the petitioner's contention. In that case the accused had made a report to the police that seven persons had committed dacoity. The police sent up five of those persons for trial but took no action against the other two, namely, Q. S. and A. S. Subsequently proceedings under S. 211, I P. C., were started against the accused for having brought a false charge against Q. S. and A. S. A magisterial inquiry was held against the accused who was committed to the Sessions Court for trial for having made a false charge against Q. S. and A. S.

It was held by Scott-Smith, J., that though Q. S. and A. S. were not proceeded against in Court, S. 195 still applied as the matter had come up before the Court in connexion with the same report made by the accused to the police and thus the offence (if any) was committed in relation to proceedings in a Court. As the prosecution of the accused under S. 211, was not initiated with the sanction or on the complaint of the Court concerned, the commitment was held to be illegal and was accordingly quashed. The learned Judge in his judgment based his decision on a Division Bench ruling of the Allahabad Court: *Hardwar Pal* v. *Emperor* (2). This case will be found reported in the authorized reports as *I. L. R.* 34 *All.* 522. I have considered both these cases, and as at present advised, I feel grave doubts as to the soundness of the view taken therein. As has already been pointed out, the Court which has tried Nihal Singh was not concerned with the allegations made by the petitioner in his report

(1) [1917] 19 P. R. 1917 Cr.=39 I. C. 692=20 P. W. R. 1917 Cr.
(2) [1912] 34 All. 522=16 I. C. 510=10 A. L. J. 61.

to the police against Ahmad Din and Raushan Beg. These persons had not been sent up to take their trial before the Court and I fail to see how that Court could initiate proceedings under S. 211, with reference to the alleged false charge against them who were never before it. In taking this view I feel fortified by a later decision by another Division Bench of the Allahabad Court in *Kashi Ram* v. *Emperor* (3) where *Hardwar Pal* v. *Emperor* (2) was dissented from. The point was raised before the Calcutta High Court in *Brown, F. A.* v. *Ananda Lal Mullick* (4), but was not expressly decided, though there are indications in the judgment that the learned Judges were inclined to doubt the soundness of the decision in *Hardwar Pal's* case. As the question is one of considerable importance and arises frequently, I think it is necessary to have an authoritative pronouncement by a Division Bench of this Court on it.

I, therefore, refer the case to a Division Bench for decision of this point, which is the only point left undecided.

Agha Haidar, J.—A reference was made to a Division Bench by a learned Single Judge of this Court on 22nd July 1927 under the following circumstances:

A report was made to the police by one Muhammada, the accused, in the present case, to the effect that his sister Mt. Bago, who was a widow and had some property, was an indoor patient in the Ferozepore hospital; that one Nihal Singh had trespassed into the compound of the said hospital in order to murder the said lady; that Nihal Singh, when caught by the informant, invoked the aid of two of his accomplices, namely Raushan Beg and his son Ahmad Din; that the informant identified these two men by their speech; and that they being the reversioners of Mt Bago's estate would have been directly benefited by her death. The police made an investigation, but did not feel satisfied as regards the complicity of Raushan Beg and Ahmad Din and so no action was taken against them. Nihal Singh, however, was charged under S. 19, Indian Arms Act (11 of 1878) and tried by a Magistrate. On 17th November 1925, the Magistrate acquitted Nihal Singh observing at the conclusion of his judgment that the case seemed to be frivolous one which had been initiated by Muhammada and Mt. Bago in order to implicate Raushan Beg and Ahmad Din who were the reversioners and heirs of Mt. Bago.

On 16th January 1926, Raushan Beg filed a complaint under Ss. 211/500, I. P. C, in the Court of a Magistrate. This comp aint ended in the conviction of Muhammada under S. 211, I. P. C.

Muhammada appealed to the Sessions Judge, Ferozepore, who, however, dismissed his appeal. An application for revision of the order of the Sessions Judge was filed in this Court, and the case came on for hearing before a learned Single Judge, who went through the evidence on the record and arrived at the conclusion that the conviction of Muhammada under S. 211, I. P. C. was correct.

A point of law, was, however, raised before him to the effect that the complaint which Raushan Beg had made direct to the Magistrate was incompetent in that the case was covered by S. 195 (1) (b), Criminal P. C. and, therefore, a complaint in writing should have been mad by the Court which tried the case against Nihal Singh or some other Court to which such Court was subordinate, and that, therefore, the whole proceedings were null and void. The learned Judge of this Court entertained some doubt as to the correctness of a certain decision of the Punjab Chief Court and, therefore, referred the case to a larger Bench.

The portion of S. 195, Criminal P. C., relevant to the present reference is as follows:

> No Court shall take cognizance:
>
> • • •
>
> (b) of any offence punishable under • • • S. 211 • • • of the same Code, when such offence is alleged to have been committed in, or in relation to, any proceed ng in any Court, except on the complaint in writing, of such Court, or of some other Court to which such Court is subordinate.
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> • • •

The case in *Emperor* v. *Gurditta* (1), is in favour of the applicant. This was, however, a judgment by a Single Judge who followed *Emperor* v. *Hardwar Pal* (2). Now, we have to see whether *Hardwar Pal's* case (2) was rightly decided. In that case a report was made by one *H* at a police station against several persons, one of whom was *S*

(3) A. I. R. 1924 All. 779=46 All. 906.
(4) [1917] 44 Cal. 650 (658)=25 C. L. J. 59=36 I. C. 857=20 C. W. N. 1347.

charging them with rioting and voluntarily causing hurt. The police made an investigation and sent up several persons for trial, but no action was taken against *S*. Some of the persons charged were convicted by the Magistrate but were acquitted by the Sessions Judge. Thereupon *S* filed a complaint in the Court of the Magistrate charging *H* with having made a false report to the police implicating him (*S*) in the offence. The matter came up before a Division Bench who held that, as there was considerable relation between the first report and the proceedings in Court, the latter being the result of the former, the alleged offence with which *H* was charged was committed in relation to proceeding in Court. They further held that the report led to the police inquiry and the police inquiry led to the proceeding in Court. And proceeding on this line of reasoning the learned Judges finally held that the sanction of the Court under S. 195 (1) (b) was necessary and in the absence of such sanction they quashed the proceedings taken by *S* against *H* in the Court of the Magistrate.

The matter once came before a Division Bench of the Allahabad High Court where two learned Judges in *Emperor* v. *Kashi Ram* (3) threw considerable doubt upon the correctness of *Emperor* v. *Hardwar Pal* (2). In this case the learned Judges observed as follows :

> In *Emperor* v. *Hardwar Pal* (2) a charge was made against several people including one *S*, but *S* was never charged in Court. *S* was not put upon his trial and no proceedings were taken against him. The other people were, and the ratio decidendi in *Emperor* v. *Hardwar Pal* (2) is that the charge against *S* amounted to a charge in Court because Court proceedings were taken against some body else. In this respect we are unable to agree with *Emperor* v. *Hardwar Pal* (2).

The learned Judges then proceeded to lay down the following formula deciding the question as to where a report to the police stops and the charge before the Magistrate begins.

> If the complainant confines himself to reporting what he knows of the facts, stating his suspicions, and leaving the matter to be further investigated by the police, or leaving the police to take such course as they think right in the performance of their duty, he is making a report but he is not making a charge. But if he takes the further step, without waiting for any official investigation of definitely alleging his belief in the guilt of a specified person, and his desire that the specified person be proceeded against in Court, that act of his, whether verbal or written, if made to an officer of the law authorized to initiate proceedings based upon the complainant's statement, whether amounting to an expression of the complainant's belief in the guilt of the specified persons, or his desire that Court proceedings be taken against him, amount to making a charge.

This being the position, the authority of *Emperor* v. *Gurditta* (1), may be taken to have been considerably shaken in that the case on which it was founded has been definitely dissented from by the Allahabad High Court itself.

There is another case, *Tayebulla* v. *Emperor* (5), where Mookerjee and Sheepshanks, JJ., held that no sanction was necessary under S. 195, Criminal P. C., to prosecute an informant under S. 211, I. P. C., when a false charge had been made by him only to the police.

Brown v. *Ananda Lal Mullick* (4) approves of the case in *Tayebulla* v. *Emperor* (5) and the learned Chief Justice, who delivered the main judgment of the Court, definitely refused to express an opinion as to whether the case in *Emperor* v. *Hardwar Pal* (2) was rightly or wrongly decided.

We prefer to follow the law as laid down in *Emperor* v. *Kashi Ram* (3) Raushan Beg was never charged in any Court, nor was he ever put upon his trial before any Magistrate, nor were any proceedings taken against him before the Court in which Nihal Singh was involved. This being so, it cannot be said that the offence under S. 211, I. P. C., with which Muhammada, the applicant, had been charged, was an offence which was committed in or in relation to any proceeding in Court. This being our view, it was not necessary that the present prosecution should have been started on the complaint in writing of the Magistrate who tried and disposed of *Nihal Singh's* case. Under these circumstances the objection as to the maintainability of the present complaint fails.

The case having been heard on the merits by the learned referring Judge and the only question that had been referred to us for consideration having been also decided against the applicant, the result is that the application for revision fails and is dismissed.

S.J. *Application dismissed.*

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(5) [1916] 43 Cal. 1152=24 C. L. J. 134=36 I. C. 845=20 C. W. N. 1265.

* A. I. R. 1928 Lahore 263

BROADWAY AND SKEMP, JJ.

Narsingh Das—Objector-Appellant.

v.

Secretary of State—Respondent.

First Appeal No. 2187 of 1922, Decided on 26th May 1927, from order of Dist. Judge, Lahore, D/- 29th May 1922.

(a) Limitation Act, S. 5—Copy of land acquisition award must be filed with appeal — Filing can be allowed even at the time of hearing and time extended in proper cases—Land Acquisition Act (amended 1921), S. 26 — Civil P. C., O. 41, R. 1.

In an appeal from an award of District Judge in a land acquisition case, the appellant failed to file a copy of the award with the appeal. The appeal was filed in 1922. The decision of Lahore High Court in *A. I. R. 1925 Lah. 438*, under which the amendment to Land Acquisition Act in 1921 was interpreted making the filing of copy of award with appeal obligatory, was decided in 1925. The appellant's counsel applied during the hearing of the appeal in 1927 for an extension of time under S. 5 Lim. Act, and put in a complete copy of the award together with an affidavit and statement of reasons asking for indulgence.

Held : that the application should be allowed and that the appeal should be heard : *A. I. R. 1928 Lah. 216, Ref.* [P 264 C 1,2]

(b) Land Acquisition Act, S. 23 — Hypothetical building schemes — Probable investment and return must be estimated through a surveyor.

Hypothetical building schemes can be the usual basis of valuation in case of building lands, but the course contemplated in such cases is that a surveyor should be called who would unfold a scheme giving details of the amount to be spent and estimating probable returns which could be tested in cross-examination: 16 *Bom. L.R. 55, (P.C.) Ref.* [P 265 C 1]

(c) Land Acquisition Act, S. 23 — Frontage.

A frontage of 100 fit. depth should be allowed : 33 *Bom. 325, Rel. on.* [P 265 C 2]

(d) Civil P. C., S. 11 — Land Acquisition Act, S. 4.

A prior decision in land acquisition case, though between the same parties and in respect of adjacent land, is not res judicata if land is acquired under different notification. [P 266 C 2]

(e) Land Acquisition Act, S. 28 — Amount enhanced by District Judge—Claimant is entitled to interest on difference.

Where the District Judge enhances the amount of compensation as awarded by the Collector, the claimant is entitled to interest on the amount whereby the District Judge enhanced the Collector's award from the date of that award until the date of his own judgment, and if the amount is further enhanced by the High Court, he is entitled to further interest at the same rate from that date until the date of judgment of the High Court. [P 266 C 2]

(f) Land Acquisition Act, S. 27 (2)—Collector was ordered to pay claimant's costs though claim was extravagant.

Where though claimant's claim was extravagant, but the extravagant amount claimed did not increase the Collector's costs at all and appellant was substantially successful :

Held : that the Collector should pay claimant's costs. [P 267 C 1]

C. B. Petman, Mool Chand and *Jai Gopal Sethi*—for Appellant.

C. H. Carden Noad and *Mehr Chand Mahajan*—for Respondent.

Skemp, J.—These three connected appeals, which have been urged together, have arisen out of three references (not four as stated by the learned District Judge) made by the Collector under S. 18, Land Acquisition Act. To understand the matter it is necessary to refer to the plan Ex. P. A. on the record. The appeals concern four areas near the Queen's Statue, in the heart of the civil station of Lahore, taken up with the intention, as yet unrealized, of building a new Secretariat. These areas have been marked A,B,C and D by the District Judge who varied the lettering given by the Land Acquisition Officer. Plots A and B and C belong to Rai Bahadur Lala Narsingh Das and form the subject of first appeals Nos. 2187 and 2188 of 1922, plot D belongs to Mumtaz Din and Moiz-u-din and form the subject of first appeal No. 2817 of 1922. Plots B, C and D were acquired in pursuance of a notification of the Punjab Government dated the 23rd August 1918 and plot A in pursuance of a notification dated the 22nd July 1919. The learned District Judge disposed of the references by a common judgment dated the 29th May 1922.

A preliminary objection is taken that the appeal in respect of plot A is barred by time. The objection is the same as that taken in *Mubarak Ali Shah* v. *Secretary of State* (1). The learned District Judge wrote one main judgment which was attached to the reference dealing with plots B and C ; in respect of the other two plots he merely wrote : " See my judgment in Land Acquisition Case No. 13 of 1919."

The preliminary objection is that as under S. 26, Land Acquisition Act, amended in 1921, the award of the District Judge shall be deemed to be a decree it is necessary under O. 41, R. 1 Civil P. C., to attach a copy thereof to the

(1) A. I. R. 1925 Lah. 438=6 Lah. 218.

appeal. Copies of the full award were attached with the other two appeals but all that was attached in the appeal as to plot A was a copy of the reference to the main award. This, as previously laid down, does not comply with the law, and the Court has no power to dispense with a copy of the decree.

Mr. Bevan Petman for the appellant Narsingh Das contended first that the judgment of the District Judge dealing with plot A did not amount to an award and, therefore, that no copy of the award could be attached to the appeal. S. 26 (1) sets forth :

> Every award under this part shall be in writing signed by the Judge, and shall specify the amount awarded under Cl. 1, sub-S. (1), S. 23, and also the amounts, if any, respectively awarded under each of the other clauses of the same sub section.

The District Judge's judgment does not comply exactly with this provision The District Judge wrote :

> I, therefore, find this plot A to be worth Rs. 2,500 per kanal. The area acquired is 30 kanalas 15 marlas 17 feet, the value, therefore, works out at Rs. 76,885 plus 15 per cent Rs. 11,532-12 0, total Rs. 88,417-12 0.

There is, however, no doubt that the sum last mentioned is the amount the District Judge awarded and equally no doubt that no one would have troubled about this phraseology but for the objection taken on behalf of the Crown. In my opinion this contention on behalf of the respondent has no value.

But Mr. Bevan Petman also orally applied for an extension of time under S. 5, Lim. Act, and during the hearing which occupied several days put in a complete copy of the award together with an affidavit and statement of reasons asking for indulgence. In my opinion this application ought to be granted. I do not think the Crown ought to take technical objections in a case of this kind. It is hard to conceive of anything more likely to engender a sense of injustice than to take a man's property compulsorily at an under-valuation and then to dismiss his appeal to higher authority on the basis of a technical objection he could have never heard of.

The procedure followed in these cases was in accordance with the practice of the Court until the amendment of the Act made in 1921, which was made not in order to restrict appeals but to enable appeals to go up to the Privy Council. The old practice continued in this Court until attention was first drawn to it in *Mubarak Ali Shahi's* case (1). Since that case, which was decided on 19th February 1925 and published the same year, the matter has been before this Court several times. In Civil Misc. Appeal No. 2585 of 1924 decided on 10th November 1926, the Secretary of State under similar circumstances was allowed time under S. 5 to file a copy of the award. But in *Secy. of State* v. *Tirath Ram* (2) permission was refused to the Secretary of State on the objection taken by the respondent that the Secretary of State was fixed with knowledge of the defect in law 14 months before the application was made, and that he had taken no steps during this period to lodge a copy of the award.

Mr. Carden Noad for the Secretary of State contended that since the publication of *Mubarak Ali Shah's* case (1) all practitioners of this Court ought to have been aware of this technical difficulty but that the appellant took no steps to lodge an application for time under S. 5 until arguments were almost completed.

Mr. Bevan Petman admitted that this argument would have had force if the appeal had been lodged at or about the time *Mubarak Ali Shah's* case (1) was decided. It was actually lodged on 1st August 1922, some 2½ years earlier, and he contended that no practitioner could keep in mind an appeal lodged so long before. Under these circumstances I am of opinion that the application should be allowed and that the appeal should be heard.

Turning to the merits : the learned District Judge awarded Rs. 2,500 per kanal for this plot A. In coming to this conclusion he relied mainly on the fact that the appellant had, a short time before the notification, sold a portion of the plot in dispute at this rate. The notification was dated 22nd July 1919 and Rai Bahadur Narsingh Das stated that he agreed to sell the plot to the Associated Hotels Company on the 22nd April 1918 and was paid the consideration on the 19th May 1919, the sale-deed being executed in December 1919. Mr. Bevan Petman minimized this sale on the ground that it was effected on something different from an ordinary commercial basis. The appellant, Mr. Moncrieff, and Mr. Bevan Petman were

(2) A. I. R. 1928 Lah. 216=9 Lah. 76.

co-directors of the Alliance Bank and Mr. Moncrieff was a partner in Boulton Brothers which practically owned the Associated Hotels Company. The appellant says that his co-directors in the bank persuaded him to sell this plot to the Hotels Company for what he paid for the land plus interest.

In my judgment there is no reason for not relying on this sale as a criterion of the value of the land sold, for it was a sale by a willing seller to a willing buyer.

Mr. Bevan Petman, however, rightly pointed out that whereas the land sold was back land having access only on a very narrow front to the Cooper Road and adjacent to the servant's quarters of Falletti's Hotel, the land remaining has a double frontage on the Montgomery and Cooper Roads. He contended that his client intended to erect thereon a first class hotel with shops and a cinema. On this point there is only the evidence of the appellant himself supported by a draftsman who prepared a plan for a hotel with shops underneath. No doubt their Lordships of the Privy Council in *Merwanji* v. *Government of Bombay* (3) have pointed out that hypothetical building schemes are the usual basis of valuation in case of building lands, but the course there contemplated is that a surveyor should be called who would unfold a scheme giving details of the amount to be spent and estimating probable returns which could be tested in cross-examination. This course had not been followed in the present case and indeed there is not even a plea of a cinema the reference to which is verbal only. Before he thought of the cinema Lala Narsingh Das had already been approached by the Associated Hotels Company and if Government had not acquired the land we do not know for certain that the scheme would have materialized. We are still less certain whether it would have been successful financially. I, therefore, agree with the learned District Judge that the only solid ground on which to base valuation of this plot is the sale of part thereof effected about three months before the notification. I also agree with the appellant that the part sold was the less valuable part of the plot remote from the more desirable thoroughfare and adjacent to a row of servants' quarters. Servants' quarters and stables have now been extended to the limit of the land shown on the plan: indeed Government has acquired a portion of the plot which the appellant contracted to sell to the Hotels Company and the same disadvantage now attaches to the back portion of the plot. I think, however, that the front portion on the Montgomery Road is more valuable. The appellant contended in other connexions for a frontage of 100 feet which is the depth allowed in various cases by the High Court of Bombay, e. g., *Government of Bombay* v. *Karim Tar Mahomed* (4) from which come most of the important land acquisition cases in India. I would, therefore, allow Rs. 3,000 per kanal for a frontage of 100 feet from the Montgomery Road and Rs. 2,500 per kanal for the remainder of the area. There is also a small item of Rs. 100 for trees on this plot allowed in the award of the land acquisition officer, but overlooked by the District Judge. With interest and costs I will deal later.

Turning to the plot B: there is a dispute about the area. There was a claim that the Forest Department which occupies an adjacent site had encroached, but this was given up by Mr. Bevan Petman and it would appear that the encroachment, if made at all, was completed some time before the last settlement. The point remaining is very simple. The District Judge found the area of B to be 90 kanals 1 marla 209 square feet, this being the total of the area of two plots described in the award of the land acquisition officer as B and C. The appellant in proceedings before the District Judge called a Civil Engineer who said that the area of these two plots (now B) was 90 kanals 14 marlas 221 square feet. The Collector called the Engineer in charge of the 1 Lahore Provincial Division, who measured the area as 91 kanals 19 marlas 82 feet, i. e., more than the other engineer. The appellant contends and the Government Advocate does not contest that the area must be taken to be that given by the Secretary of State's own witness. This point could hardly have escaped the attention of the learned District Judge but for the fact that he did not pronounce judgment for some 17 months after hearing arguments. The area of the District Judge's plot

(3) [1914] 16 Bom. L. R. 55 (P. C.).

(4) [1909] 33 Bom. 325=3 I. C. 273=10 Bom. L. R. 660.

marked B for which compensation is to awarded will, therefore, be increased from 90 kanals 1 marla 209 feet to 91 kanals 19 marlas 82 square feet.

The area in question was the major part of a large area which Lala Narsingh Das contracted to buy in January 1908. He then arranged to pay the owner Rs. 690 per kanal. The owner, however, died before the contract was carried out and his legal representatives refused to ratify it. In 1914 Government acquired a plot of 10 kanals 8 marlas, part of this estate behind the Charing Cross Police Post at Rs. 2,000 per kanal. The value was admitted to be correct on the 28th April 1914 both by Narsingh Das and by the agent of the vendor's mother and legal representative. The Collector then settled the dispute between the parties and Lala Narsingh Das paid an additional Rs. 16,000 including interest. A sale-deed was executed in his favour and registered in August 1915. The total amount that Narsingh Das paid came to Rs. 880 per kanal.

The Government Advocate strongly relies on the fact that in 1914 Narsingh Das was willing to accept Rs. 2,000 a kanal for part of this land, but Narsingh Das had got this land cheap for several reasons. The vendor lived in the U. P.; there was a shrine in the property, and a dispute about wakf. On the other hand Narsingh Das had been out of his money for years and was unable to get title, indeed the Collector in apportioning the award held that Narsingh Das's claim was worthless. Narsingh Das was, therefore, in no position to contest the matter. Moreover, there was always the fear of a suit being brought to have the property declared wakf. Mr. Bevan Petman stated in arguments that such a suit had been lodged four months previously.

The Government Advocate also relied on a sale (p.11) of 1 kanal out of this land in 1914-15 to Ghulam Rasul for Rupees 2,000. But this kanal was separated from the rest of the area by a broad and deep storm water channel. Ghulam Rasul had previously in December 1913 bought land on the Mall for Rs. 2½ lakhs, including 5 marlas of vacant land at Rs. 10,000 a kanal. This 1 kanal in question was situated between the storm water channel and Ghulam Rasul's Mall property on which Rasul Building now stands and obviously not of great value.

In this connexion the Government Advocate also referred to a previous judgment of the High Court in *Narsingh Das* v. *Secy. of State* (5) decided by a Division Bench on the 27th April 1922 and printed in the paper book and elsewhere. This judgment dealt with an appeal of Narsingh Das concerning the acquisition of land under a notification, dated 7th July 1917, for the police post at Charing Cross adjacent to the plot now marked C. The learned Judges allowed Rs. 2,400 per kanal and their judgment was subsequently confirmed on appeal by their Lordships of the Privy Council in a case reported as *Narsingh Das* v. *Secy. of State* (6). The Government Advocate contended that this judgment operated as res judicata, but it is sufficient to say that the cause of action is not the same. Different land was acquired under a different notification. Their Lordships of the Privy Council specifically stated that they would not interfere with judgments of Courts in India as to matter involving valuation of property because of the local knowledge requisite. The judgment of the Division Bench says:

> We may state at the outest that the evidence produced by the parties is both extremely meagre and affords extraordinarily little help.

The cases before us are more important and the appellants made greater efforts and produced more evidence. It would also seem probable that certain arguments have been adduced before us which were not put before the learned Judges who decided the earlier case. There is, therefore, no lack of respect involved in not concurring with all the conclusions come to in that case. (The judgment then considered the sales of other lands in the neighbourhood and proceeded.) Mr. Bevan Petman also complained that the District Judge did not allow interest on the amount whereby he enhanced the Collector's award from the date of that award until the date of his own judgment. The appellant is clearly entitled to interest on the difference from the 21st March 1919 to the 29th May 1922. He is entitled to further interest at the same rate from that date until the present time The simplest method of cal-

(5) A, I. R.1922 Lah. 327.
(6) A. I. R.1925 P. C. 91=6 Lah. 69=52 I. A. 133 (P. C.).

culation would be to allow interest at 6 per cent on the enhancement from the date of the land acquisition officer's award until the date of the present judgment.

Complaint was also made that the District Judge, while enhancing the award to some extent gave the Collector costs in all these proceedings because of the large demands made by the objectors and the comparatively small extent to which they succeeded. This course is not in accordance with law. S. 27, sub-S. (2), of the Act runs :

When the award of the Collector is not upheld, the costs shall ordinarily be paid by the Collector unless the Court shall be of opinion that the claim of the applicant was so extravagant or that he was so negligent in putting his case before the Collector that some deduction from his costs should be made or that he should pay a part of the Collector's costs.

Lala Narsingh Das claimed before the District Judge Rs. 10,000 a kanal for A and Rs. 8,000 per kanal for C. For B he claimed Rs. 4,000 and Rs. 3,000. The rates claimed for A and C are certainly extravagant, but it was only permissible to make some deduction from his costs or order him to pay the Collector's costs. Taking the case as a whole, however, I am of opinion that the Collector should pay the appellants' costs because the extravagant amount claimed has not increased the Collector's costs at all and the appellant has been substantially successful. These remarks apply with particular force to the appeal of Mumtaz Din and Moiz-ud-din who have now succeeded to the extent of half of their claim. I would allow the appellants their costs.

An award is now to be prepared on the forgoing principles for areas as follows :

Plot A.—Area 30 kanals 15 marlas 17 square feet ; frontage at 100 feet along 512 feet at Rs. 3,000 per kanal. Remaining area at Rs. 2,500 per kanal.

Plot B.—Area 91 kanals 19 marlas 82 square feet. Area of a rectangle 500 by 100 feet at Rs. 3,000 per kanal. Remaining area at Rs. 2,500 per kanal.

Plot C.—As by District Judge.

Plot D.—Area as by District Judge. Valuation Rs. 6,000 per kanal.

Broadway, J.—The only question on which I had any doubt was whether time should be extended under S. 5, Lim. Act. After a careful consideration of the matter and a perusal of my brother Skemp's judgment I am not prepared to differ and I, therefore, agree generally with the above.

D.D. *Order accordingly.*

A. I. R. 1928 Lahore 267

FFORDE AND ADDISON, JJ.

Mt. Viranwali and *another*—Defendants—Appellants.

v.

Kundan Lal—Plaintiff—Respondent.

Second Appeal No. 40 of 1923, Decided on 17th May 1927, from decree of Dist. Judge, Sargodha, D/- 14th October 1922.

Hindu Law—Alienation by widow—Suit for declaration by reversioner—Remote reversioner is not entitled to sue unless nearest reversioner refuses to sue or has precluded himself from suing.

A suit for declaration by a Hindu reversioner must always be brought by a reversioner nearest in succession. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings or he has precluded himself by his own act or conduct from suing or has colluded with the widow the next presumable reversioner will be entitled to sue and he must state in his plaint the circumstances under which he claimed to sue in the presence of the nearest reversioner.

In the presence of daughters and daughter's son, even if daughter's son be a minor, a remote reversioner is not entitled to sue ; 40 *All.* 518; 249 *P. W. R.* 1912 (*F.* B.); 60 *P. R.* 1916 and 6 *Cal.* 764 (*P. C.*), *Foll.* [P 268 C 2]

Mehr Chand Mahajan—for Appellants.

Badri Das—for Respondent.

Addison, J.—(After setting out the pedigree showing the relationship of the parties the judgment proceeded.)

Kundan Lal sued two defendants for a declaration to the effect that Mt. Viranwali, the widow of his de ceased uncle Ram Asra Mal, was not the proprietor of a one-fourth share of certain land and that she had no power to sell her share to defendant 2. The suit was based on the allegation that plaintiff was joint with the husband of defendant 1, who was thus entitled to maintenance only. It was admitted that the other members of the family were separate. The trial Judge held that the suit for a declaration lay and that it was not necessary to sue for possession, as third parties were in possession of the suit land. He also held that Ram Asra Mal and plaintiff were not members of a joint Hindu family. On this finding he dismissed the suit, leaving the parties to bear their own costs.

On appeal the District Judge agreed with the trial Judge that the plaintiff

and the deceased husband of defendant 1, were not members of a joint Hindu family, and there was ample evidence to support this conclusion. He did not, however, dismiss the appeal but went on to hold that the plaintiff could sue to protect his interest as reversioner. As the sale on his finding was only for necessity to the extent of Rs. 500, he therefore granted the plaintiff as reversioner a declaratory decree to the effect that the alienation would not be binding upon him upon the death of defendant 1 except to the extent of Rs. 500. Against this decision the defendants have appealed.

It was quite clear that the suit was brought on the allegation that defendant 1 had no right in the land which was owned by the plaintiff as the last surviving coparcener of a joint Hindu family. As there was a clear finding that this joint family did not exist, the suit should have been dismissed,

It is true that a suit by a plaintiff as reversioner might lie but only in special circumstances. There are two daughters alive, one of whom has a son and the other a daughter. It has been held in *Gumanan* v. *Jahangira* (1) and *Bechu Pandey* v. *Mt. Dulhman* (2), that a suit for a declaration by a Hindu reversioner must always be brought by the reversioner nearest in succession at the time. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, the next presumable reversioner would be entitled to sue. In the presence of daughters and a daughter's son, even if the daughter's son be a minor, a remote reversioner is not entitled to sue.

It has been held by a Full Bench of the Punjab Chief Court, reported as *Barkat Ram* v. *Jagat Ram* (3), that separated nephews of a deceased Hindu have no locus standi to maintain a suit to challenge the widow's act where daughters and a daughter's son were alive, their interest being too remote.

In *Tek Chand* v. *Soman Singh* (4) it was held that a suit by a reversioner would lie in the presence of a daughter of the deceased. In that case the Full Bench decision was distinguished as a daughter's son was not in existence. The subject was again considered in *Kanshi Ram* v. *Sarda Nand* (5) where it was held that the principles applicable to a suit by a reversioner in circumstances like the present were those laid down by their Lordships of the Privy Council in *Anand Kumar* v. *Court of Wards* (6), and the decision turned upon whether the daughter's son had precluded himself by his own act or conduct from suing or had colluded with the widow. As the daughter's son was a minor at the date of the alienation and was still a minor at the date of suit the answer to the question must be in the negative, and the plaintiffs were not entitled to the declaration prayed for. It was held further that according to the principles laid down by their Lordships in the case aforesaid, the plaintiffs should have stated in their plaint the circumstances under which they claimed to sue in the presence of the nearest reversionary heir and upon a plaint so framed the Court should have exercised its judicial discretion in determining whether the more remote reversioners were entitled to sue, one of the circumstances to be considered being whether plaintiffs' chances of succession were so remote that no declaration should be granted

In the suit under appeal none of these things were done and the District Judge could not convert the suit from one by a coparcener in a joint Hindu family to one by a reversioner to set aside an alienation by a widow in the presence of her daughters and a daughter's son. None of the facts necessary to be alleged in such a plaint were alleged, nor could the point be decided whether the suit should be allowed to proceed I would, therefore, accept the appeal and setting aside the judgment and decree of the District Judge restore that of the trial Judge. The appellants, Mt. Viranwali and her vendee, will have their costs in this Court and in the Court of the District Judge There is no force in the cross-objections which are dismissed.

Fforde, J—I agree.

S J. *Appeal accepted*

(1) [1918] 40 All. 518=46 I. C. 186=16 A. L. J. 465.
(2) A. I. R. 1925 All. 8.
(3) [1912] 249 P.W.R 1912=17 I.C. 379(F.B.)
(4) [1916] 27 P.R. (1916)=147 P.L.R. (1916)=34 I. C. 631=218 P W.R. (1915.)
(5) [1916] 60 P. R. 1916=33 I. C. 763=88 P. W.R. 1916.
(6) [1891] 6 Cal 761=3 I. A. 14=8 C. L. R. 381 (P. C.).

*A. I. R. 1928 Lahore 269

TEK CHAND AND HARRISON, JJ.

Sultan Singh and *another*—Plaintiffs —Appellants.

v.

Joti Sarup and *another*—Defendants —Respondents.

Second Appeal No. 2409 of 1923, Decided on 8th February 1928, from decree of Dist. Judge, Ambala, D/- 23rd July 1923.

***Civil P. C., O. 2, R. 2—Suit by simple mortgagee to recover interest from the mortgagor personally—Subsequent suit to recover balance of mortgage amount is not barred—Civil P. C., O. 34, R. 14.**

In the case of a simple mortgage providing for the recovery of the principal and interest from the mortgaged property as well as from the other property and the person of the mortgagor a prior suit for interest against the mortgagor personally does not bar a subsequent suit for recovering the balance due on the mortgage from the mortgaged property under O. 2, R. 2, the cause of action in the two suits being different: *A. I. R.* 1922 *P. C.* 412, *Appl.*; *A. I. R.* 1922 *P. C.* 28, *Dist.* [P 270 C 1]

Mohammad Tufail—for Appellants.

Jagan Nath Aggarwal—for Respondents.

Tek Chand, J.—The plaintiffs, who are the mortgagees under a registered deed, dated 12th August 1906, instituted a suit under O. 34, R. 4, Civil P. C., for recovery of Rs. 1,599 14-3, being the balance of the principal and interest, alleged to be due on foot of the mortgage. One of the pleas raised by the defendants was that the suit was barred by O. 2, R. 2, Civil P. C., by reason of a previous suit having been instituted by the plaintiffs in 1909 for interest only. This plea was overruled by the Sub-Judge who passed a decree in terms of O. 34, R. 4, Civil P. C On appeal the learned District Judge took the contrary view and the suit was dismissed. The mortgagees have preferred a second appeal and the only point requiring decision is whether O. 2, R. 2, bars the suit.

The relevant facts are that on 12th August 1906 the predecessors-in-interest of the defendants-respondents executed a simple mortgage without possession in favour of the plaintiffs for Rs. 4,500. The term of the mortgage was fixed as three years. The principal was to bear interst at As. 9-6 par cent. per mensem. It was provided that if this interest was not paid for three months consecutively the mortgagees

shall be competent to include interest in the principal amount and realize compound interest through the Court by instituting a suit or cancel all the conditions and recover the principal mortgage money with interest.

The deed also contained a clause that in the event of the mortgagors failing to pay the principal or interest, the mortgagee was empowered to realize it from the mortgaged properties as well as from the other properties belonging to them or their person.

The mortgagors failed to pay interest regularly and were in default for more then three months consecutively. Accordingly, on 8th August 1908, before the stipulated period of three years had expired, the mortgagees instituted a suit for recovery of Rs. 682-7-3 on account of interest and compound interest due on that date. It is important to note that in that suit no relief against the mortgaged properties was claimed, the prayer being simply for recovery of the amount due from the defendants, and the Court passed a personal decree against them. This decree was duly satisfied, and the mortgagors, from time to time, made further payments in discharge of their liability under mortgage. The balance due on the date of the institution of the present suit was Rs. 1,599 14-3, which the mortgagees sued to recover from the mortgaged properties.

In deciding whether the suit is barred under O. 2, R. 2, two points must be borne in mind: (1) the nature of the mortgage: and (2) the relief claimed in the former suit. As already stated the mortgage in question is a simple mortgage, which expressly gave the mortgagees power to realize the principal and interest from the mortgaged properties as well as from the persons of the mortgagors. In the former suit the plaintiffs did not claim any relief against the mortgaged properties but simply sued to recover the amount due from the defendants personally and were given a personal decree and nothing more.

Now it is well-known that a simple mortgage of this kind gives rise to two distinct obligations; the obligation to repay the amount as a loan and the

obligation to permit the mortgagee to realize his dues from the mortgaged property. These two obligations are independent of each other and the procedure for enforcing them is different, though under certain conditions one suit may be brought to enforce both. If two suits be brought, the one will be to recover the debt as a loan ond the other to proceed against the property. The plaint in the former must be in Form 1 of Appendix A, Civil P. C., while that in the second will be in Form 45. The limitation for claiming a personal decree against the mortgagor is six years (Art. 116) but that for proceeding against the property is twelve years (Art. 132). Similarly the former relief can be claimed even if the document is unregistered while registration is cumpulsory in the latter case if the principal is more than Rs. 100. As pointed out by Ghose in his Law of Mortgages (5th edn.) Vol. 1, p. 81:

A simple mortgage consists of two parts: a covenant on the part of the mortgagor to pay the debt, and an agreement empowering the mortgagee to realize his money out of the property pledged to him. The pledgee must, however, ordinarily obtain a decree directing a sale in order to make his security available. In the case of a simple mortgage, therefore, the mortgagee has, generally speaking, on the default of the debtor. a twofold cause of action: one arising out of the breach of the covenant to repay and the other arising out of the hypothecation; and he can sue the mortgagor on both the causes of action in one suit.

The personal liability created by a simple mortgage being separable from the obligation *in rem* created by the pledge, the mortgagee may sue the debtor personally although he may not be able to enforce his security as, for instance, in a case in which, owing to want of registration, no mortgage has been effectually created * * * * *.

A simple mortgage possesses this feature in common with another kind of mortgage, known as "English mortgage" and defined in S. 58, T. P. Act. It is well-established that an "English mortgage" also gives rise to a double obligation on the part of the mortgagor and in it, as in a simple mortgage, personal liability is presumed, even though the deed is silent on the point. As was observed by Lord Talbot in *King* v. *King* (1):

Every mortgage implies a debt; every loan a debt, and though there were no covenants in the bond, the personal estate of the last owner must remain liable to pay off the mortgage.

But the position is wholly different in a mortgage by conditional sale as well as in a pure usufructuary mortgage, in either of which the creditor can only look to the property pledged to him for the satisfaction of the debt. The distinguishing feature between the two classes of mortgages is that in the first, which comprises the simple and the English mortgages, there is the implied obligation to repay the amount as a loan, while in the second—the usufructuary and the conditional sale—there is no such obligation unless the instrument contains a clause specifically creating it.

It will thus be seen that the mortgage transaction in question gave rise to two independent obligations; the right of recovering the amount due as a loan and that of enforcing the relief against the property, and each of them furnished an independent cause of action. In the former suit the plaintiffs claimed a personal decree for interest against the mortgagors and so enforced the first obligation only. In the present suit they seek relief against the property, and the cause of action, therefore, is wholly distinct. Consequently no question of the applicability of O. 2, R. 2 arises.

In support of his decision the learned District Judge has relied on *Kishen Narain* v. *Pala Mal* (2) but. in my opinion, that ruling lays down the exact opposite. It seems to me that the point is concluded in favour of the appellants by the following observations of Lord Buckmaster at p. 36 of the report:

That O. 2, R. 2, Civil P. C., is the relative section of the Code applicable to the dispute is not in contest. The whole question is, what does it mean? It does not appear to their Lordships that if the mortgage had provided, as mortgages always do in this country, for an independent obligation to pay the principal and the interest, that in a suit *brought to obtain a personal judgment in respect of the interest alone the rule would have prevented a subsequent claim for payment of the principal.* In such a case the cause of action would have been distinct. * * * * *.

Again it is stated:

If, therefore, the plaint originally brought came to be properly interpreted as claiming only a personal relief in respect of the unpaid interest, the appellant's case would be on surer ground. but although their Lordships are anxious that claims for a just debt should not be defeated by the intricacies of legal procedure, yet they are unable to hold that the plaint that was originally issued by the appellant can properly bear that interpretation. The claim is for a decree for the interest "recoverable from the

(1) [1735] 3 P. Wms. 358.

(2) A. I. R. 1922 P. C. 412=4 Lah. 32=50 A. 115 (P. C.).

mortgaged property" and the other property and persons of the defendants. The words are not dissimilar from the words of Cl. 5 of the mortgage-deed, which clearly points to the interest being payable (that is by sale) out of the mortgaged property.

As in that particular case the former claim was for a decree for the interest "recoverable from the mortgaged property" their Lordships held that the second suit was barred by O. 2, R. 2. In the present case, as pointed out above, the plaintiffs claimed and obtained in the former suit a personal decree against the mortgagors and no relief was sought against the property. The case clearly comes within the rule laid down by their Lordships of the Privy Council and; it must be held that the suit is not barred.

Mr. Jagan Nath has relied on *Mohammad Hafiz* v. *Mirza Mohammad* (3) but that case is distinguishable as there also the former suit had been instituted for recovery of interest from the mortgaged property.

For the foregoing reasons I would accept the appeal, set aside the decree of the District Judge and restore that of the trial Court. The appellants will have their costs throughout.

Harrison, J.—I agree.

R.D. *Appeal accepted.*

(3) A. I. R. 1922 P. C. 23=44 All. 121=49 I. A. 9 (P. C.).

A. I. R. 1928 Lahore 271

HARRISON, J.

Lal Chand—Plaintiff—Petitioner.

v,

Mt. Pisto—Defendant—Respondent.

Civil Revn. Petn. No. 128 of 1927, Decided on 5th January 1928, from order of Sr. Sub-Judge, Karnal, D/- 4th Dec. 1926.

Civil P. C., O. 53, *R.* 1—"*Means*" *explained.*

The use of the word "means" shows that it is intended to cover and include all forms of realizable assets which can be converted into cash and as such can be used for financing the litigation: *A. I. R.* 1926 *Lah.* 642, *Ref.*: *A. I. R.* 1927 *Cal.* 309, *not Foll.* [P 271 C 2]

Anant Ram Khosla for *Jagan Nath Aggarwal*—for Petitioner.

Shamair Chand—for Respondent.

Judgment.—Lal Chand, a minor, alleging himself to be the adopted son of one Miri Mal, has applied for permission to sue in forma pauperis the widow of the said Miri Mal, for possession of certain property and also for an injunction The application has been dismissed and a revision has been admitted.

Mr. Shamair Chand takes the preliminary objection that no revision lies and relies more especially on *Mahadeo Sahai* v. *Secy. of State* (1); *Shankar Ben* v. *Ram Deo* (2); *Mir Ahsan Ali* v. *Mirza Muhammad Jafar* (3), *Haur Kaur* v. *Munni Lal* (4); and the present authority *Amir Hassan Khan* v. *Sheo Baksh Singh* (5). Counsel on the other side has quoted *Firm Bhajan Ram Gil Raj Mal* v. *Mt. Narain Devi* (*A. I. R.* 1926 *Lah.* 642;) *Sm. Mabia Khatun* v. *Satkari* (*A. I. R.* 1927. *Cal.* 309); and *Achalsingh* v. *D. B. Seth Jiwandas* (6).

I take first the question raised by counsel for the petitioner as to the meaning of O. 33, R. 1, Civil P. C., that is, whether the words "possessed of sufficient means" cover only the case of a man with sufficient funds in current coin. For this proposition he relied on *Sm. Mabia Khatun* v. *Satkari* (*A. I. R.* 1927 *Cal.* 309). It is there laid down that a debt, which is due from a third person, however good and realizable, cannot be said to be "means." On the same principle I take it that shares or fixed deposits in a bank would not be "means." It has also been held that ornaments which a woman ordinarily wears are not "means." With all respect to the Judges who gave that decision I regret that I cannot agree, and it appears to me that the very use of the word "means" shows that it is intended to cover and include all forms of realizable assets which can be converted into cash and as such can be used for financing the litigation. It has been held in *Firm Bhajan Ram Gil Raj Mal* v. *Mt. Narain Devi* (*A. I. R.* 1926 *Lah.* 642) that where a Court made the mistake of supposing that the property, which forms the subject-matter of the suit and which is not at the time in the possession of the plaintiffs, can be treated as means, the mistake is such an obvious error of law as to render the whole order open to revision. It is not really necessary for me to express an opinion as to whether such a mistake made by a Judge having jurisdiction is or is not open to revision, for that is not the question in this case.

(1) A. I. R. 1922 All. 1=44 All. 248.
(2) A. I. R. 1926 All. 446=48 All. 498.
(3) [1915] 2 O. L. J. 254=30 I. C. 86.
(4) [1919] 134 P. R. (1919)=53 I. C. 441.
(5) [1885] 11 Cal. 6=11 I. A. 237 (P. C.).
(6) A. I. R. 1924 Nag. 44.

Counsel who presented the petition has stated that the Court-fee required was Rs. 870 whereas on his own showing it was Rs. 412. The value of the decrees, which stand jointly in the names of the prospective plaintiff and the prospective defendant, is Rs 1,035. Counsel has urged that these are in no sense in possession of or under the control of the plaintiff.

I do not understand, nor has counsel been able to enlighten me, as to the meaning of the expression "possession of the decree." The decrees either staud in the name of the plaintiff or not, and it is admitted that they do and that he is one of the decree-holders. It is urged that Mt. Pisto has copies of the decrees, but there is nothing to pr vent the plaintiff obtaining similar copies and taking action upon them, when he has received them. It is stated vaguely in the grounds that it has not been proved what the present value of these decrees may be. It appears to me that it was the duty of the candidate for pauperism to prove that it has less than the face value and this he he has not attempted to do. The face value of half of these decrees is more than that of the stamp shown by him to be required on the plaint, I repeat once more, shown by the plaintiff himself. I hold that there has been no mistake in law and there is a finding of a Court having jurisdiction. That finding is not wrong on the face of it, and, even if it were, I do not think I have any power to interfere. I dismiss the application with costs.

N.K. *Application dismissed.*

A. I. R. 1928 Lahore 272

SHADI LAL, C. J., AND AGHA HAIDAR, J.

Dula Singh and *another*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Appeal No. 397 of 1927, Decided on 15th February 1928, from order of Dist Magistrate, Lahore, D/- 25th March 1927.

(a) *Penal Code, S. 27—Article found in a house not in exclusive possession of any one member—Possession of the article is presumed to be with the head of the family — Explosive Substances Act* (6 *of* 1908), *S.* 4.

Where the portion of a house in which an article is found is not in the exclusive possession of any one member of the joint family, but is used by or accessible to, all the members of the family there is no presumption that the article is in the possession or control of any person other than the house-master or the head of the family. But it is open to the prosecution to prove that the possession was with some other member of the family, and that member would then be liable to account for it : 15 *All.* 129, *Foll.* [P 273 C 2]

(b) *Criminal Trial—Suspicion is no substitute for proof.*

Suspicion, however plausible, can never be a substitute for proof. [P 273 C 2]

(c) *Penal Code, S. 27—Possession—English law and Indian law distinguished—Indian law does not recognize dis inction between possession and custody—Possession to be punishable must be possession with knowledge.*

The expression "possession" in S. 27, shows that the Indian law does not recognize the distinction which the English law makes between "possession" and "custody." In the English law a moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need. The word "custody" means such a relation towards the thing as would constitute possession if the person having custody had it on his own account. Whether the possession is that of the owner or of another person, it is clear that the person, who is said to possess the thing, must have knowledge of the existence of that thing. In other words, possession to be punishable under the criminal law must be possession with knowledge. [P 273 C 2 ; P 274 C 1]

(d) *Explosive Substances Act* (6 *of* 1908), *S.* 4 *—A person not knowing existence of explosives cannot be said to possess it maliciously.*

Not only does the term "possession" imply knowledge, but the expression "maliciously," as used in S. 4, connotes intention. But neither knowledge. nor intention as to the use to be made of an object, can be imputed to a person who is not conscious of its existence. [P 274 C 1]

Brij Lal—for Appellants.

R. C. Soni—for the Crown.

Shadi Lal, C. J.—On 9th January 1927, two bombs were found in the ceiling of a thatched shed situate in the court-yard of a residential house. The house belonged to a joint family composed of Dula Singh, his nephew Sohan Singh, another nephew Chanan Singh, aged about twenty years and several other persons, male as well as females. Two members of the family, namely, Dula Singh and Sohan Singh, have been convicted under S. 4, Explosive Substances Act 6, 1908, and have been sentenced to suffer rigorous imprisonment for seven years and five years respectively.

It is common ground that Dulla Singh was not in the house at the time of the recovery of the bombs and had been absent from the village for two days. His conviction rests on the sole ground that, as he was the head of the family to which the shed in question belonged, he must be deemed to be in possession of the bombs concealed in it. His nephew Sohan Singh has been found guilty, because he was the senior male member of the family present at the time of the recovery of the bombs and should, therefore, be held to be in actual possession of them.

These are the undisputed facts of the case, and the question arises whether they can sustain the conviction of the prisoners. S. 4, Explosive Substances Act punishes a person :

> who unlawfully and maliciously * * * has in his possession or under his control any explosive substance with intent by means thereof to endanger life, or to cause serious injury to property in British India * * * *.

The expression "unlawfully" signifies "not for a lawful object," and the term "maliciously" means and implies an intention to do an act, which is wrongful, to the detriment of another person per Bowen, L. J. *in Mogul Steamship Co. Ltd.* v. *McGregor* (1).

The vital point requiring determination is whether the prisoners can be held to be in possession of the bombs found in a shed belonging to the joint family. The law on the liability of the members of a joint family for an article found in the house of the family is in an unsatisfactory state, and it is not easy to reconcile the judicial cases on the subject. Some propositions, founded as they are upon sense, do not, however, admit of any doubt. It may be stated at the outset that the law does not require that the incriminating article must be in the manual possession of the accused. A thing is in the possession of a person, if it is in his power or under his control. It is at the same time clear that the mere fact that an article is found in a house belonging to the joint family does not per se render every member of the family liable for its possession. If it is found in a portion of the house, of which one member has the exclusive use, the presumption, which might be rebutted, is that that member alone and none else is liable for it. The difficulty arises when the portion of the house, where the article is found, is not in the exclusive possession of any particular mamber, but is used by, or accessible to, all the members of the family. In such a case the rule, as enunciated in *Queen-Empress* v. *Sangam Lal* (2), and followed in several other judgments, is to the effect that there is no presumption that the article is in the possession or control of any person other than the house-master or the head of the family. But it is open to the prosecution to prove that the possession was with some other member of the family, and that member would then be liable to account for it.

Now, there is not a scintilla of evidence on the record that Sohan Singh was in possession of the bombs or was aware of their existence in the shed. The mere circumstance that he happened to be the senior member of the family at the time of the recovery does not justify the inference that he must be regarded to be in possession of every article hidden in the residential house or in a shed attached thereto. There is nothing but suspicion to connect him with the commission of the crime and it is obvious that suspicion, however plausible, can never be a substitute for proof.

As against Dulla Singh, we have only the fact that he was the head of the joint family which owned the shed in question, and as such he is prima facie presumed to be in possession of the articles found in the family building. But it is only a presumption which can be rebutted by direct or circumstantial evidence. As stated above, Dulla Singh was not in the house at the time of the recovery of the bombs and had been absent from it for two days. Is there anything improbable in the suggestion that the bombs were brought into the place during his absence, and that he never knew that they were concealed in the ceiling.

Neither the Explosive Substances Act nor any other Indian statute defines the expression "possession," but S. 27, I. P. C., shows that the Indian law does not recognize the distinction which the English law makes between "possession" and "custody." In the English law, a moveable thing is said to be in the possession of a person when he is so

(1) [1899] 28 Q. B. D. 598.

(2) [1893] 15 All. 129.

situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need. The word "custody" means such a relation towards the thing as would constitute possession if the person having custody had it on his own account. Stephen's Digest of the Criminal Law, edn. 7, p. 298. Whether the possession is that of the owner or of another person, it is clear that the person, who is said to possess the thing, must have knowledge of the existence of that thing. In other words, possession to be punishable under the criminal law must be possession with knowledge.

Not only does the term "possession" imply knowledge, but the expression "maliciously," as used in S. 4, connotes intention. But neither knowledge, nor intention as to the use to be made of an object, can be imputed to a person who is not conscious of its existence.

For the aforesaid reasons I hold that there is absolutely no evidence on the record to prove possession or control, such as would warrant the conviction of the prisoners under S. 4, Explosive Substances Act, or even under S. 5, which punishes a person who knowingly has in his possession or under his control any explosive substance under the circumstances specified therein. I accordingly allow the appeal and setting aside the conviction and the sentence direct that the appellants be released forthwith.

Agha Haidar, J.—I agree.

N.K. *Appeal allowed.*

A. I. R. 1928 Lahore 274

JAI LAL, J.

Muhammad Shafi Muhammad Ayub—Plaintiff—Petitioner.

v.

Delhi House of Multan—Defendant—Respondent.

Civil Revn. No. 598 of 1927, Decided on 22nd February 1928, from decree of Judge, Small Cause Court, Delhi, D/- 1st July 1927.

(a) *Civil P. C., O. 7, R. 11—Court-fee stamps not available in treasury on the day of presentation of plaint and hence Court-fee paid late—Plaint must be deemed to have been presented on the proper date.*

The period of limitation provided for certain suits was reduced by an Act of the legislature. In order to give relief to those persons whose suits would have become barred under the amended law, the 8th December 1926 was fixed to be the date by which all such suits, which would otherwise have been barred by limitation could be instituted in the province of Delhi. On that date apparently a large number of suits were filed in the civil Courts with the result that the supply of Court-fee stamps was exhausted. Plaintiff's suit was instituted on the 8th December but without the necessary Court-fee stamps being affixed on the plaint. The Court directed that the stamp be paid the next day. On that day the plaintiff absented himself and the 15th December was fixed as the date on which the stamp could be paid. On that date also the plaintiff did not appear and consequently the suit was dismissed by default. On the 17th December an application was made by the plaintiff for the restoration of the suit. It was alleged that he could not pay the Court-fee on the 8th because no Court-fee stamp was available on that day and also that since then he had been ill and therefore unable to attend the Court in order to pay the requisite Court-fee stamp. The Court below thereupon permitted him to pay the Court-fee stamp and admitted the plaint subject to any objection that the defendant might have on the score of limitation.

Held: that there was sufficient cause for the plaintiff not paying the Court-fee on the plaint on the 8th December and that the Court was fully justified under the circumstances in allowing the plaintiff to pay such fee before the time fixed by it; the same having been so paid the plaint must be deemed to have been presented on the 8th December. [P 275 C 1]

(b) *Provincial Small Cause Courts Act, S. 25—Powers of High Court under S. 25 are wider than those under S. 115—Civil P. C., S. 115.*

The powers of revision vested in the High Court under S. 25 of Provincial Small Cause Courts Act are wider than those under Civil P. C., S. 115. [P 275 C 1]

(c) *Provincial Small Cause Courts Act, S. 25—Civil P. C.; O. 7, R. 11—Limitation Act, S. 3.*

Revision lies from an order wrongly dismissing a suit as time barred. [P 275 C 2]

Shamair Chand—for Petitioner.

Nand Lal—for Respondent.

Judgment.—The period of limitation provided for certain suits was reduced by an Act of Legislature so far as the Punjab is concerned and in order to give relief to those persons whose suits would have become barred under the amended law the 8th December 1926 was fixed to be the date by which all such suits, which would otherwise have been barred by limitation, could be instituted in the province of Delhi. On that date apparently a large number of suits were filed in the civil Courts with the result that the supply of Court-fee stamps was exhausted.

The suit out of which these proceed-

ings have arisen was instituted by the plaintiff petitioner on the 8th December but without the necessary Court-fee stamps being affixed on the plaint. The Court directed that the stamp be paid the next day, i. e., the 9th December. On that day the plaintiff absented himself and the 15th December was fixed as the date on which the stamp could be paid. On that date also the plaintiff did not appear and consequently the suit was dismissed by default. On the 17th December an application was made by the plaintiff for the restoration of the suit. It was alleged that he could not pay the Court-fee on the 8th because no Court-fee stamp was available on that day and also that since then he had been ill and therefore unable to attend the Court in order to pay the requisite Court-fee stamp. The Court below thereupon permitted him to pay the Court-fee stamp and admitted the plaint subject to any objection that the defendant might have on the score of limitation.

The suit was registered on the 18th on payment of the requisite Court-fee stamp within the time fixed by the Court and summons sent to the defendant who appeared and raised an objection that the suit was barred by time. This objection found favour with the Judge, Small Cause Court, who on the 1st July 1927 dismissed the suit as barred by time.

An affidavit has been filed with the petition in this Court in which it is asserted by the plaintiff that on the 8th December he could not get the requisite Court-fee stamp from the treasury. There is no counter-affidavit filed on behalf of the respondent. I, therefore, must hold that the allegation of the plaintiff that he was unable to procure the requisite Court-fee on the 8th December owing to the supply of the Court-fee stamps having been exhausted is true.

A preliminary objection is taken on behalf of the respondent that no petition for revision lies. Certain authorities were cited in support of this contention and reliance was also placed on the provisions of S. 115, Civil P. C. It is to be noted that this is not a petition under S. 115, Civil P. C., but under S. 25, Small Cause Courts Act, and the powers of revision vested in this Court under the latter Act are wider than those under the Civil Procedure Code. With regard to the judgments cited by the learned counsel some of them are no doubt under S. 25, Small Cause Courts Act, and it has been held therein that if a suit, which is barred by time has been decreed by the trial Court the High Court need not interfere in revision with the decree of the trial Court because in such a case substantial justice has been done between the parties and the Court is not bound to interfere in revision in every case in which the judgment of the trial Court may be opposed to some provisions of law. But in the case before me it is not that substantial justice has been done between the parties. On the other hand the plaintiff's suit has been dismissed and if I hold that it has been wrongly dismissed then it would be in the interests of justice that the petition be accepted. The cases cited by the learned counsel, therefore, have no application to the facts of the present case and I must, therefore, overrule the preliminary objection.

On the merits I hold that it having been established that the failure of the plaintiff to affix the requisite Court-fee stamp on the plaint on the 8th December 1927 was not due to any fault on his part, but was due to the supply of stamps having become exhausted, I consider that the Court below should have exercised its discretion under S. 149, Civil P. C. But counsel for the respondent says that in this case not only there was a failure to pay the requisite Court-fee stamp, but also there was subsequent absence of the plaintiff, but that absence has been condoned by the Court below and the explanation of the plaintiff has been accepted as true inasmuch as the Court did set aside the dismissal in default. No notice prior to the restoration of the case was necessary to be sent to the defendant as contended by his counsel because the suit had been dismissed in the absence of the defendant.

I, therefore, hold that there was sufficient cause for the plaintiff not having paid the Court-fee on the plaint on the 8th December and that the Court was fully justified under the circumstances in allowing the plaintiff to pay such fee before the time fixed by it, and further that the same having been so paid the plaint must be deemed to have been presented on the 8th December. Admittedly the suit was within time on that date and consequently this petition

is accepted, the decree of the trial Court dismissing the suit as barred by time set aside and the case remanded to it with directions to dispose of it on the merits. Costs of these proceedings will abide the result.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 276

AGHA HAIDAR, J.

Mashar Khan and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 211 of 1927, Decided on 30th November 1927.

(a) *Legal Practitioner — Members of the English Bar should not file an affidavit in a case in which they appear.*

According to the well-recognized practice which prevails wherever members of the English Bar practise, the counsel should never file an affidavit in a case in which he is appearing professionally. [P 276 C 1 2]

(b) *Criminal P. C., S. 526—Transfer cannot be granted on fanciful and sentimental grounds.*

Application for transfer cannot be granted lightly on fanciful and sentimental grounds. [P 277 C 1]

Shah Nawaz—for Petitioners.

Ram Lal—for the Crown.

Order.—This is an application for transfer. It came before me on 14th October 1927, and I issued notice on it. I further directed that copies of the application and the affidavit should be sent to the District Magistrate, Kangra at Dharmsala, Mr. Labhu Ram, and also to Mr. Kanwar Bhan and Mr. Disney, Magistrates, in the same district. These officers were directed to submit such explanation as they might think necessary. These explanations came up before me on 11th November 1927. On this date a very unusual document was filed before me by Chaudhuri Shuja-ud-Din, Bar-at-law, Dharmsala, counsel for the applicants. This is an affidavit in connexion with the application for transfer and the declarant, Chaudhri Shuja-ud-Din, has been appearing apparently as counsel for the applicants. According to the well-recognized practice which prevails wherever members of the English Bar practise, the counsel should never file an affidavit in a case in which he is appearing professionally. The reason is obvious. To begin with, it hampers his freedom of action as an advocate. Besides, he gives up his dignified position of detachment as an advocate and lowers himself to the level of either a pairokar or a witness who has to support the case of a particular party by giving evidence on his behalf. Chaudhri Shuja-ud-Din has not exercised proper judgment as a counsel and he has been, in any case, ill-advised in adopting the course that he did. As to the affidavit itself: it has got no evidentiary value as such because it is not such an affidavit at all which a Court of justice can take into consideration. However, the so-called affidavit of Chaudhri Shuja-ud-Din was placed on the file by me on 11th November 1927. Mr. B. H. Bevan Petman asked for further adjournment with the view of filing an additional affidavit or statement.

The case came up before me on 25th November 1927, and it was argued by Mr. Shah Nawaz for the best part of the day. In fact his arguments alone took about three hours. The Crown was represented by the Assistant Legal Remembrancer, Mr. Ram Lal, and naturally he took some time in replying to Mr. Shah Nawaz's arguments. Mr. Ram Lal placed on the record a document which purports to be a letter addressed by Mr. Labhu Ram, District Magistrate, Kangra, to the Government Advocate. I understand that a copy of that letter had also been given to Mr. Shah Nawaz, counsel for the applicants. In any case no objection was taken to this document being placed on the record of the present case, and Mr. Shah Nawaz directed part of his arguments to this document. I regret to say that this document plainly and categorically contradicts the main allegations of Chaudhri Shuja-ud-Din's so-called affidavit. It is a very serious matter if either Chaudhri Shuja-ud-Din's statement is incorrect or the District Magistrate's explanation is erroneous. However, I am satisfied on the explanation submitted by the District Magistrate and Mr. Kanwar Bhan and Mr. Disney that the present application is without force. I do not think that the District Magistrate has conducted himself at any stage in such a way as to create an impression upon the mind of

an accused person that the Magistrate was prejudiced against him and that he would not have a fair and impartial trial in his Court. It is true that there has been some bungling during the course of the trial of this case and proceedings have been inordinately protracted, but for this result, I find from an order of Mr. Labhu Ram, dated 15th September 1927, that the applicants are mainly responsible.

At the request of Mr. Shah Nawaz at the last hearing I ordered Mr. Abdul Rab, Additional District Magistrate, Kangra, to give his explanation also in case he thought fit to do so. He has done so. It appears from that explanation that there is some feeling among a certain section of the people in the district which on one occasion, at any rate, took the form of a demonstration which ended in a riot. But for this side issue the District Magistrate, who is trying the case, cannot be held responsible. Furthermore, I do not think that the feeling is of such volume and intensity as to create an atmosphere in the whole district so inimical to the applicants that trial of the case against them would in any way be affected.

Applications for transfer cannot be granted lightly on fanciful and sentimental grounds, and I may also mention that it is not my practice, as a rule to grant such applications when they are supported by false affidavits. I find, I am sorry to say, that the affidavits filed on behalf of the applicants are such that I cannot take any action upon them. I am sure the District Magistrate would try this case with all expedition and would show all fairness and impartiality to the accused persons which is expected of him.

With these observations I reject this application for transfer.

N.K. *Application rejected.*

A. I. R. 1928 Lahore 277

BROADWAY AND ZAFAR ALI, JJ.

Nawab and *another*—Convicts—Appellants.

v.

Emperor—Opposite Party.

Appeal No. 1517 of 1927, Decided on 18th February 1928, from order of Sess. Judge, Attock, D/- 12th December 1927.

Penal Code, S. 147—K assaulted by B—Men running to rescue B and a fracas ensuing B killed—Conviction under S. 147 is not sustainable—Reasons explained.

Where *K* being attacked by *M* & *N*, friends and partizans of *K* arrived on the scene and attacked *K's* assailants causing them various injuries, *Held* their conviction under S. 147 was not sustainable, the common object of the crowd being to rescue *K*, the person originaly assaulted, and not to assault *M* & *N*, his assailants. Further, the users of excessive force alone were liable to be punished for the assaults committed by them and not the other members of the assembly; *A.I.R.* 1922 *Pat.* 498, *Foll.* [P 278 C 1, 2]

M. Saleem—for Appellants.

Carden Noad—for the Crown.

Broadway, J.—Nawab, son of Fattu, and Misri, son of Budha, have been convicted of having been members of an unlawful assembly with the object of revenging an attack upon one Khuda Bakhsh and that the members of this unlawful assembly in the prosecution of that object caused grievous hurt to Lakha and simple hurt to Misri, son of Taura, Nur Khan, son of Atar, and Baru. Each of them has been sentenced to two years' rigorous imprisonment under S. 325/147, I. P. C., for the grievous hurt caused to Lakha, and to one year's rigorous imprisonment under S. 323/147, I. P. C., for the hurt caused to Misri, son of Taura, Nur Khan and Baru, the four sentences to run concurrently. They have appealed and on their behalf we have heard Mr. Saleem.

The finding of the learned Sessions Judge is that one Khuda Bakhsh has been attacked by Misri, son of Taura, Nur Khan and others who had succeeded in disposing of him entirely, inflicting such injuries as resulted in his death a few hours later, that subsequent to the attack on Khuda Bakhsh and immediately following it Khuda Bakhsh's friends and partizans, including the two appellants, arrived on the spot and attacked Khuda Bakhsh's assailants, causing them various injuries as already indicated. The report in this case was made by Sher Khan at 12 noon at thana Lawa, which is a few furlongs from the scene. The learned Sessions Judge has not accepted the story of the prosecution in its entirety because he has considered that

they were obviously partial and their story was incredible. He says :

> It is impossible to accept any portion of their statements unless corroborated by outside facts or self-evident probabilities :

and because the two appellants received injuries, he has convicted them. Now the story told by Sher Khan is that he, together with Misri, son of Taura, and Nur Khan, had gone out on the morning of the 9th June 1927 to sow bajra in their fields after the rain that had fallen on the preceding night, that they had there discovered that the banna between their field and the field of Mt. Sahib Khatun, which was being managed and looked after by Khuda Bakhsh and which is 18 inches lower in level than their own, had beed breached, that they proceeded to repair this breach when they were interrupted by Khuda Bakhsh and Latif. When Khuda Bakhsh and Latif attacked Misri, son of Taura, and Nur Khan, Sher Khan cleared off. He, however, heard Khuda Bakhsh called out and in response to his calls saw a large number of persons including the two appellants, come running to the scene whereupon a general melee ensued in the course of which somehow or other Khuda Bakhsh was beaten and Misri, son of Taura, Nur Khan and Lakha received injuries. That is the case for the prosecution and it was urged by Mr. Saleem that it was wrong on the part of the learned Sessions Judge to resort to conjecture and to assume that the common object of those persons, including the two appellants, who came up on Khuda Bakhsh's cries was to take revenge for the injuries which had been inflicted on Khuda Bakhsh. He referred to *Ambika Singh* v. *King-Emperor* (1) and urged that the facts of the present case were, as near as may be, on all fours with the facts of the case cited by him.

In *Ambika Singh* v. *King-Emperor* (1) it was held that where on *K* being assaulted by *B* a number of persons rushed to the scene and a fracas occurred in which *B* was killed, the conviction under S. 147 was not sustainable, the common object of the crowd being to rescue *K*, the person originally assaulted, and not to assault *B*, his assailant. Further, that in so far as excessive force had been used by some members of the assembly, the users of such force alone were liable to be punished for the assaults committed by them, and not the other members of the assembly ; and finally, that in the absence of proof as to who actually dealt the fatal blow to *B*, the original assailant, no member of the assembly was punishable in respect of that blow.

It seems to me that in the present case the story as told by Sher Khan shows that when Khuda Bakhsh was attacked by Misri, son of Taura, and Nur Khan, he called out for assistance and those who came to his assistance must be held to have come with the object of rescuing him and the assembly was at that stage, therefore, not an unlawful one. S. 147, I. P. C., is therefore, not applicable in the present case and the individual members of that assembly can only be convicted of any act they committed in excess of their right to rescue Khuda Bakhsh. It seems to me that the learned Sessions Judge has fallen into the error he has owing to the fact that although he kept this trial completely separate from the trial relating to the murder of Khuda Bakhsh, he failed to realize that the material on this record was very considerably different from the material in the other case. In these circumstances, following *Ambika Singh* v. *King-Emperor* (1) I accept this appeal and acquit the appellants who must be released forthwith.

Zafar Ali, J.—I agree.

N.K. *Appeal accepted.*

(1) A. I. R. 1922 Patna. 498=1 Pat. 212.

A. I. R. 1928 Lahore 278

BROADWAY, J.

H. Bharucha—Accused—Petitioner.

v.

Municipal Committee, Lahore—Complainant—Respondent.

Criminal Revn. No. 1777 of 1927, Decided on 16th December 1927, reported by Addl. Sess. Judge, Lahore, D/- 31st October 1927.

Punjab Municipal Act (3 *of* 1911), *S.* 153—*Premises used as brothel—Order to the owner thereof to vacate the same is bad—Proper order is to ask the owner to cease to use it as brothel.*

An order passed under S. 153, Punjab Municipal Act, on an owner of a hotel which was being used as brothel to vacate the premises is bad ; the proper order in such a case is to ask the owner to discontinue the using of the hotel as a brothel. [P 279 C 2]

Report.—Mr. H. Bharucha, a Parsee gentleman, is carrying on an hotel known as Albion Hotel on the Nicholson Road,

Lahore. The Municipal Committee of Lahore complained against him under S. 153, Punjab Municipal Act, 1911, that the said hotel was being used as a brothel and was visited by disorderly persons. The case was tried by Mr. Phailbus, Magistrate, 1st Class, who considered the evidence produced in the case by both the parties and came to a finding that the hotel was in fact used as a brothel, that there was a boarding house in the upper flat of the building and a temple and a mosque in its vicinity and that the neighbours had been disturbed at night by the disorderly behaviour of drunken people in the hotel. On this finding, the learned Magistrate ordered "that Mr. Bharucha should vacate the premises within five days."

This is a petition for revision against the said order. Only three points have been argued before me. The first is that there is no sufficient proof that the hotel is used as a brothel. This is, however, a finding of fact which has been recorded by the Magistrate after considering the evidence and is not open to question on revision. Then it is complained that there was no notice under S. 153, Punjab Municipal Act, declaring the area to be a prohibited area. This argument hardly needs any notice, as there was no prosecution under S. 152. The proceedings have been under S. 153 and the same could be taken within the whole of the municipal area, provided the conditions laid down in the said section were fulfilled, which does appear to be the case here. The last condition is that the Magistrate could not order the petitioner to vacate the premises. This is conceded by the learned counsel on behalf of the Municipal Committee. He agrees that under this section the order should only have been that Mr. Bharucha should, within five days, discontinue the use of the Albion Hotel as a brothel and so arrange that there should be no undue noise and disorderly behaviour therein.

The records are, therefore, submitted to the High Court with a recommendation that the Magistrate directing the hotel premises to be vacated, be set aside, and that an order substituted instead to the effect that the Albion Hotel should cease to be a brothel and should no longer be accessible to disorderly persons and that the said order should be carried out within five days.

Order.—Accepting the recommendation of the referring Court I set aside that portion of the Magistrate's order as directs vacation of the premises and in lieu thereof direct that the petitioner discontinue using the Albion Hotel as a brothel and so arrange the carrying on of his business as to avoid undue noise to the detriment of his neighbours. This he must do within five days.

S.J. *Order set aside.*

A. I. R. 1928 Lahore 279

TEK CHAND, J.

Amir Chand and *others* — Plaintiffs—Petitioners.

v.

Kahan Das and *others*—Defendants—Respondents.

Civil Revn. No. 130 of 1927, Decided on 16th November 1927, against decree of Senior Sub-Judge, Multan, D/- 15th November 1926.

Civil P. C., O. 41, R. 33 — Suit decreed against K and J, both taking separate defences —K not appealing—J appealing on his behalf only—Suit against K cannot be dismissed in J's appeal.

J and *K* as partners were sued for a certain money. *J* pleaded that no money was borrowed for the partnership. *K* admitted liability but pleaded payment of his share of the debt. Defence of both was disbelieved and suit was decreed against both. Against this decree *J* alone appealed to the Senior Sub-Judge. *K* did not appeal. The first appellate Court accepted the appeal of *J*, but instead of dismissing the suit against him alone he dismissed it against *K* also.

Held : that the first appellate Court was not justified in dismissing the suit as against *K*.

[P 280 C 2]

Ram Lal Anand for *Ram Chand Manchand*—for Petitioners.

Ghulam Rasul and *Din Dayal* — for Respondents.

Judgment. — The plaintiff Amir Chand instituted a suit against three persons, Kahan Das, Jinda Ram and Hari Chand for recovery of a certain sum of money which was alleged to be due to him on foot of an entry in the bahi made by Hari Chand as the Karinda of a firm working under the name and style of Kahan Das-Jinda Ram. It was alleged that this firm consisted of two partners Kahan Das and Jinda Ram and that Hari Chand as their agent had made the entry in question.

The defence put forward by Jinda Ram was that the partnership had ended long

before the entry in question was made, that the firm had no previous dealings with the plaintiff and that Hari Chand had no authority to raise the debt. Nor was any portion of the money so raised used for any purpose in which he was concerned.

Kahan Das admitted that he was a partner in the firm and that Hari Chand had authority on behalf of the firm to make the entry. He also admitted that he was a member of the firm and was liable for the debt, but pleaded that he had paid off his share of the debt and that he was no longer liable to pay anything more to the plaintiff.

Hari Chand's defence was that he was a mere servant of the other two defendants and was not personally liable.

The Sub-Judge discharged Hari Chand holding that he was a servant and not a partner in the firm. He also held that the defence put forward by Kahan Das and Jinda Ram respectively had not been established. He accordingly passed a decree against both Kahan Das and Jinda Ram.

Against this decree Jinda Ram alone appealed to the learned Senior Sub-Judge raising the same pleas as he had urged in the trial Court. Kahan Das did not appeal and does not appear to have been present at the hearing. The learned Senior Sub-Judge accepted the contentions put forward on behalf of Jinda Ram and accepted the appeal, but instead of dismissing the suit against him alone, he dismissed it against Kahan Das also.

The plaintiff has come up to this Court on the revision side and on his behalf it is urged that the defences set up by Kahan Das and Jinda Ram were separate, that the findings of the trial Court against Kahan Das had not been reversed by the learned Senior Sub-Judge; that O. 41, R. 4 is inapplicable; and the Senior Sub-Judge ought not to have dismissed the suit against Kahan Das.

The findings of the lower appellate Court in favour of Jinda Ram are also attacked, but after hearing the petitioner's counsel I do not find any sufficient ground to interfere with this part of the case in revision. There is no material irregularity committed by the appellate Court in deciding the point on which the suit was dismissed against Jinda Ram. I, therefore, dismiss the revision as against him.

On behalf of Kahan Das I have heard Mr. Ghulam Rasul. But after giving due weight to his contentions I am of opinion that the petition must succeed so far as he is concerned. As pointed out already his defence was wholly different from that of Jinda Ram. He had clearly admitted his membership of the firm at the time when the entry was executed as also the authority of Hari Chand to raise the money on his behalf. He had preferred no appeal himself nor did Jinda Ram purport to appeal on his behalf. The grounds on which the appeal of Jinda Ram was accepted were wholly different from the defence set up by Kahan Das. The learned Senior Sub-Judge was not, therefore, justified in dismissing the suit as against Kahan Das.

Accordingly I accept the petition for revision to this extent that the suit of the plaintiff-petitioner against Kahan Das defendant-respondent will be decreed in full with costs in the trial Court and in this Court, but the suit as against Jinda Ram and Hari Chand is dismissed.

Jinda Ram will have his costs from the petitioner in all Courts.

N.K. *Petition accepted in part.*

A. I. R. 1928 Lahore 280

HARRISON AND DALIP SINGH, JJ.

Mt. Kaman—Defendant—Appellant.

v.

Ghafoor Ali and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 406 of 1923, Decided on 17th January 1928, from decree of Senior Sub-Judge, Hissar, D/- 24th January 1923.

(a) *Custom (Punjab) — Women's right to succeed acknowledged—Riwaj-i-am to the contrary — Onus on females is not so great as in case of males.*

Where a custom is acknowledged by which women's right to succeed is admitted such an acknowledgment has great force but it is equally true that where the riwaj-i-am is to the contrary the onus upon the females is not so heavy as it would be in the case of males. [P 281 C 1, 2]

(b) *Custom (Punjab) — Daughter entitled to succeed—Her predeceasing the father's widow does not deprive her daughter of succession.*

Where a daughter is herself entitled to succeed the mere fact that she predeceased the widow of her father will not deprive her heirs of the succession to the property left by her

father and there is no logic in holding that whereas a daughter can succeed as full heir to her father's self-acquired property a daughter's daughter will not so succeed in case her mother had predeceased the father's widow.

[P 282 C 1]

Mehr Chand Mahajan and *Mian Niaz Muhammad*—for Appellant.

G. C. Narang, *Nanak Chand* and *Nawal Kishore*—for Respondents.

Judgment.—The pedigree-table of the parties is printed at p. 35 of the paper-book. The plaintiffs are the descendants of Hasan Ali and the defendant, Mt. Kaman, is the daughter's daughter of Mir Khan, brother of Hassan Ali. Ghulam Hussain, the father of Hussan Ali and Mir Khan had three sons: Hassan Ali, Nur Khan, who married Nuri and died without issue, and Mir Khan. It is common ground that the property in dispute was acquired originally by Ghulam Hussain, the common ancestor of the plaintiffs and of the defendant. It is also clear from p. 9 of the paper-book that Ghulam Hussain in his life gifted the property acquired by him in various shares to his sons and other relatives of his and Mir Khan got the property in dispute from Ghulam Hussain by way of gift and not by way of succession.

It has been urged by counsel for the plaintiffs that Ghulam Hussain merely accelerated the succession of his sons but Ghulam Hussain reserved a portion of the property for himself and there were other donees besides the sons and, therefore, this argument has no force. The land that was reserved by Ghulam Hussain for himself was taken in equal shares by Nur Khan and the sons of Hassan Ali. Mir Khan got no share by way of inheritance. It is, therefore, clear that the property was the self-acquired property of Mir Khan, and we hold accordingly.

It has been contended that even if the property be held to be the self-acquired property of Mir Khan the riwaj-i-am of the parties shows that daughters are not the heirs even to the self-acquired property of their father in this tribe of Mussalman Rajputs of the Hissar District. As has been pointed out by their Lordships of the Privy Council, where a custom is acknowledged by which women's right to succeed is admitted, such an acknowledgment has great force, but it is equally true that where the riwaj-i-am is to the contrary the onus upon the females is not so heavy as it would be in the case of males. In this particular case there is a note by the officer who prepared the riwaj-i-am printed at p. 136 of the paper-book that he has great doubts as to the accuracy of the reply that daughters in no case inherit their fathers' property whether ancestral or acquired, and he gives instances against the alleged custom including one of Mahommadan Rajputs of the district. He is of opinion that the people who give no explanation of these cases have stated their wishes for the future in this matter and not their existing custom. Besides this note at least two instances have been produced by the defendants in which daughters succeeded to the estate of their father. One is Ex. D. 6. printed at p. 128 where after a contest it was decided by the learned District Judge that daughters did succeed to their father's self-acquired property. The other instance is Ex. D. 65 at p. 93 of the paper-book in which a daughter succeeded to the property of her father. In this case the area of the property was 233 kanals, and though there was no contest it cannot be said that this was a small amount of land, which the daughter was allowed to keep in lieu of maintenance. On the other hand the plaintiffs have not been able to prove a single instance in which collaterals have excluded daughters in succession to self-acquired property of the father. A number of witnesses have come forward to state that in this tribe there is no custom that daughters succeed to their father's property. But after considering this evidence we are of opinion that the presumption raised by the riwaj-i-am has been rebutted in this particular case and that daughters have a right to succeed to the self-acquired property of their father.

On the death of Mir Khan his widow, Mt. Tajo succeeded to the property. Mt. Tajo gifted the land to her daughter Mt. Umdan with the consent of all the collaterals now suing or of their predecessors-in-interest. It is contended, however, that the gift to Mt. Umdan was not an acceleration of the estate of the next heir by the widow, but was a gift conditional on Mt. Umdan having male issue and that as Mt. Umdan predeceased Mt. Tajo without leaving male issue the property reverted to Mt. Tajo and, on the death of Mt. Tajo, which took place

during the pendency of this case, Mt. Kaman could only succeed as a daughter's daughter and that there is no evidence to the effect that a daughter's daughter would exclude 'near collaterals. It has bee contended on the other side that the word "pisri" in the mutation order is an interpolation and that the order itself makes no mention of any such condition and further that Mt. Tajo, the donor, withdrew her claim and therefore, waived the condition which was in her favour.

It is unnecessary to decide any of these points because we are of opinion that where a daughter is herself entitled to succeed the mere fact that she predeceased the widow of her father, would not deprive her heirs of the succession to the property left by her father, and there is no logic in holding that, whereas a daughter could succeed as full heir to her father's self-acquired property, a daughter's daughter would not so succeed in case her mother had predeceased the father's widow. In any case the daughter's daughter is the defendant and and it was for the plaintiffs to prove that collaterals would exclude a daughter's daughter from inheritance of self-acquired property of the father in such a case. There is no evidence to show this and we, therefore, consider that Mt. Kaman is entitled to the property.

We, therefore, accept the appeal and dismiss the plaintiff's case with costs throughout.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 282

SHADI LAL, C. J., AND AGHA HAIDAR, J

Emperor—Appellant.

v.

Sheo Ram—Accused—Respondent.

Criminal Appeal No. 1049 of 1927, Decided on 19th January 1928, from order of 1st. Cl. Hony. Magistrate, Hissar, D/- 27th May 1927.

Evidence Act, S. 26— Confession made by accused not to Magistrate but Superintendent of Post Offices is not admissible.

Confession made by an accused not to a Magistrate but to the Superintendent of Post Offices, at his house, where he was taken temporarily by the police and was again removed back to police lock-up, is inadmissible in evidence : 20 *Bom.* 165, *Foll.* [P 283 C 2]

Abdul Rashid—for the Crown.

Shamair Chand and *Qabul Chand*—for Respondent.

Shadi Lal, C. J.—This is an appeal preferred by the Local Government, under S. 417, Criminal P. C., against an order of acquittal. The respondent Sheo Ram was tried for the theft of certain postal articles from the post office at Tosham in the Hissar District, but was acquitted by the Magistrate on the ground that the prosecution had failed to establish the charge.

The facts of the case may be shortly stated : One Bishen Singh was the postmaster of the post office at Tosham, and during his temporary absence on leave Islam-ud-din, a postman, was appointed to officiate for him as postmaster. On the afternoon of 12th March 1926 Islam-ud-din lodged a report at the police station to the effect that two parcels insured for Rs. 400, four currency notes of the value of the 210, and Rs. 9-12-0 in cash had been lost, and asked for an investigation. It appears that the postal authorities originally suspected both Islam-ud-din and the respondent of the theft, and consequently called upon each of them to pay Rs. 300 in order to make up the loss caused to the Postal Department. Subsequently the respondent was arrested and prosecuted for having committed the theft.

Now, the officiating postmaster, who was in charge of the articles in question, describes the procedure adopted by him for keeping them in safe custody. He states that on the morning of 12th March he placed a small box called cash box, containing the said articles and cash amounting to Rs. 430 in a large box; and, after locking that box as well as the door of the post office, he, accompanied by the postman Sheo Ram, left the post office and went to the city. At about 1 p. m. he alone returned to the post office but again left after a short time. It was, however, in the afternoon, when he came back again, that he found the lock of the large box open and discovered that the articles mentioned above had been removed from the small box.

This version makes it clear that the theft, if any, was committed in broad daylight. But there is no eyewitness of the affair. The case for the prosecution rests upon two pieces of evidence ; (1) the alleged confession of the accused ; and (2) the recovery of the stolen property from a nauhra ; and it is necessary to examine them carefully.

As regards the confession: it is common ground that it was made after the accused had been arrested by the police. The parties are at variance as to the exact date on which he was taken into custody, but it is admitted, even by the Sub-Inspector of Police, that he was arrested on 24th March. It was not, however, until the 27th March that the confession relied upon by the prosecution was made by him. It is noteworthy that the confession was made, not to a Magistrate, but to the Superintendent of Post Offices at his house at Hissar, and was then reduced to writing. Now, S. 26, Evidence Act, lays down that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. The prosecution, however, seek to get over this imperative provision of the law by alleging that the Sub-Inspector of Police was not present at the time of the making of the confession and that on 27th March he merely took the accused to the house of the Superintendent of Post Offices (who was himself taking a leading part in the investigation of the case) and left him there. When the Sub-Inspector returned to the house after an interval of about three hours he found that the accused had not only admitted the commission of the crime but also reduced it to writing. He then brought the prisoner back to the police lock-up with the document embodying the confession.

Now, taking this version of the incident at its face value, it is obvious that the reason for taking the accused to the house of the Superintendent of Post Offices and leaving him temporarily there was that he, having already been prepared to make a confession, should make it to a person who could not be regarded to be a police officer.

As observed above, the confession was made at Hissar, but it is not explained why the accused was not produced before a Magistrate who would have satisfied himself that the confession was voluntarily made and would, before recording the confession, have explained to him that he was not bound to make a confession and that, if he did so, it might be used as evidence against him. The procedure adopted by the police was obviously intended to evade the mandatory rule enacted by S. 26, Evidence Act, and we consider that the confession is inadmissible in evidence.

The principle enunciated in *Empress* v. *Lester* (1), is applicable to the present case. In that case, a person under arrest on a charge of murder was taken in a tonga, from the place where the alleged offence was committed, to Godhra. A friend drove with the accused in the tonga and a mounted policeman rode in front. In the course of the journey, the policeman left the tonga and went to a neighbouring village to procure a fresh horse, the tonga meanwhile proceeding slowly along the road for some miles without any escort. In the absence of the policeman, the accused made a communication to the friend with reference to the alleged crime. At the trial, it was proposed to ask what the prisoner had said, on the ground that the prisoner was not then in custody, and that S. 26, Evidence Act, did not apply. It was, however, held that, notwithstanding the temporary absence of the policeman, the accused was still in custody, and the question must be disallowed. In the case before us, the accused, who had been in the police lock-up for three days was brought out temporarily, taken to the house of the Superintendent of Post Offices, where he made the confession, and then brought back to the lock-up. No breach of the police custody was occasioned by the temporary separation of the accused from the Sub-Inspector of Police in these circumstances, and this attempt to evade the law, disingenuous as it was, cannot take the case out of the prohibition prescribed by S. 26, Evidence Act.

Coming now to the recovery of the stolen property: we observe that the place where the recovery was made was not a residential house, but a nauhra or a cattle house. It is admitted that the nauhra was the property of one Nirmal Singh, but it is stated by the Sarbarah lambardar Moiz-ud-din (P. W. 4) that the accused had taken it on rent from the owner. Nizam-ud-din, lambarder, another witness for the prosecution, however, deposes that it was the accused's father Devi Sahai who had taken the nauhra on lease from Nirmal Singh. Be that as it may, the witnesses for the prosecution admit that the building was, on the day

(1) [1896] 20 Bom. 165.

of the search, locked up; and that the key of the lock was obtained from Devi Sahai. There is not a scintilla of evidence to prove that the nauhra in question was in the possession of the prisoner, or that it should be deemed to be in his possession.

It appears that the nauhra is surrounded by low walls. Nizam-ud-din also states, and his statement is borne out by what the trial Magistrate himself saw at the time of his inspection of the spot, that one of the walls was in a dilapidated condition. In these circumstances the Magistrate was justified in holding that the building was accessible to any outsider who could, if he so desired, place in it the incriminating articles.

There is some evidence to the effect that the accused himself dug out from the courtyard of the nauhra a piece of cloth containing Rs. 10-12-0 in cash. Nizam-ud-din, on the contrary, deposes that it was Moiz-ud-din and the Sub-Inspector of Police who were making the search for the stolen property after digging up the foundations of the walls. Moreover, the cash stolen was only Rs. 9-12-0 and it is not explained why the accused had added a rupee to it and concealed Rs. 10-12-0 in the courtyard.

Our attention has been invited also to the evidence for the prosecution which shows that currency notes of the value of Rs. 760 were found in a piece of cloth recovered from a small room in the nauhra. There was no door to this room, and the cloth containing the notes was found lying under some fodder which was removed partly by a sweeper and partly by the accused. Now, according to the story for the prosecution, currency notes of the value of Rs. 210 were stolen from the post office, but the search of the building resulted, as stated above, in the recovery of the notes of the value of Rs. 760. The explanation offered, for the excess, which amounted to Rs. 550, is that notes of that value were contained in the two parcels which were insured for Rs. 400.

It is to be remembered that this nauhra had been searched by the police at least once before, but no property was recovered therefrom. In view of this fact and having regard to the defects pointed out above, we must hold that, even if the discovery was not a faked affair, it has not been proved that the accused was actually or constructively in possession of the stolen articles.

As the confession is inadmissible in evidence and there is no other reliable evidence to connect the accused with the commission of the crime, it is unnecessary to examine the authorities cited by the learned counsel for the respondent which lay down the proposition that the finding of fact arrived at by the trial Court is ordinarily entitled to great weight and should be set aside by the Court of appeal only when the indications of mistake are clear, specially when the finding is in favour of the accused's innocence. If in such a case, the evidence is all oral, and its credibility is a mere matter of opinion without involving other considerations, the opinion of the Court which heard the witnesses must be treated as almost conclusive.

For the aforesaid reasons we cannot set aside the verdict of acquittal pronounced by the trial Magistrate. We accordingly dismiss the appeal.

S.J. *Appeal dismissed.*

A. I. R. 1928 Lahore 284

HARRISON, J.

Matwal Das and *another* — Defendants—Petitioners.

v.

Nand Lal and *another*—Plaintiffs—Respondents.

Civil Revn. Petn. No. 742 of 1926, Decided on 31st October 1927, from decree of Senior Sub-Judge, Multan, D/- 5th May 1926.

(a) *Civil P. C., S.* 115—*Revision—Error of law or wrong interpretation of document capable of two meanings is no ground for revision.*

When there are two possible views of the meaning of the words used in the document, but the trial Court and the appellate Court have taken one, whether the High Court agrees with that view or not, it is not open for it to take the question up in revision. [P 285 C 1]

No revision can be entertained on a wrong decision on a question of law. [P 285 C 1]

(b) *Provincial Small Causes Courts Act* (9 *of* 1187), *Sch.* 2, *para.* 8—"*House rent*" *includes shop rent.*

The words "house rent" as used in para. 8 Sch. 2, Act 9, 1887 cover and include shop rent. [P 285 C 1]

Faqir Chand—for Petitioners.

B. P. Khosla—for Respondents.

Judgment.—This revision was admitted on the question of the interpre-

tation to be placed on a certain document. The suit was between certain landlords and their tenants, the remaining landlords being impleaded as defendants. The agreement in question which ended the previous litigation provided for the raising of the rent from a certain date and immediately after the sentence which made this provision the words are to be found that repairs would be done on behalf of the landlords by one Haji Karim Bakhsh before that date. The contention of the defendants has been throughout that the raising of the rent was conditional on the previous carrying out of the repairs. The view taken by both the trial Cpurt and the lower appellate Court was that the two conditions were independent and that the raising of the rent was not dependent upon the previous performance of the repairs.

I have been referred to the standard authority *Amir Hasan Khan* v. *Sheo Baksh Singh* (1) and also to *Shew Prosad* v. *Ram Chunder* (2), and on the other side reliance has been placed upon *Jogunnessa Bibi* v. *Satish Chandra Bhattacharjee* (3). It appears to me that this is essentially a case governed by *Amir Hassan Khan* v. *Sheo Baksh Singh* (1). There are two possible views of the meaning of the words used in the document, but the trial Court and the appellate Court have taken one, and whether I agree with that view or not it is not open to me to take the question up in revision and the petition should not have been admitted by me in the first instance for I am of opinion that it is a revision and not a second appeal and that the the words 'house rent' as used in para. 8, Sch. 2, Act 9, 1887, cover and include shop rent. If it be conceded in the first instance that the interpretation of this document is a question of law and not a finding of fact on the intention of the parties similar to that explained in *Diwan Chand* v. *Sundar* (4) and even if it be further conceded that the question of law has been wrongly decided no revision can be entertained as laid down in *Amir Hassan Khan* v. *Sheo Baksh Singh* (1).

(1) [1885] 11 Cal. 6=11 I. A. 237=4 Sar. 559 (P. C.).
(2) [1914] 41 Cal. 323=23 I. C. 977.
(3) A. I. R. 1924 Cal. 633=51 Cal. 690.
(4) [1916] 68 P. R. 1916=77 P. L. R. 1917=36 I. C. 199=182 P. W. R. 1916.

The further point about the suit in this form not being maintainable is again a question which has been decided wrongly, but with complete jurisdiction. The petition is dismissed with costs.

S.J. *Petition dismissed.*

A. I. R. 1928 Lahore 285

TEK CHAND AND AGHA HAIDAR, JJ.

Saif-ul-Rahman and *another*—Plaintiffs—Appellants.

v.

Mohammad Ali Khan and *others*—Defendants—Respondents.

Second Appeal No. 1698 of 1926, Decided on 16th May 1927, from decree of Dist. Judge, Jullunder, D/- 16th March 1926.

(a) *Custom (Punjab)—Succession—Ancestral property.*

Land ceases to be ancestral if it comes into the hands of an owner otherwise than by descent or by reason merely of his connexion with the common ancestor: 59 *P. R.* 1909; *A. I. R.* 1922 *Lah.* 392; *A. I. R.* 1922 *Lah.* 65; *A. I. R.* 1923 *Lah.* 210; *A. I. R.* 1925 *Lah.* 87 and *A. I. R.* 1925 *Lah.* 245, *Foll.*; 62 *I. C.* 855 and 167 *P. L. R.* 1912, *Dist.* [P 288 C 1]

(b) *Punjab Courts Act, S.* 41 (3)—*Decision on a point neither pleaded nor put in issue nor such decision necessary for deciding the case—Certificate is not necessary.*

Where the decision of the lower Court proceeded on a point, which was neither in the pleading nor put in issue and a decision on which was not really required for the decision of the case.

Held: that it was not necessary to file certificate under S. 41 (1) (3) with memorandum of appeal. [P 289 C 1]

Badri Das and *Jagan Nath Bhandari*—for Appellants.

Zafar Uullah Khan—for Respondents.

Tek Chand, J.—The relationship of the parties will appear from the following pedigree table:

(For pedigree see p. 286.)

The property in dispute is situate in two villages Rahon and Bharata Khurd, both in the Jullundur District. The last holder of the property was one Badar Bakhsh who died sonless many years ago leaving him surviving a widow, Mt. Aziman, and a daughter Mt. Janat. On his death the mutation of his entire estate was effected in favour of Mt. Aziman who took possession on the usual widow's life-estate. On 21st May 1910, Aziman gifted 928 kanals 6 marlas of land in Rahon to the plaintiffs,

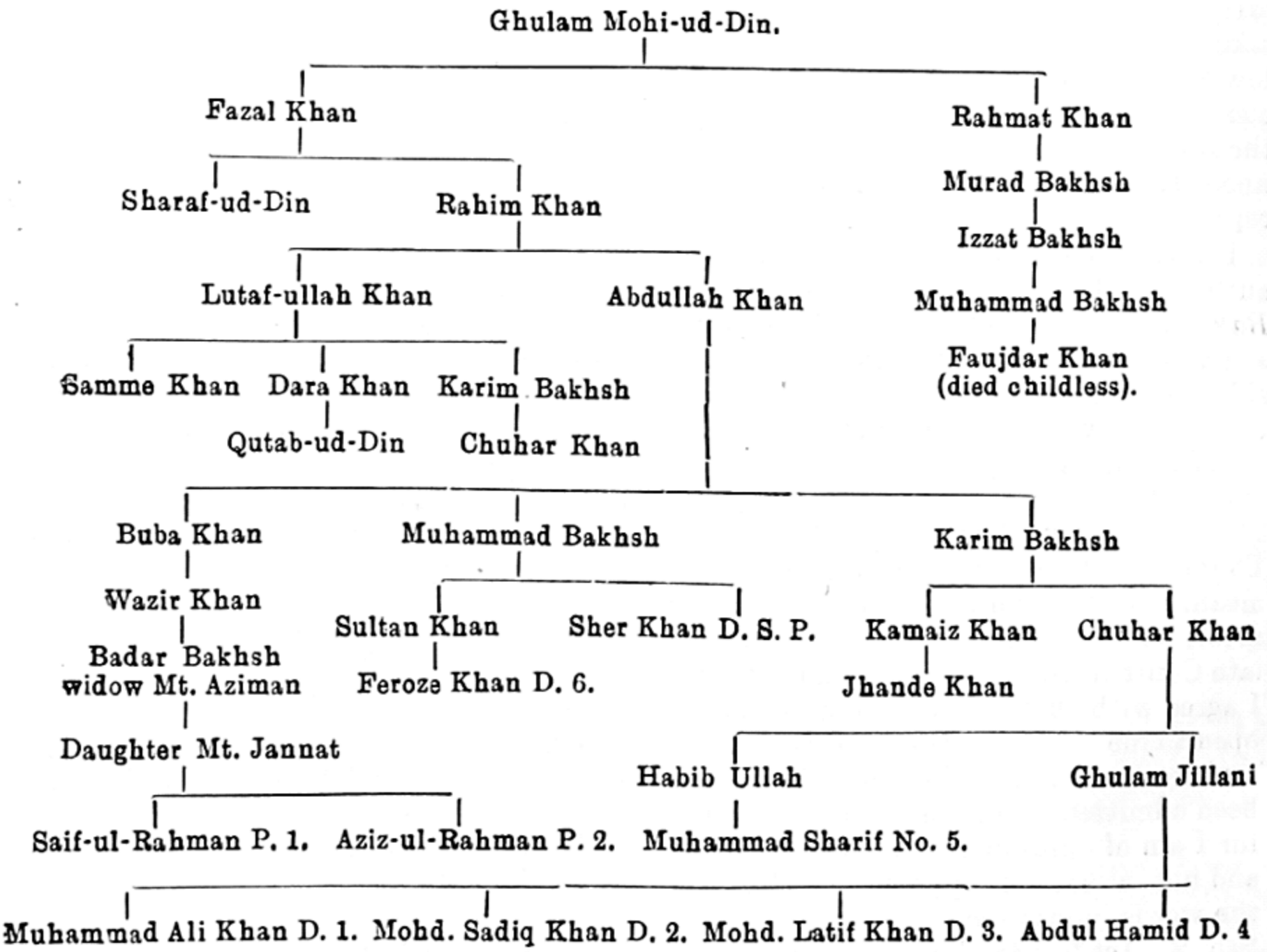
Saif-ul-Rahman and Aziz-ul-Rahman, who are the sons of her daughter Mt. Jannat. In the same year Mt. Aziman sold 55 kanals out of the remaining land in Rahon to Jang Baz Khan and Abdul Rahman.

The present defendants, who are the collaterals of Badar Bakhsh in the fourth degree, instituted two suits to contest the gift and the sale respectively. In the suit relating to the gift the daughter's sons were impleaded as defendants, while in the other suit in which the sale was contested the vendees were the sole defendants, the daughter's sons not being impleaded as they had no immediate interest in that contest. The suit relating to the sale was decreed in favour of the collaterals on a compromise entered into between them and the vendees. The terms of this compromise were that the vendees were to retain possession of the land sold to them till the death of Mt. Aziman, and on her death the land alienated was to be taken possession of by the collaterals without any payment to the vendees. This decree is dated 19th December 1911 and, as pointed out already, the daughter's sons, the present plaintiffs, were no parties to this compromise or the decree.

The collaterals' suit to contest the gift by the widow in favour of the daughter's sons relating to the Rahon land was finally decided by Mr. Lumsden, Divisional Judge, Jullundur, on 25th June 1913, who held that according to the custom prevailing among the parties the collaterals were preferential heirs *qua* the ancestral land, but the daughter's sons had a superior right to succeed *qua* the non-ancestral land. He carefully examined the history of the various plots comprised in the gift and came to the conclusion that 272 kanals 16 marlas were ancestral and the remaining 655 kanals 10 marlas were non-ancestral. Accordingly a declaratory decree was passed in favour of the collaterals to the effect that the gift would not affect their reversionary rights with regard to 272 kanals 16 marlas. The rest of the claim was disallowed.

The widow Mt. Aziman died in 1921, and on her death the collaterals took possession of the whole of the land in mauza Bharta Khurd and also of the lands in Rahon for which they had obtained a declaratory decree in 1911 and 1913.

On 1st March 1924, the present suit was instituted by Saif-ul-Rahman and Aziz-ul-Rahman, the daughter's sons of Mt. Aziman and Badar Bakhsh for pos-



session of: (a) the whole of the land in Bharta Khurd belonging to Badar Bakhsh which on his death was held by his widow Mt. Aziman and (b) 55 kanals of land in mauza Rahon which had been sold by Mt. Aziman to Jang Baz Khan and Abdul Rahman, and with regard to which, as already stated, a decree on compromise had been passed in favour of the collaterals. The plaintiffs claimed that both these lands were nonancestral of Badar Bakhsh *qua* the defendants and that according to the custom prevailing in the tribe of the parties the daughters and their sons had a preferential right to succeed to such property as against the collaterals.

The plaintiffs also claimed a declaration with regard to Khasra No. 2669, but there is now no controversy relating to this plot and I shall not deal with it in this judgment. It may also be noted that the present suit is not concerned with 272 kanals 16 marlas out of the gifted land for which a declaratory decree had been passed in favour of the collaterals in 1913.

The defence put forward by the collaterals was that the whole of the Bharta Khurd land, as also the 55 kanals at Rahon was ancestral. With regard to the latter land it was further pleaded, that even if it be held to be nonancestral the plaintiffs have locus standi to sue, as the defendants, collaterals had obtained it under a compromise decree passed against the vendees.

There is now no contention between the parties as to the rule of custom governing succession, all concerned being agreed that the daughters had a prior right to succeed to the nonancestral property and the collaterals to the ancestral property.

The learned Subordinate Judge traced the history of such plot of land and held that the Bharta Khurd land in suit comprised $5\frac{1}{2}$ out of 72 shares which represented the total area held by the common ancestor of the parties in that village. Out of these $5\frac{1}{2}$ shares he held that 3 were ancestral and $2\frac{1}{2}$ were nonancestral. As to the 55 kanals in Rahon he found that only one-fourth of it was ancestral, and the remaining three-fourths was nonancestral. He further overruled the defendants' plea that the compromise decree of 1911 was a bar to the maintainability of the suit with regard to the Rahon land. A decree was accordingly passed in favour of the plaintiffs for $2\frac{1}{2}$/$5\frac{1}{2}$ of the land in Bharta Khurd and for three-fourths of 55 kanals in Rahon.

Both parties appealed to the learned District Judge, who in a judgment, the reasoning of which I confess I am unable to understand, held that the whole of the Bharta land was ancestral. As regards the Rahon land he did not think it necessary to decide whether the whole or any part of it was ancestral as he thought that the plaintiff had no locus standi to sue by reason of the principles underlying Punjab Act 1, 1920, and the rule laid down in *Partapi* v. *Hazara Singh* (1). On these findings he dismissed the plaintiffs' suit in toto.

The plaintiffs have preferred a second appeal to this Court and we have heard Mr. Badri Das in support of the appeal, while Mr. Zafar-ullah-Khan has addressed us on behalf of the respondents. As to the Bharta Khurd land Mr. Badri Das has conceded that 3 shares out of the $5\frac{1}{2}$ in dispute have descended from Ghulam-Mohi-ud-Din to Badar Bakhsh in the male line of succession and, therefore, it must be held to be ancestral *qua* the plaintiffs. On this admission the plaintiffs have obviously no claim with regard to these 3 shares. As to the remaining $2\frac{1}{2}$ shares, it has been found that they were originally held by Ghulam-Mohi-ud-Din from whom they descended to Muhammad Bakhsh, and on Muhammad Bakhsh's line becoming extinct, devolved on one of his collaterals Qutab-ud-Din. Subsequently Qutab-ud-Din gifted these $2\frac{1}{2}$ shares to Wazir Khan, the father of Badar Bakhsh. The question to be decided is whether this land, which was at one time held by the common ancestor Ghulam Mohi-ud-Din and which had under the ordinary rules of succession descended to one of his male lineal descendants, Qutab-ud-Din, retained its ancestral character after Qutab-ud-Din had gifted it to one of his collaterals, Wazir Khan. There is no doubt that if Wazir Khan had obtained this land by succession it would have been ancestral. But here the ordinary course of inheritance was diverted by the gift by Qutab-ud-Din to Wazir Khan, who was not his heir at the time He was one of his distant collaterals and the gift by Qutab-ud-Din to him was admittedly not made by way of surrender of his estate

(1) [1916] 33 P. R. 1916=31 I. C. 794.

or acceleration of succession but was a gift pure and simple. In my opinion the mere fact that the donee was one of the large number of collaterals makes no difference whatever. It will be seen from the pedigree table that Qutab-ud-Din's immediate heirs were his uncle Samme Khan and his first cousin Chuhar Khan, and on Samme Khan's and Chunhar Khan's lines becoming extinct his estate would have been divided equally among the descendants of Bube Khan, Muhammad Bakhsh and Karim Bakhsh. Wazir Khan was a remote heir of Qutab-ud-Din, and even if he was to succeed at all to Qutab-ud-Din's property he would have got only a small portion of his estate. It cannot, therefore, be said that a gift made in these circumstances partook of the nature of an acceleration of succession or was made by reason merely of the donee's connexion with the common ancestor. In any case the onus of proving these facts lay upon the collaterals, who have failed to place any materials on the record from which a contrary conclusion might be drawn.

It is now firmly established that land ceases to be ancestral if it comes into the hands of an owner otherwise than by descent or by reason merely of his connexion with the common ancestor: see *Sri Ram* v. *Ramji Das* (2), which has been followed in *Gurdit* v. *Mt. Ishar Kuar* (3); *Munsha Singh* v. *Uttam Singh* (4): *Phui* v. *Devatia* (5); *Nagina Singh* v. *Jiwan Singh* (6); and *Ghania* v. *Phuman Singh* (7). Applying the test that has been laid down in these rulings this land must be held to be nonancestral. Mt. Zafar Ullah Khan relies strongly on *Imam Din* v. *Ram Rattan* (8) in which a Division Bench of this Court held that property which is ancestral does not cease to be so merely because the owner acquired it not by descent but by gift from a collateral, where the reason of the gift was the donee's connexion with the common ancestor of himself and the donor. The judgment as printed in *Indian Cases* does not set out the history of the land in any great detail and it is not possible to say definitely on what facts that decision was given. We sent for the High Court record relating to that case and examined the judgments of the two lower Courts, but nothing was revealed which could give us an indication as to the circumstances under which the gift has been made, except that it appeared that the donor there was sonless and the donee was his brother, who would have in the ordinary course succeeded to the former on his death. If this was so, the case was clearly one of acceleration of succession and in those circumstances it was rightly held that the gift would not alter the character of the land which would still continue to be ancestral. The facts in the present case, however, are, as pointed out already, entirely different. I, therefore, hold that the learned trial Judge was correct in holding that the whole of the land in Bharta Khurd was nonancestral to which the plaintiffs had a right to succeed in preference to the defendants. It may be mentioned that the learned District Judge sought to base his decision on *Maya Das* v. *Gurdit Singh* (9), but both counsel are agreed that that ruling has not got the remotest bearing on the point for determination in the case. I would, therefore, set aside the finding of the learned District Judge relating to the Bharta Khurd land and restore that of the learned Subordinate Judge.

As to the 55 kanals of Rahon land the learned Subordinate Judge found that one-fourth of it was ancestral and three-fourths nonancestral. The learned District Judge has given no finding on this point. Both Mr. Badri Das and Mr. Zafar Ullah Khan, after examining the record, are agreed that this finding of the Subordinate Judge is in accord with the facts on the record. Mr. Zafar Ullah Khan, however, argues that the plaintiffs are not entitled to be heard in second appeal in support of their claim relating to this land, as the learned District Judge has thrown out their claim on a question of custom, and as no certificate has been filed with the memorandum of appeal, this Court is precluded from adjudicating upon it. It appears, however, from the pleadings of the parties and the issues as framed, as well as from the evidence led at the trial that no question of

(2) [1909] 59 P. R. 1909=86 P. L. R. 1909=2 I. C. 949=94 P. W. R. 1909.
(3) A. I. R. 1922 Lah. 392=3 Lah. 257.
(4) A. I. R. 1922 Lah. 65.
(5) A. I. R. 1923 Lah. 210.
(6) A. I. R. 1925 Lah. 87.
(7) A. I. R. 1925 Lah. 245.
(8) [1920] 62 I. C. 855.
(9) [1912] 146 P. W. R. 1912=16 I. C. 855=167 P. L. R. 1912.

custom was raised by either party that might have had any bearing on the claim relating to this land. The learned District Judge in rejecting this part of the plaintiffs' claim purports to follow *Partapi* v. *Hazara Singh* (1), from which ruling he infers that the plaintiffs, who are the daughter's sons of Mt. Aziman had no right to contest the sale effected by her. He also thought that the decree which the collaterals had obtained in 1911 would enure for the benefit of those persons only who have a right to sue under Punjab Act 1 of 1920, the plaintiffs have no locus standi to sue.

With regard to the first of these grounds I may say at once that neither party had during the trial suggested that in the tribe to which the parties belong daughters or their sons have no right to contest an alienation by the widow of the last male holder with regard to the property which she had got from her husband. No evidence was led on the point nor any finding given by the trial Judge. The learned District Judge, was therefore, not justified in importing it, into the decision of the case. If the question had been raised at the proper stage and if a decision on it had been necessary for the purposes of this case, it would not have been difficult for the plaintiffs to prove that they had a locus standi to contest Mt. Aziman's alienation. It is only sufficient to point out that *Mt. Partapi* v. *Hazara Singh* (1) is no longer regarded as laying down a rule of general application. Subsequent decisions of this Court, the most important of which are *Gobinda* v. *Nandu* (10) and *Dayal Kaur* v. *Mahtab Kaur* (11) have taken a contrary view of the locus standi of a female to contest an alienation by another female. Further this question is of no importance whatever in this litigation as the present is not a suit to contest an alienation by a widow. It is a suit to succeed to the property of the last male holder on the death of his widow by persons who are admittedly his next heirs and, therefore, the rule in *Mt. Partapi's* case has no bearing on it.

Nor can I see the force of the argument based upon Punjab Act 1 of 1920. That Act prescribes the period of limitation for suits by a certain class of collaterals to contest alienations of ancestral land. In the present case no question of limitation is involved nor is the suit one to contest an alienation of ancestral land. There can be no doubt that the decree passed in 1911 setting aside the sale in 1911 enures for the benefit of those persons, who were entitled to succeed at the time when succession opened out in 1921. The plaintiffs are admittedly the heirs of Badar Bakhsh *qua* his nonancestral land and are entitled to succeed to it.

For these reasons the learned District Judge's finding cannot be supported. As the decision proceeded on a point, which was neither in the pleading nor put in issue and a decision on which was not really required for the decision of the case it was not necessary for the plaintiffs to file certificate under S. 41 (1) (3), Punjab Courts Act, with their memorandum of second appeal. I would, therefore, overrule the objection raised by Mr. Zafar Ullah Khan against the competency of the appeal. Mr. Zafar Ullah Khan has frankly conceded that he is unable to support the plea raised by the defendants in their written statements that the compromise decree of 1911 barred the plaintiffs' claim to this land. I have already held that three-fourths of the land is ancestral. The plaintiffs are, therefore, entitled to succeed with regard to the three-fourths of 55 kanals of land in Rahon.

For the foregoing reasons I would accept this appeal, set aside the judgment and the decree of the lower appellate Court and restore that of the trial Court. As the plaintiffs have substantially succeeded they will get their costs in all Courts.

Agha Haidar, J.—I agree.

R.D. *Appeal accepted.*

(10) A. I. R. 1922 Lah. 217.
(11) A. I. R. 1921 Lah. 168.

A. I. R. 1928 Lahore 289

TEK CHAND, J.

Joint Hindu Family Hazuri Mal Malawa Mal—Plaintiffs—Petitioners.

v.

Ghulam Husain and *another* — Defendants—Respondents.

Civil Revn. No. 328 of 1927, Decided on 30th November 1927, from order of 2nd Class Sub-Judge, Multan, D/- 2nd April 1927.

Civil P. C., O. 1, R. 9 and O. 2, R. 7—Objection regarding misjoinder of parties raised but not pressed — No issue regarding misjoinder framed—Trial proceeding on merits—Order returning plaint due to misjoinder at this stage is bad.

In a suit one of the parties objected to the suit on the ground of misjoinder of parties and of causes of action, but the objection was not pressed further and the Court framed issues, but no issue was framed as to the suit being bad for misjoinder of parties or of causes of action. Evidence was then recorded and case closed. After this the Court returned the plaint on the ground that two different causes of action were joint and that two separate suits should be filed.

Held, that as one of the parties had pleaded that the suit was bad for multifariousness but no issue was framed on this point and the parties had proceeded to trial on the merits, the objection has waived and so the order returning the plaint on that score at so late a stage is bad. [P 290 C 2]

Nand Lal—for Petitioners.

Saim Das—for Respondents.

Judgment.—The plaintiffs instituted a suit for recovery of Rs. 240 alleged to be due from three persons, Ghulam Hussain, Mohammad Hussain and Hassan sons of Madu. In the plaint it was alleged that the sum claimed was due on account of: (a), a balance struck by Madu, father of the defendants; and (b), a loan of 18¾ pais of wheat borrowed by Ghulam Hussain, defendant 1, from the plaintiffs. A decree was claimed for the sum due on both these items.

The defendants resisted the suit alleging that nothing was due in either account and pleading that there was misjoinder of parties and of causes of action in the suit as framed. The Court framed two issues on the merits:

(1) Whether a balance had been struck relating to item (a) by the father of the defendants and (2) whether the quantity of wheat mentioned in (b) had been given by the plaintiffs to defendant 1.

No issue was framed as to the suit being bad for misjoinder of parties or of causes of action. Both the parties were directed to lead evidence on the issues framed. The plaintiffs after producing their evidence closed their case on 2nd April 1927, but the defendants' pleader stated that they had no evidence to give. At this stage the Court instead of deciding the suit on the issues framed passed an order holding that the plaintiffs had joined two different causes of action in a single suit and accordingly it returned the plaint to the plaintiffs with the direction that they should file two separate suits.

A petition for revision has been preferred by the plaintiffs and I have heard Dr. Nand Lal for the petitioners and Mr. Saim Das for the respondents. I am of opinion that the order of the lower Court is clearly erroneous and ought to be set aside. The defendants had no doubt pleaded that the suit was bad for multifariousness but no issue was framed on this point and the parties had proceeded to trial on the merits. The defendants had no doubt raised the objections, but they had clearly waived it. The suit was a simple one and no real embarrassment was or could be caused to the parties by the joinder of the two causes of action. Therefore the defendants never pressed the objection and for all practical purposes had abandoned it.

I, therefore, accept the petition, set aside the order of the lower Court and send the case back to it for disposal in accordance with law. Costs will be costs in the cause.

S.J. *Petition accepted.*

A. I. R. 1928 Lahore 290

SHADI LAL, C. J., AND BHIDE, J.

Ahmad Din and *others*——Plaintiffs—Appellants.

v.

Mt. Fatima Bibi and *others* — Defendants—Respondents.

First Appeal No. 796 of 1923, Decided on 28th November 1927.

Custom (Punjab)—Female inheriting landed property from male holds on life-tenure — Reversioners can contest alienation of even non-ancestral property.

A female inheriting landed estate from a male holds the property on life-tenure, and it is immaterial whether the female is a widow, a daughter or a mother. A female is not competent to alienate the property except for necessity, and the reversionary heirs of the last male holder are entitled to contest the alienation, even if the property is not proved to be ancestral: 18 *P. R.* 1906, *Ref.* [P 291 C 1,2]

Des Raj Sawhney and *Din Dayal Kapur*—for Appellants.

Zafrulla Khan, Bashir Ahmad and *Khurshid Zaman*—for Respondents.

Judgment.—On 19th March 1918, one Mt. Umar Bibi, acting on behalf of her two minor daughters, mortgaged the land in dispute to the defendants Umar Din and Muhammad Din for Rs. 755. The estate originally belonged to Mt.

Umar Bibi's deceased husband Sadar Din, a Jat of Kotli Maharan in the Gujranwala District, and on the latter's death it was inherited by his widow. The widow subsequently contracted a marriage with one Jalal, and consequently forfeited her life-estate, with the result that the property was mutated in favour of the two daughters of Sadar Din.

The plaintiffs, who claim to be the collaterals of Sadar Din, have brought the present action for the declaration that they are entitled to inherit the land as soon as the daughters get married or attain majority, and that the alienation shall not prejudicially affect their right of succession to the estate. Now, the trial Judge holds, after examining the evidence on the record, and we have no hesitation in endorsing his conclusion that the plaintiffs are collaterals of Sadar Din in the sixth degree and not in the fifth degree as claimed by them. We do not, however, agree with the learned Judge that the property in question has been proved to be ancestral *qua* the plaintiffs. It is beyond dispute that it was their duty to satisfy the Court that the property descended from the common ancestor Ghariba, and the mere fact that the revenue records are silent on the question of the acquisition of the land by any of the descendants of Ghariba does not justify the conclusion that it belonged to him. A mere conjecture, however plausible, cannot be a substitute for proof, and the learned counsel for the plaintiffs is unable to invite our attention to any evidence which would show that the property descended from the common ancestor.

Nor do we think that the plaintiffs, who are related to the last male holder in the sixth degree, are entitled to inherit the estate in preference to his daughters, more especially when it is not proved to be ancestral. The onus rested upon them to establish a custom in favour of their right of succession to the exclusion of the daughters, and this onus they have wholly failed to discharge.

The trial Judge is, however, wrong in dismissing the suit merely on the ground that the daughters have got a preferential right of succession. The rule of the customary law is firmly established that a female inheriting landed estate from a male holds the property on life-tenure, and it is immaterial whether the female is a widow, a daughter or a mother, vide, inter alia, *Abdul Hussan* v. *Habib Ullah* (1). A female is not competent to alienate the property except for necessity, and the reversionary heirs of the last male holder are entitled to contest the alienation, even if the property is not proved to be ancestral.

It is, therefore, clear that the alienation cannot adversely affect the plaintiffs when the succession opens out to them, unless the mortgagees prove not only consideration but also necessity for the mortgage. The learned Subordinate Judge was, therefore, wrong in dismissing the suit without determining the question of the consideration and necessity for the alienation.

We accordingly accept the appeal and remit the case to the trial Judge for redecision with reference to the foregoing remarks. The costs in this Court shall abide the event.

N.K. *Appeal accepted.*

(1) [1906] 18 P. R. 1906=19 P. W. R. 1906=114 P. L. R. 1906.

A. I. R. 1923 Lahore 291

TEK CHAND AND AGHA HAIDAR, JJ.

Inayat—Plaintiff—Appellant.

v.

Mt. Bharai and *others*—Defendants—Respondents.

First Appeal No. 746 of 1923, Decided on 16th June 1927, from decree of Senior Sub-Judge, Jhang, D/- 6th January 1923.

(a) Custom (Punjab)—Dinga Sial of Jhang District — Gift by widow to predeceased son's daughter's sons—Objection by remote undefined collaterals of the last male owner is not tenable.

Where the property was acquired by one who was a Sial of the Dinga *got* residing in the Jhang District, and on his death the property was mutated in the name of his widow who made a gift of it in favour of her predeceased son's daughter's sons, but this was objected to by one who claimed himself to be a collateral of the deceased in the fourth degree and instituted a suit for a declaration that the aforesaid gift was null and void and ineffectual as against his rights.

Held : that the mere fact that a parson belongs to the same *got* as the last male owner gives him no right to control his widow's dealings with regard to the property that has descended to her from her husband: 68 *P.R.* 1892; 14 *P. L. R.* 1910; 235 *P. L. R.* 1912; *A. I. R.* 1923 *Lah.* 530 and *A. I. R.* 1917 *Lah.* 255, *Foll.*

[P 293 C 2]

(b) *Custom (Punjab) — Succession — Dinga Sials of Jhang District—Son's daughter's sons have superior claim to an agnate of a very remote degree.*

In the Dinga Sials of Jhang District a son's daughter's sons have under custom decidedly superior claim to succeed to a deceased's property than an agnate of a very remote degree. [P 294 C 1]

(c) *Mahomedan Law—Succession — Son's daughter's son succeeds as distant kindred in preference to person having undefined relationship.*

According to Mahomedan law son's daughter's sons are entitled to succeed as distant kindred in preference to a person whose relationship is undefined : 31 *P. L. R.* 1907 (*F.B.*), *Foll.* [P 294 C 2]

Gopal Chand and *Din Dayal*—for Appellant.

J. L. Kapur and *Abdul Aziz*—for Respondents.

Tek Chand, J.—The facts of the dispute giving rise to the action out of which this appeal arises are as follows :

The property in suit was acquired by one Bakha who was a Sial of the Dinga *got* residing in mauza Kaurian in the Jhang District. Bakha died about 17 years before the institution of the suit, leaving him surviving a widow Bharai, defendant 1, and his pre-deceased son's daughter Daulat. Daulat married Sardara who is also a Dinga Sial of the same district, and gave birth to two sons : Muhammad, defendant 2, and Ahmad, defendant 3. On the death of Bakha the property in dispute was mutated in the name of his widow Bharai. On 13th August 1920, Mt. Bharai made a gift of this property in favour of her pre-deceased son's daughter's sons, Muhammad and Ahmad, defendants 2 and 3. She had mutation entered in respect of this gift and in the proceedings before the revenue officer stated that she was making this gift in pursuance of instructions given in an oral will by her husband just before his death. The mutation was sanctioned in favour of the donees on 11th April 1921.

On 10th March 1922, Inayat, claiming himself to be a collateral of Bakha, deceased, in the fourth degree, instituted the present suit for a declaration that the aforesaid gift was null and void and ineffectual as against his rights. Defendants 2 and 3 denied that the plaintiff was a collateral of the husband of the donor in the fourth degree. On the other hand, they alleged that they were related to the deceased in the fifth degree and that the plaintiff was more distantly related to him. The will, which had been mentioned by Mt. Bharai during the mutation proceedings, was also pleaded in support of the gift. It was further stated that the donees were the sons of the daughter of the pre-deceased son of Bakha and the gift being in the nature of acceleration of succession the plaintiff had no locus standi to sue. In their statements before issues it was admitted by both counsel that Sials were governed by the general agricultural custom of the province in matters of succession and alienation. The trial Court in an exhaustive judgment dismissed the suit and the plaintiff has preferred a first appeal to this Court.

I may at the outset remark that the defendants have entirely failed to establish the oral will alleged to have been made by Bakha just before his death 17 or 18 years ago, under which Mt. Bharai, purported to make the gift in favour of the defendants. The evidence produced by the defendants in support of it is very vague and inconclusive and was, in my opinion, rightly rejected by the lower Court.

The most important question to be decided is how and in what degree are the parties related to Bakha, deceased. As already stated. the .plaintiff claimed to be a collateral of the fourth degree. In support of his alleged relationship, he produced twelve witnesses. Mr. Gopal Chand for the appellant has read this evidence in extenso before us, and, after considering his arguments, I am of opinion that no reliance whatsoever can be placed on their testimony. Mr. Gopal Chand principally relies on the evidence of Ghulam Hassan (P. W. 7) who claims to be the family mirasi of Dinga Sials of the Jhang District. This witness has produced a pedigree-table which purports to connect the plaintiff with Bakha deceased, in the fourth degree. After going through his evidence and examining the document put in by him, I have not the least doubt that this pedigree-table has been manufactured for the purposes of this case. The rest of the oral evidence is of a partisan character and is extremely vague and indefinite as to the exact relationship of the plaintiff with Bakha, deceased. I am, therefore, of opinion, that the learned Senior Subordinate Judge came to a correct con-

clusion in holding that the plaintiff had failed to prove that he was related to the deceased Rakha in the fourth degree.

Defendant 2 and 3 claim to be connected with the deceased Bakha in two different ways. Firstly, they contend that they were his collaterals in the fifth degree ; and secondly that they were his predeceased son's daughter's sons. As to the alleged collateral relationship, I must say at once that the evidence produced by the defendants in no way differs in character from that produced by the plaintiff. Two of these witnesses, Inayat (D. W. 2) and Sultan (D. W. 5) claim to be the maurusi mirasis of the defendants and they have propounded a pedigree-table which is printed as Ex. D-3 at pages 13 to 16 of the paper-book. After examining the evidence of these two witnesses and looking at the document produced by them, I am of opinion that this document also has been prepared for the purposes of this case. The rest of the oral evidence produced by the defendants to prove their alleged collateral relationship is of a partisan character and must, like the evidence of the plaintiff, be totally rejected.

There is, however, no doubt that the defendants donees are the sons of the daughter of the pre-deceased son of Bakha, deceased. This was, as already pointed out, stated in so many words in the mutation proceedings and was not denied either in those proceedings or in the written statement filed at the trial. Counsel for the plaintiff did not contradict this in his statement made before the issues were framed and the case in the lower Court proceeded on this assumption. Mr. Gopal Chand has been unable to point out anything to the contrary and it must be held that defendants 2 and 3 are Bakha's predeceased son's daughter's sons. The result of my findings on this point, therefore, is that, whereas it is established that both the plaintiff and defendants are Dinga Sial and very probably are the descendants of a common ancestor and are his agnates of a remote degree, it is not possible to definitely say in what degree either the plaintiff or the defendants are related to him. But the defendants are in this advantageous position that they are the predeceased son's daughter's sons of Bakha deceased.

The next question to be considered is whether on the above findings the plaintiff has established a locus standi to maintain the suit. Mr. Gopal Chand for the plaintiff contends that Mt. Bharai, defendant 1, was in possession of her husband's estate on the usual widow's life-tenure and as such she had no power to make a gift beyond her lifetime. He argues that the plaintiff being an agnate of Bakha deceased, even though of a remote degree, has a right to question his widow's alienation and to preserve the estate for the benefit of the reversionary body after her death. I am, however, of opinion that this contention is devoid of all force. As pointed out already all that has been established is that the plaintiff belongs to be same *got* and is possibly or at best probably descended from a remote common ancestor with Bakha deceased. As such, he has, in my judgment, no right whatever to impugn an alienation by Bakha's widow.

It is now settled that the mere fact that a person belongs to the same *got* as the last male owner gives him no right to control his widow's dealings with regard to the property that has descended to her from her husband. In *Muhammad Rafi* v. *Khazan Singh* (1), which is regarded as the leading authority on the subject, it was held that a person being unable to prove any specific relationship with the deceased proprietor, cannot be allowed to maintain a suit for declaration to contest an alienation on the ground that he belonged to the same *got* or was descended from the same stock as the alienor. To the same effect are the decisions in *Ram Bhaj* v. *Nand Ram* (2), *Jhindu* v. *Gopal* (3), *Kirpa* v. *Chinti* (4), and the recent case of *Duni Chand* v. *Lekhu* (5). It must, therefore, be held that the plaintiff has no locus standi to maintain the suit.

This finding is sufficient to dispose of the appeal and it is not necessary to deal with the other points that arise on the pleadings. I wish, however, to examine an argument strenuously urged by Mr. Gopal Chand that both according to the custom of the Sials of the Jhang District as well as under the general agricultural

(1) [1892] 68 P. R. 1892.
(2) [1909] 14 P. L. R. 1910=4 I. C. 1024=167 P. W. R. 1909.
(3) [1912] 135 P. W. R. 1912=15 I. C. 266=235 P. L. R. 1912.
(4) A. I. R. 1923 Lah. 530.
(5) A. I. R. 1927 Lah. 255.

custom of the province the defendants being the sons of the daughter of the pre-deceased son of Bakha are not nearer heirs of Bakha deceased than the plaintiff who is his agnate of a remote degree. The riwaj-i-am of the Jhang District prepared by Mr. Abbott in 1904-09 is, however, opposed to this contention. In answer to question No. 5 given by the members of the Sial tribe it is distinctly stated that if a person dies leaving the descendants of a pre-deceased son, these descendants succeed to his property in the same way as the pre-deceased son would have himself succeeded. This indicates that the right of representation is recognized to the fullest extent amongst the members of this tribe. This answer is in accord with the general agricultural custom of the province which on the whole favours the right of the descendants of a pre-deceased person to succeed. I must, therefore, hold that the defendants-donees, who are the daughter's sons of Fattu, the pre-deceased son of Bakha, have under the custom a decidedly superior claim to succeed to Bakha's property as against the plaintiff, who is, if at all, an agnate of a very remote degree.

It may also be mentioned that according to the general agricultural custom a grand-daughter and her sons are more or less on the same footing as a daughter and her sons as against distant collaterals, and as pointed out by the learned Judge of the Court below, among Sials of this district daughters of a sonless proprietor occupy a very much more favourable position as against collaterals than in many other tribes in the Province. Mr. Gopal Chand has urged that answers to questions Nos 15 and 19 of the riwai-i-am indicate that custom favours only such daughters as are married in the same *kuff* as the deceased proprietor. In this case it is proved that the daughter of Fattu was married to Sardara, who is, like the plaintiff, a Dinga Sial of the Jhang District. The rule laid down in the answer to these two questions, therefore, applies to the defendants and they are, for this reason also, better heirs than the plaintiff. The gift is, therefore, an accelaration of succession in favour of defendants 2 and 3.

However, even if we were to accept the argument of Mr. Gopal Chand that the paragraphs of the riwaj-i-am above referred to do not apply to a case like the present and that no custom special or general is proved laying down the rule which is to regulate succession to the property of a deceased proprietor as between remote collaterals and his pre-deceased son's daughter's sons then in that case the Courts are bound under the authority of the leading case reported as *Daya Ram* v. *Sohel Singh* (6) to fall back upon the personal law of the parties which in this case is Mahomedan law. It is conceded that under that system of law the defendants being the pre-deceased son's daughter's sons are entitled to succeed as distant kindred in preference to the plaintiff whose relationship, is as stated above undefined. In this view of the case also defendants 2 and 3 have got a right to be maintained in possession of the property of Bakha after the death of his widow Mt. Bharai.

For the foregoing reasons, I hold that there is no force in this appeal and I would dismiss it with costs.

Agha Haidar, J.—I agree.

S.J. *Appeal dismissed.*

(6) [1905] 110 P. R. 1905=59 P. W. R. 1907=31 P. L. R. 1907 (F. B.).

A. I. R. 1928 Lahore 294

DALIP SINGH, J.

Devi Dial and *others*—Accused—Petitioners.

v.

Mt. Rattan Devi—Complainant—Respondent.

Criminal Revn. No. 1383 of 1927, Decided on 13th December 1927, reported by Dist. Magistrate Gujranwala, D/- 24th August 1927.

Criminal Trial—Warrant case—Accused reserving cross-examination—Case ordered to be treated as summons case—Order is unjustifiable and accused has a right to cross-examine.

In a case tried as a warrant case under S. 323, I. P. C., some of the prosecution witnesses were cross-examined, accused reserving his right of cross-examining the complainant and a charge was framed against the accused. At this stage the magistrate ordered the case to be treated as one under S. 352, I. P. C., that is to say, as a summons case and the accused were refused permission to further cross-examine the prosecution witness.

Held: the order of the Court was unjustifiable and the accused must be allowed to cross-examine all the prosecution witnesses that they may wish to. [P 295 C 1, 2]

Partab Singh—for Petitioners.

Report. — Mt. Rattan Devi, complainant lodged a complaint under Ss. 147 323, 354, 504, I. P. C., against Devi Dial and others. The case was sent to the Bench of Honorary Magistrates, Gujranwala, exercising 2nd Class powers. The Court issued summons under S. 323, I. P. C. The prosecution witnesses were examined, but the complainant and one or two other prosecution witnesses were not cross-examined at all by the accused, evidently because the case was proceeded with as a warrant case and they knew that they had a right to re-cross-examine the prosecution witnesses in case a charge was framed against them. However, at this stage, the Court ordered that the case should be treated as one under S. 352, I. P. C., i. e., a summons case and that the accused should produce their defence. On this the accused applied that the prosecution witnesses should be summoned for re-cross-examination as they had reserved their right to re-cross-examine them; but this application was refused by the Court and now the accused have applied to me for the revision of the said order.

I have perused the file and I find that the complainant was not cross-examined at all and there was practically no cross-examination of another prosecution witness also. I certainly think the refusal of the Court to summon these witnesses for re-cross-examination cannot be considered justifiable and the order of refusal is prejudicial to the interests of justice. The accused party must have an opportunity to cross-examine them.

As I cannot pass the order myself, I submit the case to the Hon'ble Judges of the High Court with the recommendation that the order of the Court, dated 6th July 1927, may be revised and the Court directed to re-summon the prosecution witnesses whom the accused want to re-cross-examine.

Judgment.—This case has been reported by the District Magistrate, Gujranwala, under S. 438, Criminal P. C. The facts are that on a complaint by Mt. Rattan Devi the case was being tried by a Bench of Honorary Magistrates as a warrant case under S. 323, I. P. C. Some of the prosecution witnesses were cross-examined, the complainant was not cross-examined at all and a charge was framed against the accused. At this stage the Bench of Honorary Magistrates ordered that the case should be treated as one under S. 352, I. P. C., that is to say, as a summons case and refused to allow the accused to further cross-examine the prosecution witness. It is obvious that the accused may have been considerably prejudiced by this and in the circumstances I direct that the Bench of Honorary Magistrates allow the accused to cross-examine all the prosecution witnesses that they may wish to and then the case will be disposed of according to law.

The reference is accepted accordingly.

S.J. *Reference accepted.*

A. I. R. 1928 Lahore 295

ADDISON AND JOHNSTONE, JJ.

Emperor—Appellant.

v.

Puran Singh—Respondent.

Criminal Appeal No. 677 of 1926, Decided on 22nd June 1927, from order of Sess. Judge, Ludhiana, D/- 12th April 1926.

Arms Act (11 *of* 1878), *S.* 19 *(f)* — *Instrument consisting of a lathi and an axe-like blade and not one used for domestic purposes is "Arm."*

An instrument consisting of two separate pieces, namely, a lathi 6' 3" long, at one end of which a hallow screw and an axe-like blade 5" by 4½" having a screw to allow of its being fixed into the long lathi was held to be an arm within the meaning of S. 19 (f), Arms Act, as no instrument like that is ever used for domestic or agricultural purposes : 33 *P. L. R.* 1914; 16 *P.R. (Cr.)* 1900; and 32 *P. R. Cr.* 1918, *Foll.*

[P 296 C 1]

Government Advocate—for the Crown.

H. Rustomji—for Respondent.

Addison, J. — The respondent was tried under S. 19 (f), Arms Act, for being in possession of an "arm" and was convicted of that offence on 30th March 1926 when he was sentenced to three months rigorous imprisonment. His appeal was accepted on 12th April 1926 by the learned Sessions Judge on the ground that the blade of the weapon was an ordinary axe-blade and that, therefore, it could not be said to be an "arm." Against his acquittal by the Sessions Judge the Crown has appealed.

The respondent was an absconder in a dacoity case. The police received information that he was living with a relative in a particular village. They raided the

house about 3 a. m. on 1st October 1925, and arrested the respondent when he was lying asleep on a bed. After the arrest the house was closed. It was searched in the morning after daylight. During the search, concealed in the bed on which the respondent had been sleeping, were found a long lathi and an axe-like blade, detached from each other. There is ample evidence to this effect and the only question is whether these two articles when combined together, constitute an "arm."

The instrument in question consists of two separate pieces, namely, a lathi 6′ 3″ long, at one end of which is a hollow screw, and the axe-like blade, 5″ by 4½″. This blade has a screw to allow of its being fixed into the long lathi. No instrument like that is ever used for domestic or agricultural purposes. The handle is too long and the screw would soon become useless if the instrument was much used. On the other hand, it is an admirable weapon for offence and defence, while it admits of being successfully concealed by hiding the axe-like head on the person and carrying the handle as a lathi The learned Sessions Judge was clearly wrong in holding that because the head was like an ordinary axe-head; it was not an "arm." In the first place it was not an ordinary axe-head because of the screw. In the second place the length of the handle renders the instrument useless for domestic purposes. Further, his decision goes in the face of numerous decisions of this Court. In *Gahna* v. *Emperor* (1), where there was a handle 4′ long and an axe-like blade capable of being fixed to the handle by a ring, it was held that this did not differ from a chhavi and that it was an "arm" within the meaning of the Arms Act, In *The Crown* v. *Santa Singh* (2), it was held that

> where the circumstances of a case show that a weapon or instrument is carried or possessed for the purpose of offence or defence and not as an article of domestic or agricultural utility, there is no reason why such weapon or instrument should not be held to fall within the category of 'arm,'

and further that

> it was not necessary to decide whether the weapon was a chhavi or a gandasi, it being immaterial what the name, shape or size of an instrument is, but material to determine the use for which it is carried or possessed.

(1) [1914] 33 P. L. R. 1914=24 I. C. 594=1 P. W. R. 1914 Cr.
(2) [1900] 16 P. R. 1900 Cr.

The same conclusion was arrived at in *Emperor* v. *Ralla Singh* (3).

In these circumstances I would accept the appeal and, setting aside the order of acquittal passed by the learned Sessions Judge, convict the respondent of an offence under S. 19 (f) Act 11, 1878.

The respondent was about half a month in a jail before he was acquitted by the Sessions Judge. He has been out of jail since April 1926. The sentence passed upon him by the Magistrate was by no means excessive, but owing to the fact that he has been for so long out of jail I do not think that he should be sent back to jail. At the same time, as half a month's imprisonment is obviously much too light a sentence, I would sentence him now to pay a fine of Rs. 100 and in default of its payment to undergo two months' rigorous imprisonment. The respondent will either pay the fine or surrender to his bail bond before the District Magistrate.

Johnstone, J.—I agree.

S.J. *Appeal accepted.*

(3) [1918] 32 P. R. 1918 Cr. =48 I. C. 486= 20 Cr. L. J. 11.

A. I. R. 1928 Lahore 296

BROADWAY, J.

Emperor

v.

Akbar—Accused—Respondent.

Criminal Revn. No. 1186 of 1927, Decided on 16th December 1927, reported by Dist. Magistrate, Attock, on 26th August 1927.

Criminal P. C., S. 562 — Accused charged under S. 193, Penal Code for deliberately committing perjury—Deterrent punishment should be awarded.

A the accused was a complainant in the case against *B* and had received a bullet wound. He was won over by the defence in the case against *B* and he deliberately committed perjury intending to screen *B*. In a case against *A* under S. 193, Penal Code, the Magistrate proceeded in dealing with *A* under S. 562.

Held : the Magistrate was wrong in dealing with the accused so leniently and that a deterrent punishment ought to be awarded.

[P 297 C 1]

Report.—The matter arose out of a case under S. 307, Penal Code. One Hans Raj fired a pistol shot at the said Akbar at Ghurghushti in police station Hazro. The bullet hit him in the shoulder and remained in the body. Hans Raj was challaned under S. 307, Penal Code. Ak-

bar was produced as a witness by the prosecution and while on oath he told material lies in the Court to save Hans Raj. Some other witnesses did the same. Hans Raj was, however, convicted by Khan Abdul Majid Khan, M. B. E., Magistrate of the 1st Class, exercising enhanced powers under S. 30, Criminal P. C., and the conviction was upheld in appeal. Complaints under S. 193, Penal Code, were lodged against Akbar and one Jullundhur. Akbar was convicted and released on probation under S. 562, Criminal P. C.

The infection of the prosecution witnesses going hostile, particularly amongst the residents of Chhachh (police station Hazro), is daily increasing. It is a well-known fact that in cases of perjury it is extremely difficult to obtain evidence sufficient to bring the guilt home to the perjurer. If the very few cases, in which prosecution succeeds in convincing a Judge, are also lightly dealt with merely because, as the Court has remarked, the convict had received a bullet wound and was probably seduced by interested people, there will be no end to the matters. The people should not be suffered to understand that a perjurer if convicted, which is very seldom, has still a chance of escape on probation. If the complainants themselves succumb to accused's allurements what is to be expected of the corroborating witnesses? This sentence has had a very bad effect on the witnesses in other cases. I, therefore, forward the record to their Lordships and recommend that the order of release on probation be set aside and a deterrent sentence inflicted on the convict.

Order.—Akbar has been found guilty of an offence under S. 193, I. P. C., and has been dealt with under S. 562, Criminal P. C. The reason for this is that he was the complainant in the case against Hans Raj and had received a bullet wound. There is no doubt that he was won over by the defence in the case against Hans Raj and that he deliberately committed perjury intending to screen Hans Raj. In these circumstances I do not think the Magistrate was right in dealing with Akbar under S. 562, Criminal P. C. Perjury is far too rife for any such leniency which I consider misplaced. Bearing in mind that he was shot I set aside the order under S. 562, Criminal P. C., and sentence Akbar to rigorous imprisonment for one year.

N.K. *Revision allowed.*

A. I. R. 1928 Lahore 297

HARRISON AND TEK CHAND, JJ.

Bhamboo Mal—Defendant—Appellant.

v.

Ram Narain and *others*—Plaintiffs—Respondents.

Second Appeal No. 2225 of 1923, Decided on 17th January 1928, from decree of the Dist. Judge, Rawalpindi, D/- 4th July 1923.

(a) Civil P. C., S. 20—Suit by principal against commission agent — Suit should be brought where the commission agent carries on business.

A suit by a principal against a commission agent who has agreed to execute an order placed with him by correspondence must be instituted at the place where the commission agent carries on his business and the principal cannot sue him at the place from where he sent the order: 76 *P. R.* 1896; 1 *Lah.* 203 and *A. I. R.* 1924 *Lah.* 593, *Foll.* [P 298 C 2]

(b) Civil P.C., S. 21—Suit in British Indian Court against non-resident foreigner on a cause of action out of British India—S. 21, Civil P. C., has no application.

A suit instituted in a British Indian Court against a non-resident foreigner on a cause of action which arose wholly outside British territory is not covered by S. 21: *A. I. R.* 1919 *P. C.* 150 and (1918) *M. W. N.* 378, *Foll.*: 87 *P. R.* 1914, *Rel. on.* [P 298 C 2]

Nand Lal—for Appellant.

Bhagat Govind Das—for Respondents.

Tek Chand, J.—The plaintiffs-respondents instituted a suit in the Court of the Subordinate Judge, Rawalpindi, for recovery of Rs. 1,780 from the defendant-appellant, who carried on the business of a commission agent at Srinagar. It was alleged in the plaint that a contract had been entered into between the parties at Rawalpindi, whereby the defendant had agreed to purchase for the plaintiffs dry apricots at Askardu in Kashmir territory and to deliver them at Rawalpindi, that the plaintiffs had remitted Rs. 1,500 to the defendant at Srinagar for the purpose, but that the defendant had neither supplied the apricots nor returned the money. The plaintiffs accordingly sued to recover the amount advanced (Rs. 1,500) together with interest thereon (Rs. 280).

The defendant admitted that an order for the purchase of apricots had been placed

by the plaintiffs with him and he had received Rs. 1500 from them at Srinagar. He denied, however, that the contract had been completed at Rawalpandi or that he had agreed to deliver the apricots there. On the other hand, he alleged that the order had been placed by the plaintiffs with him at Srinagar and as the cause of action did not arise in whole or in part at Rawalpindi, the Court had no jurisdiction to entertain and try the suit. On the merits he pleaded that in accordance with the instructions sent by the plaintiff he had purchased apricots at Askardu but the cost was far in excess of Rs. 1,500, and as in spite of repreated demands the plaintiff failed to pay the balance, the defendant had sold the fruit at a loss and had recouped himself out of the amount advanced (Rs. 1,500).

The Subordinate Judge framed a preliminary issue as to the jurisdiction of Rawalpindi Courts to hear the suit and finding in the affirmative proceeded to trial on the merits. He held the contentions of the defendant to be baseless, and granted the plaintiffs a decree for Rs. 1,780.

On appeal by the defendant, the learned District Judge, in an exhaustive judgment found that the contract had been entered into at Srinagar, that no part of the cause of action arose in British India and consequently the Rawalpindi Courts had no jurisdiction to entertain and try the suit. He held, however, that as there had been no failure of justice by reason of the suit having been tried at Rawalpindi the decree of the trial Court could not, under S. 21, Civil P. C., be set aside for want of jurisdiction. On the merits the learned Judge found for the plaintiffs and held that they were entitled to recover Rs. 1,500 which they had advanced, but that they could not be allowed interest on the advance. The amount decreed by the trial Court was accordingly reduced to Rs. 1,500.

The defendant has preferred a second appeal to this Court and the plaintiff-respondent has filed cross-objections praying in that the amount decreed be enhanced to Rs. 1,780.

Mr. Govind Das for the respondent attempted to challenge the finding of the learned District Judge that the Rawalpandi Court had no jurisdiction to try the suit. But the learned District Judge has, after an exhaustive review of the evidence, held that the relationship between the parties was that of principal and agent, that the order had been placed by correspondence with the defendant at Srinagar, and that no agreement to make delivery at Rawalpindi had been proved. There can be no doubt, that on these facts the Rawalpindi Court had no jurisdiction to entertain the suit. It is settled law that a suit by a principal against a commission agent who has agreed to execute an order placed with him by correspondence must be instituted at the place where the commission agent carries on his business and that the principal cannot sue him at the place from where he sent the order, see *Muhammad Shafi* v. *Karamat Ali* (1), *Asa Ram-Kalu Ram* v. *Bakhshi Ram-Kanahyia Ram* (2) and *Pirthi Singh-Jamiat Rai* v. *Harsukh Das-Jhog Mal* (3). I must, therefore, uphold the finding of the learned District Judge that the Rawalpindi Court had no jurisdiction to entertain and try the suit.

The next question to be decided is whether the learned District Judge was right in holding, with reference to the provisions of S. 21, Civil P. C., that the decree of the trial Court could not be set aside for want of jurisdiction as there had been no consequent failure of justice. There is no doubt that if the cause of action had arisen at a place in British India, but outside the Rawalpindi District and the suit had been instituted at Rawalpindi and tried and decided there in spite of the objections of the defendant, the decree so passed could not have been set aside on appeal unless it had been established that there had been a consequent failure of justice : see *Ratti Ram* v. *Kundan Lal* (4). But this rule does not apply when a suit has been instituted in a British Indian Court against a non-resident foreigner on a cause of action which arose wholly outside British territory and the lower Court has, after overruling the defendant's objection, tried and decreed the suit against him. S. 21, Civil P. C., on which reliance is placed, runs as follows :

> No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court

(1) [1896] 76 P. R. 1896.
(2) [1920] 1 Lah. 203=53 I. C. 331.
(3) A. I. R. 1924 Lah. 593.
(4) [1914] 87 P. A. 1914 = 26 I. C. 543= 234 P. L. R. 1915.

of first instance, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

It will be seen that this section refers to objections only to the "place of suing" and not to those of the inherent incompetency of a Court to assume jurisdiction. Ss. 15 to 20 of the Code which immediately precede S. 21 lay down rules as to the "place of suing" and there can be no manner of doubt that in that section this expression is used with reference to these rules. It is not denied that Ss. 15 to 20 regulate the venue within British India and apply only to those places where the Code is in force. They deal with matters of domestic concern and prescribe rules for assumption of territorial jurisdiction by British Indian Courts in matters within their cognizance and do not govern claims against persons or things wholly outside their jurisdiction. It follows, therefore, that the rule laid down in S. 21 applies only to cases cognizable by such Courts only. Reference may in this connexion be made to *Setrucharlu Ramabhadra Raju* v. *Maharaja of Jeypore* (5), where a suit had been instituted in the Court of the Subordinate Judge of Vizagapatam on a mortgage of property which was partly situate in that district and partly in one of the scheduled districts to which the Civil Procedure Code did not apply. No objection was taken by the defendant at the trial to the jurisdiction of the Court to deal with any part of the property in suit and a decree was passed for the sale of the entire mortgaged property. On appeal the defendant objected for the first time that the trial Court had no jurisdiction to deal with the part of the property situate in the scheduled district, but the High Court, finding that no prejudice had been caused by suing in the wrong Court refused to interfere in view of the provision of S. 21, Civil P. C. The Privy Council, however, set aside the decision of the High Court and observed that S. 21 applied only where the right place of suing was one subject to the Code. Dealing with the property situate in the scheduled district their Lordships remarked that

this is not an objection as to the place of suing; it is an objection going to the nullity of the order on the ground of want of jurisdiction.

(5) A. I. R. 1919 P. C. 150 = 42 Mad. 813 = 46 I. A. 151 (P. C.).

Their Lordships, in rejecting an argument based on S. 17, Civil P. C., held that the word "Courts" as used in that section "must be held as meaning the Courts to which the Code applies."

The question was also considered by a Division Bench of the Madras High Court in *Manjappa* v. *Rajagopalchariar* (6) where it was held that S. 21 has no applicability to a case in which there has been usurpation by the lower Court of the jurisdiction of a foreign Court. I must, therefore, hold that the Rawalpindi Court had no jurisdiction to try the case and that the District Judge was bound to give effect to the defendant's objection. I would accordingly accept the appeal, set aside the decree of the District Judge and dismiss the plaintiffs-respondents' suit. But having regard to all the circumstances of the case I would leave the parties to bear their own costs throughout. The cross-objections necessarily fail and are dismissed.

Harrison, J.—I agree.

S.J. *Appeal accepted.*

(6) [1918] M. W. N. 378 = 45 I. C. 779 = 24 M. L. T. 95.

A. I. R. 1928 Lahore 299

TEK CHAND, J.

Secy. of State—Defendant—Petitioner.

v.

Haji-Bakha Fazal Din—Plaintiffs—Respondents.

Civil Revn. Petn. No. 744 of 1926, Decided on 9th February 1927, from decree of Senior Sub-Judge, Ferozepore, D/- 28th July 1926.

(a) *Railways Act* (9 *of* 1890), *S.* 72—*Risk-Note B—Suit for damages for loss of goods—Burden of proving neglect of railway is on the party suing for damages.*

Before a person, who has consigned his goods under Risk-Note B, is entitled to maintain an action for damages for loss of his goods, he must definitely prove that the loss was caused by reason of the wilful neglect of the Railway Administration or its servants: *Smith Ltd.* v. *Great Western Ry. Co.*, (1922) 1 *A. C.* 178, *Foll.* [P 301 C 1]

(b) *Railways Act* (9 *of* 1890), *S.* 72—*Risk-Note B—Suit for damages for loss of goods—Railway Company alleging theft from running train but failing to prove it—The admission is not of theft at large but of a specific form of it—Onus is still on the party suing for damages to prove neglect or theft by servants of the Railway Company.*

Where the Railway Company alleges theft from a running train, but fails to prove the

allegation, the admission is not of theft at large but of a specific form of theft; and in any case the onus still lies on the plaintiff to prove neglect or theft by the servants of the Company: *A. I. R.* 1926 *Pat.* 148 and 43 *Bom.* 769, *Foll.* [P 301 C 1]

(c) *Civil P. C., S* 115—*Lower appellate Court failing to take notice of real point in the case—High Court can interfere in revision.*

Where the lower appellate Court has failed to take notice of the real point in the case and has given no decision on it at all, it is clearly a material irregularity justifying interference of the High Court on the revision side: *A. I. R.* 1921 *Lah.* 60; 18 *P. W. R.* 1909; 13 *I. C.* 657 and 15 *C. L. J.* 114, *Foll.* [P 301 C 2]

Carden Noad—for Petitioner.

Muhammad Amin—for Respondents.

Judgment.—On 14th July 1922 the Gwalior Metal Works Company Limited booked a consignment of 21 bags of aluminium wares at the Gwalior Railway Station on the G. I. P. Railway for carriage to Ferozepore City on the North-Western Railway. The goods were booked to the consignor himself, but he had endorsed the railway receipt in favour of the plaintiff thus entitling him to take delivery of the consignment at Ferozepore. When the plaintiff went to the Ferozepore railway station to take delivery, it was discovered that only three bags out of 21 had arrived and that the remaining 18 bags were not forthcoming. The plaintiff took delivery of the three bags and on 27th August 1923, instituted the present suit against the Secretary of State for India through the Agent, North-Western Railway, for recovery of Rs. 495-3-6 being the price of the missing 18 bags. In the plaint it was alleged that the loss was due to the wilful neglect and gross carelessness of the Railway Administration The G I. P. Railway and the Gwalior Metal Works were also impleaded as defendants, but none of them appeared and the proceedings were ex parte against them.

The Secretary of State pleaded, inter alia, that the goods were booked at a special reduced rate at the owner's risk under Risk-Note B and that for this reason the Railway Administration was free from all liability for the alleged loss. It was further pleaded that the goods had been lost on the G. I. P. Railway in a theft committed from a running train and that for this reason also defendant 1 was not liable. The plaintiff at first denied the execution of the Risk-Note B, but later on he admitted it.

The trial Court found that the contention of the defendant that the goods had been lost on the G. I. P. Railway was not proved and also that the defendant had failed to establish that the goods were lost in a theft committed from a running train.

On these findings, but without going into the question as to whether defendant 1 was guilty of wilful neglect, it decreed the plaintiff's suit.

On appeal by defendant 1 to the Senior Subordinate Judge at Ferozepore, it was specifically urged in the memorandum of appeal that the lower Court could not legally pass a decree in favour of the plaintiff in view of the fact that there was no evidence of negligence on the part of the Railway Administration. The other findings as to the loss having occurred on the North-Western Railway and the goods not having been stolen from a running train were also challenged. The appellate Court, however, upheld these findings, but, without going into the question of wilful neglect on the part of defendant 1, dismissed the appeal.

Defendant 1 has come up to this Court on the revision side and the learned Government Advocate, who appears in support of the petition for revision, has, accepting the findings of the Courts below as correct, argued that the Courts have acted with material irregularity in not applying their minds to the really vital point in the case, namely whether a decree for damages for loss of the goods consigned, under Risk-Note B could be passed in favour of a consignee against the Railway Administration without a definite finding that the Railway Administration was guilty of wilful neglect. After hearing the learned Government Advocate for the petitioner and Mr. Muhammad Amin, who appears for the respondent, I am of opinion that this contention must prevail.

In Risk-Note B it is definitely provided that the Railway Administration will carry the goods

harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment, from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants, * * * provided the term "wilful neglect" be not held to include fire, robbery from a running train or any other unforeseen event or accident.

It is, therefore, clear that before a person, who has consigned his goods under Risk-Note B is entitled to maintain an action for damages for loss of his goods, he must definitely prove that the loss was caused by reason of the wilful neglect of the Railway Administration or its servants. If and when he has succeeded in proving such neglect, it will be open to the Railway Administration to claim immunity by proving that the theft was from a running train. It is now well settled that the onus of proving that the railway was guilty of wilful neglect lies clearly upon the plaintiff. There was at one time a conflict of judicial authority on this point, but all doubts have been set at rest by the decision of the House of Lords in the well-known case of *Smith Ltd.* v. *Great Western Ry. Co.* (1), where it was held with reference to a risk-note, the terms of which were very similar to those of Risk-Note B, that it lies upon the plaintiff to affirmatively establish that the loss was due to the wilful misconduct of the Railway Company and its servants, and that the failure of the railway to account for the loss of goods was not evidence, which justified the Court in interfering that the loss arose from such wilful misconduct.

The learned counsel for the respondents, however, has argued that in this case the railway had set up a plea of loss by theft from a running train and having failed to prove it, it is not open to it now to insist upon the plaintiff proving wilful neglect on the part of the defendants. In my opinion this contention is devoid of all force. In a case, which is very similar to the present one a Division Bench of the Patna Court held that where the Railway Company alleged theft from a running train, but failed to prove the allegation, the admission was not of theft at large, but of a specific form of theft; and that in any case the onus still lay on the plaintiff to prove neglect or theft by the servants of the company: *G. I. P. Ry.* v. *Datti Ram* (2). In a somewhat similar case, the Bombay High Court also came to the decision in *B. B. & C. I. Ry. Co.* v. *Ranchhodlal Chotalal & Co.* (3). The terms of the risk-note are very clear and cast a duty on the consignor to establish that the railway was guilty of wilful neglect before he can hold it liable for the loss.

In the present case the plaintiff specifically alleged in his plaint wilful neglect on the part of the defendant, but led no evidence whatever in support of it. Nor are there any materials on the record from which I can infer that the defendant or any of its servants was guilty of any such neglect. Respondents' counsel concedes that this is so, but urges that this is a petition for revision under S. 44, Punjab Courts Act, and even if a mistake of law has been committed by the appellate Court, this Court ought not to interfere. But this is not a case in which the lower appellate Court has come to an erroneous decision on a point of law. Here, as already pointed out, the appellate Court, (as also the trial Judge), has failed to take notice of the real point in the case and has given no decision on it at all. This is clearly a material irregularity justifying interference on the revision side: see *Tej Bhan* v. *Wali Dad* (4), *Bawa Naringir* v. *Miran Baksh* (5), *Baij Nath Mistry* v. *Jang Bahadur* (6), and *Sibu Sant* v. *Nelai Charan Das* (7).

For the foregoing reasons, I accept the petition and, setting aside the decrees of the Courts below, dismiss the plaintiff's suit. As defendant 1 put forward a plea of theft from a running train, but failed to prove it, I leave the parties to bear their own costs throughout.

S.J. *Petition accepted.*

(1) [1922] 1 A. C. 178=38 T. L. R. 359=27 Com. Cas. 247=91 L. J. K. B. 423.
(2) A. I. R. 1926 Pat. 148=5 Pat. 118.
(3) [1919] 43 Bom. 769=52 I. C. 516=21 Bom. L. R. 779.
(4) A. I. R. 1921 Lah 60.
(5) [1909] 18 P. W. R. 1909=4 I. C. 314.
(6) [1912] 13 I. C. 657.
(7) [1911] 15 C. L. J. 114=9 I. C. 806.

A. I. R. 1928 Lahore 301

TEK CHAND AND AGHA HAIDAR, JJ.

Fateh Ali and *others*—Plaintiffs—Appellants.

v.

Gehna and *others*—Defendants—Respondents.

First Appeal No. 318 of 1923, Decided on 11th May 1927, from decree of 1st Cl. Sub-Judge, Sialkot, D/- 22nd December 1922.

Transfer of Property Act, S. 74—Purchase of puisne mortgagee's rights by prior mortgagee—Prior security is presumed to be kept alive and not lost—T. P. Act, S. 101.

There is no rule of law under which a prior mortgagee by purchasing the rights of a

puisne mortgagee loses the rights, which had been secured to him by the earlier mortgage. In such cases, the presumption is that he intended to keep alive the prior security and would be entitled to fall back upon it in case of necessity. [P 303 C 1]

G. C. Narang and *Maya Das*—for Appellants.

S. A. Nasir and *Dhanpat Rai*—for Respondents.

Tek Chand, J.—On the 13th February 1914, defendants 4, 5 and 6 Nagahia, Sultan and Babu, who are the owners of 133 kanals, 16 marlas of land executed a deed of mortgage in respect of this land in favour of plaintiffs, 1, 2, 5 and 6 and Hakim, the predecessor-in-interest of plaintiffs 3 and 4 and defendant 7 for a sum of Rs. 3,455. The mortgage was with possession and the mortgage money was to bear no interest. The term of the mortgage was fixed as 17 years and twas specifically provided that within that period :

> the mortgagors were not entitled to redeem the land nor could the mortgagees demand their mortgage money from the mortgagors.

It was stipulated that on the expiry of this period when the principal mortgage money was paid the land shall be redeemed. This mortgage was given effect to in the revenue papers and the mortgagees took possession of the land as agreed upon.

On the 6th March 1916, the mortgagors executed another mortgage-deed in respect of the same property in favour of one Hari Singh for a sum of Rs. 6,000. It was stated in this deed that out of the mortgage money Rs. 3,400 was kept in deposit with the mortgagee (Hari Singh) for payment to Hakim etc., prior mortgagees under the deed dated the 13th February 1914. The balance of Rs. 2,600 was paid in cash partly to the mortgagors and partly adjusted in discharge of their other liabilities to Hari Singh and third persons. It was also stipulated in the deed that interest on Rs. 2,600 was chargeable at the rate of Rs. 1-4-0 per cent. per mensem. Hari Singh was authorized to take possession of the land on payment of the mortgage money due to Fateh Ali, etc., on the prior mortgage and in that event interest on this sum of Rs. 3,400 was to counterbalance the produce of the land.

On the 27th August 1917, Hari Singh, the mortgagee under the deed of the 6th March 1916, aforesaid, transferred his mortgagee rights to Fateh Ali, etc., (the mortgagees under the deed of the 13th February 1914) for a sum of Rs. 6,000. The consideration was recited as having received as follows :

> (I) Given credit for to the vendee out of Rs. 3,455 (which was kept in trust with him) on account of the mortgage-deed dated the 13th February 1914 : Rs. 3,400.
>
> (II) To be received in cash before the Sub-Registrar at the time of the registration : Rs. 2,600.

It was already recited :

> that the vendees are already in possession. They should remain in future as well, on payment of the Government revenue so long as redemption is not effected. The owners shall redeem the land mortgaged when they pay the mortgage money with interest due from them.

On the 26th January 1922, the mortgagors Jawahir, etc., executed another mortgage-deed for 197 kanals 7 marlas of land (which included 133 kanals and 16 marlas which had been the subject-matter of the former transaction) in favour of defendants 1 to 3, Gahna, Shera and Saraj Din, for Rs. 9,500. Out of this sum Rs. 6,000 was left in deposit with these mortgagees for payment to Fateh Ali, etc., the prior mortgagees. The term of this mortgage was fixed as ten years at the expiry of which the mortgagors were entitled to redeem the land mortgaged.

On the 20th February 1922 defendants 1 to 3 (mortgagees under the last mortgage, dated the 26th January 1922) presented an application under the Redemption of Mortgages Act 11 of 1913, to the Collector, asking for redemption of the land from Fateh Ali, etc., the prior mortgagees on payment of Rs. 6,000. Fateh Ali, etc., resisted the application contending that the term of their mortgage was 17 years and redemption could not take place before the expiry of that period. This contention was overruled and the defendants' application granted on the 18th March 1922.

Thereupon Fateh Ali, etc., the prior mortgagees, instituted the present suit on the 30th March 1922 under S. 12, Act 11, 1913, claiming a declaration that the term of their mortgage, i. e., 17 years, is still intact and it is not open to the original mortgagors or the subsequent mortgagees, defendants 1 to 3 to redeem the mortgage before the expiry of that period. The claim was resisted by defendants 1 to 3 on the ground that the plaintiffs, by purchasing the mortgage

rights of Hari Singh under the sale-deed of the 27th August 1917, had extinguished the prior mortgage and cannot take advantage of the provisions thereof.

The lower Court in a judgment which it is not easy to understand has upheld the defendants' contention and disallowed the plaintiffs' claim to rely on the clause securing the property to them for 17 years but has passed a decree for interest on the sum of Rs. 2,600 (which is the item over and above Rs. 3,455 the principal sum secured on the foot of the first mortgage) the liability to pay which was also denied by the defendants.

The defendants have accepted the findings of the Court below with regard to the item of interest, but the plaintiffs have preferred a first appeal asking for a declaration that the mortgage in their favour cannot be redeemed till after the expiry of 17 years from the 13th February 1914.

The sole question to be decided is whether by taking over the mortgagee rights from Hari Singh under the deed of sale dated the 27th August 1917, which is printed at pp. 6 and 7 of the paper-book, the plaintiffs can be said to have either expressly or by necessary implication given up the rights that were secured to them by the original mortgage dated the 13th February 1914. After hearing Dr. Narang for the appellant and Mr. Nasir for the respondents, I am of opinion that the conclusion arrived at by the lower Court cannot be sustained, and this appeal must succeed. There is nothing in the provisions of the sale-deed aforesaid from which it could be concluded that the plaintiffs intended to abandon the rights that had been secured to them under the prior mortgage-deed in their favour, nor is there any rule of law under which a prior mortgagee by purchasing the rights of a puisne mortgagee loses the rights, which had been secured to him by the earlier mortgage. Indeed, in such cases, the presumption is that he intended to keep alive the prior security and would be entitled to fall back upon it in case of necessity.

The learned counsel for the respondents contends that in this case by purchasing the mortgagee rights of Hari Singh, the appellants had clothed themselves with his rights and now stand in his shoes, and as the mortgage in favour of Hari Singh was for a consolidated sum of Rs. 6,000 and in that deed it is stated that Rs. 3,400 was kept in trust for payment to the appellants, they should be considered to have automatically redeemed themselves the moment the sale of Hari Singh's rights in their favour was effected. After giving full consideration to the contentions of the learned counsel and considering the terms of the deed, I am, however, of opinion that all that the plaintiffs did by entering into the transaction of the 27th August 1917, was to take over from Hari Singh an additional mortgage for Rs. 2,600 that had been created in his favour. The practical effect of the sale was to create an additional charge for this amount in their favour on the same property. There was no intention to abandon the rights under the prior mortgage nor does the creation of an additional mortgage extinguish the rights which they had already acquired under the prior mortgage.

In this connexion reference may usefully be made to the remarks of Lord St. Leonards in *Tenison* v. *Sweeny* (1):

> Then another point was started, that, as the successive mortgages were for the sum secured by the former mortgages and for the sums subsequently advanced, the old securities were merged in the new, and that the judgment-debtors had a right to come before the last mortgage. That is a very novel view of the operation of the deeds. It is clear that the former mortgages continued untouched and operative notwithstanding the new mortgages and the new mortgages were for the purpose of letting in the further advances upon the property. Nothing could be more alarming to creditors than that a doubt should be thrown out where, by taking a new security for their old debt and for further advance they do not prejudice their original securities.

I may also refer to the decision of Vice-Chancellor Knight Bruce in the well-known case of *Miln* v. *Walton* (2), that a creditor having a mortgage on the funds of his debtor for part of his debt does not necessarily surrender that mortgage or lower its priority by taking a subsequent mortgage on the same funds of the whole of the debt.

In the case before us there is the additional fact, that the first mortgage in favour of the plaintiff was for Rs. 3,455 and in the mortgage-deed in favour of Hari Singh and the sale-deed of his mortgagee rights by the latter in favour of the appellants dated the 22nd August

(1) [1844] 1 Jones & Lot. 710=7 Ir. Eq. R. 511.
(2) 60 R. R. 184.

1917, the sum of Rs. 3400 and not the full amount of Rs. 3,455 was recited as having been kept in deposit for payment on account of the prior mortgage. This clearly indicates that the intention of the parties to the later transactions was not to extinguish the prior mortgage but rather to keep it alive. Further, the mortgagors were not parties to this sale-deed and, therefore, this transaction could not affect the rights of the appellants and the mortgagers inter se, which had been secured to each of them by the mortgage dated 13th February 1914.

In the lower Court Sultan, one of the mortgagors, stated that as a matter of fact Rs. 3,400 had been actually paid to the plaintiffs in redemption of the first mortgage. This allegation, however, is contrary to the case that had been put forward by the contesting defendants in their written statement and was rightly rejected by the lower Court. I have considered the evidence which was led in support of this allegation and have no hesitation in agreeing with the learned trial Judge that it is unreliable.

For the foregoing reasons I would accept the appeal and grant the plaintiffs the declaration prayed for, but, having regard to all the circumstances of the case, I would leave the parties to bear their own costs throughout.

Agha Haider, J.—I agree.

R.D. *Appeal accepted.*

A. I. R. 1928 Lahore 304

TEK CHAND, J.

Ramjidas—Plaintiff—Petitioner.

v.

Jairam Das—Defendant—Respondent.

Civil Revn. No. 721 of 1927, Decided on 16th December 1927, from order of Sub-Judge, 1st Class, Lahore, D/- 16th November 1927.

Punjab Courts Act (6 *of* 1918), *S.* 44—*Order reviewing previous order setting aside ex-parte proceedings is interlocutory—Revision does not lie against it.*

Orders amending the conditions on which ex-parte proceedings are set aside are interlocutory orders and are not orders in 'a case which has been decided by a subordinate Court' within the meaning of S. 44, Punjab Courts Act, and a revision is not competent against them: *A. I. R.* 1924 *Lah.* 425 *Foll.*; *A. I. R.* 1926 *Lah.* 379 and *A. I. R.* 1925 *Lah.* 639, *Dist.* [P 304 C 2]

H. C. Kumar—for Petitioner.

J. L. Kapur—for Respondent.

Judgment.—This is a petition for revision of an order passed by the trial Court on 30th November 1927 whereby it reviewed its previous order of 16th November 1927 modifying the conditions on which it had set aside ex-parte proceedings against the defendant-respondent.

This suit in which these orders were passed has not yet been decided. The relevant facts are that the defendant failed to appear on a particular date and the Court directed ex-parte proceedings to be taken against him. Before the judgment was announced an application was made to set aside the ex-parte proceedings and this was granted on certain conditions. On review, one of these conditions was modified and the Court directed the parties to produce their evidence. As these various orders have been passed in a pending case and are interlocutory they are not order in a "case which has been decided by a subordinate Court" within the meaning of S. 44, Punjab Courts Act, and a revision is not competent in view of the Full Bench decision in *Firm Lal Chand Mangal Sen* v. *Firm Behari Lal-Mehr Chand* (1).

Mr. H. C. Kumar, for the petitioner, relies on *Piroj Shah* v. *Qarib Shah* (2) and *Dittu Ram* v. *Nawab* (3) in support of his contention that this Court has got the power to interfere with such orders on revision. I am, however, of opinion that these cases are clearly distinguishable as in each of them the suits had (at least for the time being) been decided by the passing of an ex-parte decree. In the present case the suit is still pending and no decree has yet been passed. The orders are, therefore, of a purely interlocutory nature and no revision lies. Accordingly I dismiss the petition for revision, but having regard to all the circumstances of the case I leave the parties to bear their own costs. The Deputy Registrar will see that the record is returned to the lower Court to-morrow.

S.J. *Petition dismissed.*

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(1) A. I. R. 1924 Lah. 425=5 Lah. 288 (F.B.).
(2) A. I. R. 1926 Lah. 379=7 Lah. 161.
(3) A. I. R. 1925 Lah. 639.

A. I. R. 1928 Lahore 305

BROADWAY AND JAI LAL, JJ.

Pir Bakhsh—Defendant—Appellant.

v.

Mt. Ghulam Bibi and *another*—Defendants—Respondents.

First Appeal No. 994 of 1923, Decided on 22nd November 1927, from decree of Sr. Sub-Judge, Lyallpur, D/- 18th April 1923.

(a) Custom (Punjab)— Succession— Amritsar District—Daughters succeed to the exclusion of agnates.

According to the customary law of the Amritsar District daughters exclude collaterals in succession to self-acquired property. [P 305 C 2]

(b) Punjab Colonization of Government Act (5 of 1912) as amended by Act (3 of 1920), S. 20— Succession in cases before the Act came into force is governed by personal law of parties and not by the Act.

Succession to a tenant who has died before the Punjab Colonization of Government Act came into existence was governed by the custom prevalent among the parties and S. 20 of the above Act has no application in such a case as it provides for devolution of a tenancy where, after the commencement of the Act any original tenant dies. [P 305 C 2]

Abdul Ghani Khan—for Appellant.

Mehr Chand Mahajan and *Faqir Chand* for *Moti Sagar*—for Respondents.

Broadway, J.—This is an appeal by Pir Bakhsh against a declaratory decree passed by the Senior Subordinate Judge of Lyallpur, declaring that the plaintiffs, the daughters of one Nathu, were entitled to succeed to the land in dispute after the death of their mother Mt. Rahmate. The learned Senior Subordinate Judge has written a lengthy judgment in which all the points have been carefully discussed.

It appears that the original tenant of this land was one Nathu who was granted the holding as an abadkar and subsequently acquired occupancy rights therein. He died in 1908 leaving him surviving a widow, Mt. Rahmate, and two daughters Mt. Ghulam Bibi and Mehtab Bibi. Mt. Rahmate attempted to dispose of this tenancy but her attempt failed as the revenue authorities declined to sanction the alienation proposed by her. Later on she made a gift in favour of her daughters. When this gift was placed before the revenue authorities for sanction Pir Bakhsh protested urging that he was the ultimate heir to this property as a collateral of the deceased Nathu. The revenue authorities accordingly declined to enter up the gift and referred the parties to a civil Court. Thereupon the two daughters (both of them married) of Nathu brought a suit for a declaration of their rights as the heirs of Nathu impleading Mt. Rahmate, widow of Nathu and Pir Bakhsh as defendants. Mt. Rahmate admitted the claim while Pir Bakhsh contested it.

It has been urged before us that the suit is governed by the provisions of Act 5 of 1912 as amended by Act 3 of 1920. This appears to have been the position taken up by both parties in the Court below. In the grounds of appeal to this Court it was alleged that Act 5 of 1912 did not apply. The learned advocate for the appellant appears to have been in somewhat of a quandary as to the line he was prepared to take in this Court, for at one time he said that he was prepared to give up that ground and urged that the parties were governed by the Act of 1912. It seems to me, however, that that Act does not afford any assistance in this matter. The succession in this case is clearly succession to Nathu and S. 20 Act 5 of 1912 as amended by Act 3 of 1920 provides for the devolution of a tenancy in cases where, after the commencement of the Act, any original tenant dies. Admittedly, in the present case Nathu died in 1908 and succession to his rights, therefore, is clearly not governed by this section. In order to ascertain who his successor is recourse must be had to the ordinary custom by which the parties are governed. The general rule of custom as laid down in para. 23 of the Digest of Customary Law by Sir William Rattigan, is that daughters exclude collaterals in succession to self-acquired property. Admittedly this estate is the self-acquired or non-ancestral property of Nathu and, therefore, by the general custom, the plaintiffs in this case would exclude collaterals. An attempt was made by Pir Bakhsh to establish a custom to the contrary and certain evidence was led in support. That evidence has been carefully examined by the learned Senior Subordinate Judge and it has been pointed out that the instances given by the witnesses have no real application to the facts before us, whereas the instances relied on and proved by the plaintiffs, support their claim. So far as the Customary Law of the Amritsar District,

(from which district Nathu originally migrated to Lyallpur) shows the general trend of opinion was that daughters succeed to non ancestral property to the exclusion of agnates. In every respect, therefore, the claim of the daughters appears to me to be superior to that of Pir Bakhsh and I would, therefore, dismiss this appeal with costs.

Jai Lal, J.—I agree.

S.J. *Appeal dismissed.*

A. I. R. 1928 Lahore 306

TEK CHAND AND AGHA HAIDAR, JJ.

Nur Muhammad and *others*—Plaintiffs —Appellants.

v.

Qaim and *others* — Defendants—Respondents.

First Appeal No. 2704 of 1923, Decided on 9th June 1927, from decree of Sr. Sub-Judge, Shahpur, D/- 14th Aug. 1923.

(a) *Record-of-Rights — Presumption of correctness about entries in it arises—Onus is on party challenging correctness of entries.*

There is a presumption of correctness attaching to the entries in the record-of-rights to rebut which the onus lies heavily on the party challenging the correctness of the entries. [P 307 C 1]

(b) *Adverse Possession—Waste land—Erroneous entry regarding title in the record-of-rights—Original owner should be considered as real owner unless adverse possession for* 12 *years by others has been established.*

Where the title to the land in question has been proved to be with the plaintiffs and the land was waste and unoccupied for a short time before the suit and where it had not been shown how the defendants acquired it,

Held: that title being originally with the plaintiffs and the land being banjar, they must, notwithstanding the erroneous entries from 1891 to 1918, be considered to be owners of it, unless overt acts of adverse possession extending for a period longer than 12 years are established. [P 307 C 1, 2]

Nanak Chand and *Devi Dial* — for Appellants.

Nand Lal and *Amolak Ram* — for Respondents.

Tek Chand, J.—The plaintiffs-appellants instituted the suit, out of which this appeal has arisen, for possession of 76¾ kanals of land comprised in specific killa numbers in squares Nos. 81 and 91, situate at mauza Bhabra in the Bhalwal tahsil of the Shahpur District. The suit has been dismissed and the plaintiffs appeal.

The plaintiffs' case is that the land in suit was allotted to the defendants by the revenue officers at the time of the killabandi in 1922 in lieu of the land which was shown as Nos 160 1604, 1608, 1612 and 1613 in Mr. Hailey's Settlement. They contend that these khasra numbers corresponded to khasra Nos. 2632, 2639, 4290/2641 and 4290/2641 respectively of Mr. Wilson's Settlement of 1891-1892, in which had been included by mistake 76¾ kanals of land out of khasra No. 2238/2 *min* which had been allotted to the plaintiff's ancestors in the partition of the village Shamilat effected in 1878-1879. They contend that the land was banjar waste till the advent of the canal in 1918-1919, and it was not till 1922 that plaintiffs were forcibly dispossessed of it by the revenue authorities, when the killabandi system was not introduced. They, therefore, claim that the land in suit, which had been given to the defendants at the rectification in March 1922 in lieu of the land which originally belonged to the plaintiffs, but which had been wrongly taken out of their possession is the plaintiff's property and possession really thereof should be restored to them.

The defendants denied that any land of the plaintiffs had by mistake been entered as the defendants' property in 1891-1892, and contended that the land comprised in khasra Nos. 1601-1603, 1612 and 1613 of Mr. Hailey's Settlement had been shown in the revenue papers as owned by the defendants since 1891-1892, and has been in their possession since as owners. They did not admit that this land was a part of No. 2238/2 which had fallen to the share of the plaintiffs in the partition of 1878-1879. They also raised pleas of limitation and bar by adverse possession.

The first point to be decided is, as to who were the real owners of the land shown as khasra Nos. 1601, 1603, 1612 and 1613 aforesaid. After hearing at length Mr. Nanak Chand for the appellants and Dr. Nand Lal for the respondents and going through the documentary evidence on the record and the statement of the patwari and special kanungo, I am of opinion, that it is satisfactorily proved that village shamilat land was partitioned in 1878-1879, when 365 kanals and 16 marlas of banjar qadim land to which No. 2238/2 *min* was assigned at that time was allotted to the ancestors of

the plaintiffs, and similarly 305 kanals and 2 marlas (also banjar qadim) described as No. 2238/2 *min* fell to the share of the defendants. The entries in the settlement of 1891-1892, however, showed that the land allotted to the plaintiffs was 289 kanals only, i. e., there was a reduction of 76 kanals 16 marlas. On the other hand the land which had fallen to the share of the defendants in 1878-1879 in the adjoining field No. 2832/3 *min* increased from 305 kanals 2 marlas to 409¾ kanals, i. e., an increase of 104¾ kanals. The defendants have given no explanation whatever for this enormous increase in their holding or for the deficiency in the plaintiff's fields.

It is admitted that the increase was not the result of any alienation by way of purchase, exchange, gift, inheritance, etc. On the other hand, the special kanungo has placed materials on the record which indicate that the increase in the defendants' land was due to the inclusion in their holding of an area partly belonging to the defendants and partly to third parties to whom No. 2254 had been allotted in 1878-1879 in both of which there was a corresponding decrease. As most of the land was banjar and incapable of physical possession and of no immediate use to the plaintiff the mistake was not noticed till the land became irrigated about the year 1918. It is no doubt true that the entries made in 1891-1892 were repeated in the subsequent jamabandi and the settlement of Mr. Hailey in 1906-1907 ; and there is a presumption of correctness attaching to these entries, to rebut which the onus lies heavily on the plaintiffs. After fully considering the matter, however, I have reached the conclusion that the plaintiffs have succeeded in rebutting this presumption with regard to the land in khasra Nos. 1601 and 1613. From Ex. P-16, which is a statement prepared by the special kanungo and which contains a detail of the entries relating to the land in suit from 1879 to 1918-1919 it is clearly established that the land in these two numbers was originally parts of 2238-2 *min* which was, as already stated, allotted to the plaintiffs in the partition of 1878-1879. This land continued to be banjar qadim till 1918-1919 and it has not been shown how the defendants acquired it. Title being originally with the plaintiffs and the land being banjar, they must notwithstanding the erroneous entries from 1891 to 1918 be considered to be owners of it, unless overt acts of adverse possession extending for a period longer than 12 years are established. No such acts on any date anterior to 1918-1919 have been alleged much less proved with regard to these two fields. The suit was instituted on 3rd January 1923 and, therefore, the defendants' possession does not extend over a period beyond four or five years. Dr. Nand Lal contends that the suit is barred under Art. 142, Lim. Act, but having regard to the nature of the land, it must be held that possession was with the real owners, the plaintiffs, till 1918-1919. The suit of the plaintiffs is, therefore, clearly within time and no adverse possession extending over the statutory period has been established. I must, therefore, hold that the plaintiffs have established a right to recover 28½ kanals in khasra No. 1601 and 38 kanals in khasra No. 1613.

The land comprised in the other two Nos. 1608 and 1612 of the settlement of 1906 has been proved to correspond to Nos. 2639 and 2641 respectively of the settlement of 1891-1892. The plaintiffs have also succeeded in proving that this land was in actual possession of the plaintiffs till 1918-1919, they being shown in cultivating possession of it in the revenue papers and the defendants being shown as the proprietors. Mr. Nanak Chand contends that the plaintiffs never attorned to the defendants and never paid them any rent and their possession was really as owners. On the other hand Dr. Nand Lal relies on the entries in Mr. Hailey's settlement showing that in the year 1906-1907 at least the plaintiffs paid rent by way of batai in the ratio of 2 : 5 to the defendants. It is, however, not necessary to determine which of the two respective contentions is correct, as I am not satisfied that the land comprised in Nos. 2639 and 2641 of the settlement of 1891-1892 was really part of the land that had been allotted to the plaintiffs in the partition of 1878-1879 and which was at the time described as khasra No. 2238/2 *min*. In the statement filed by the special kanungo (Ex. P. 16) the previous khasra numbers corresponding to No 2639 and 2641 are shown as No. 2241 *min* and No. 2244 and not 2238/2 *min*. So far as these

fields are concerned the plaintiffs have, in my opinion, failed to show that they have a part of the land allotted to them in 1878-1879. I must, therefore, hold that the plaintiff's claim fails in respect of them.

The result is that the plaintiffs succeed only with regard to 38 kanals of land of khasra No. 1813 and 28½ kanals of land khasra No. 1601 of Mr. Hailey's settlement or 66½ kanals in all.

In their amended plaint the plaintiffs claimed a decree for possession of specific killa numbers out of squares Nos. 81 and 91 as demarcated in the killa bandi of 1921-1922. As the plaintiffs have succeeded only with regard to a part of the claim and it is not possible to say on the record which of the killa numbers were allotted at the rectification in lieu of that part, a decree for possession of specific fields could not be passed in their favour. In these circumstances the relief to which the plaintiffs are entitled is a decree for joint possession with the defendants for 66½ kanals out of the land comprised in squares Nos. 81 and 91. It will be for the revenue authorities to decide on the spot which particular killa numbers are to be allotted to the plaintiffs for 66½ kanals of land that has been decreed in their favour. For the foregoing reasons I would accept the appeal, set aside the judgment and the decree of the lower Court and pass a decree in favour of the plaintiffs-appellants for joint possession of 66½ kanals of land of squares Nos. 81 and 91. As neither party has succeeded in full, parties shall bear their own costs throughout.

Agha Haidar, J.—I agree.

S.J. *Appeal partly accepted.*

** A. I. R. 1928 Lahore 308

FFORDE AND JAI LAL, JJ.

Harnam Singh—Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1264 of 1927, Decided on 24th February 1928.

** *Evidence Act, S. 27—Statement leading to discovery of fact, including connexion of that fact with crime, should be proved—Confessional part cannot be excluded—Information should be proved in the precise words used—Law in India is wider than common law in England.*

As S. 27 is intended to enable the prosecution to prove a confession made under certain circumstances, the whole of the information including the confessional portion thereof, given by the prisoner, which relates to the fact includes not only the concrete thing discovered by the investigating officer, but also its description as given by the accused including its connexion with the crime which is under investigation. While only so much of the information can be proved as has led to the discovery of the fact, there is no legal justification for splitting up or cutting down the statement of the prisoner so as to make it a vague and unintelligible statement and thus to defeat the very object with which S. 27 was enacted and, therefore, the information must be proved in the precise terms in which it was given : *A. I. R.* 1926 *Mad.* 638 (*F. B.*), *Rel. on*; 15 *P.W.R.* 1913 *Cr.*; 11 *P. R.* 1915 *Cr.*; 9 *P. W. R.* 1918 *Cr.*; *Doubted* ; *A. I. R.* 1926 *Lah.* 138, *Dist* ;. *A. I. R.* 1926 *Bom.* 513 and *A. I. R.* 1928 *Pat.* 162; *Appr.* [P 314 C 1]

Fforde, J. — The Evidence Act, in express terms, puts the law on the subject on a wider basis than does the common law in Egland. [P 315 C 2]

Malik Muhammad Amin—for Applt.

Des Raj Sawhney—for the Crown.

Jai Lal, J.—The Sessions Judge of Sialkot has convicted Harnam Singh, appellant, of an offence under S. 396, I. P. C., and has sentenced him to death. The convict has appealed against his conviction and the case is also before us under S. 374, Criminal P. C., to consider the question of confirmation of the sentence passed upon him.

Owing to the prevalence of plague in the beginning of the year 1924, the residents of Kot Moman in the district of Sialkot had evacuated the village and were living in a camp established outside the village. On the night between the 9th and 10th April 1924, a party of persons, who are stated by the prosecution witnesses to have numbered 14 or 15, committed a dacoity in this camp. The culprits were armed with guns, sharp-edged weapons and dangs, and in the course of the dacoity injuries, both grievous and simple, were caused by sharp-edged weapons and dangs to no less than fourteen residents of the camp. Buta Mal, son of Jhanda Mal, an Arora died as a result of the injuries received by him on this occasion. The medical evidence shows that he had an oblique incised wound $1\frac{1}{2}'' \times 3'' \times 4''$ on the right side of the anterior abdominal wall, the intestines having been cut across into two and an incised oblique wound $1\frac{1}{2}'' \times 1''$ in the right side of the chest between the eighth and the ninth rib. The ninth rib had been fractured and splintered. There was also a contusion on the back

of the right forearm and the ulna bone had been fractured. In the opinion of the doctor the first two injuries were caused by a sharp-edged pointed weapon like a spear and injury No 3 was the result of a blow with a blunt weapon like a lathi. It is unnecessary to describe the injuries that were found by the doctor on the persons of the remaining men injured on this occasion, but an examination thereof leaves no doubt that the dacoits beat their victims mercilessly and were prepared to go to any length in order to attain their object of looting the camp.

Some of the culprits were arrested soon after the crime, were tried and convicted under S. 396, I. P. C. Harnam Singh, however, is alleged to have absconded and was not arrested till early in June 1925. During the previous trial of the culprits Ujagar Singh, son of Hira Singh, who was suspected to have been one of the dacoits, was tendered a pardon and was examined as a witness for the prosecution. Proceedings were taken against the present appellant under S. 512, Criminal P. C., on that occasion, and as Ujagar Singh is proved to have disappeared, his whereabouts not being known even to his son Jassa Singh (P. W. 46), and every attempt to secure his attendance having failed his statements recorded before the committing Magistrate on 12th July 1924 and 8th August 1924 have been transferred to the record of the Sessions Judge in the present case and have been read as evidence against the appellant.

Ujagar Singh in the first statement has described the manner in which this dacoity was planned and carried out. It is unnecessary to make any detailed reference to his statement on this point. It is sufficient to say that he definitely implicates Harnam Singh as one of his comrades in this crime and states that the appellant carried a spear in his hand. He also states that after the dacoity the property stolen, which was considerable in value, was divided into three portions, one of which was given to Harnam Singh and five others.

The fact that the approver was one of the dacoits is established by his own statement and also by the fact that he had disposed of a large amount of jewellery within a few days of the dacoity and that he surrendered to the police a gold bar and Rs. 113 in cash which represented his share of the stolen property.

The question, however, is whether the statement of the approver has been materially corroborated so as to connect Harnam Singh with the crime in question. After his arrest Harnam Singh was identified by Lal Chand (P. W. 8) and Sohan Lal (P. W. 9) who depose to have identified him as one of the dacoits. Lal Chand was injured in the course of the dacoity; there can, therefore, be no doubt about his being in a position to indentify the culprits. Sohan Lal is son of Ladhu Mal who was robbed of considerable property and was the first man to report the matter at the police station. This witness states that he was present when the dacoity was committed and that Buta Mal, deceased, Daulat Ram, Chuni Lal and others were injured in his presence by the dacoits who carried guns, pistols, chhavis, spears and dangs. It is in evidence that the camp was lit by means of lanterns and, therefore, the witnesses had ample opportunity to see the dacoits and to identify them. I see no reason to disbelieve the testimony of Lal Chand and Sohan Lal that they actually identified Harnam Singh as one of the dacoits.

There is, however, another piece of corroboration of the approver's testimony as against Harnam Singh. The latter after his arrest stated to Wahab Din (P. W. 23), Sub-Inspector of Police, attached to the Police Station of Tarn Taran, that part of his share of the Kotli Moman dacoity had been sold by him to Wadhawa Singh, goldsmith of Kalsian Khurd, in the district of Lahore. The distance between the place where this statement was made and Kalsian Khurd village is deposed to be 40 or 45 miles. On receiving this information the Sub-Inspector deputed a head constable to proceed to the village Kalsian Khurd and to recover the property from Wadhawa Singh. The head constable was able to recover a *hasira*, a pair of *banks* and some bangles from Wadhava Singh. They are marked Exs. P-16, P-17 and P-18 respectively. Wadhawa Singh in his statement at the trial has deposed that he knew Harnam Singh and that the latter had sold to him the jewellery produced by him. This jewellery has been identified to be part of the property stolen from the house of Ladhu Mal (P. W. 5) in the course of the dacoity. Ladhu Mal and

his son Sohan Lal have identified it and they are corroborated in this by the testimony of other witnesses who say that they had pawned some of this jewellery with Ladhu Mal.

I am satisfied that the witnesses have given good reasons for identifying these articles and that they are portion of the property stolen at the time of the dacoity.

The learned counsel for the appellant contends that the property was not recovered from the possession of Wadhawa Singh as a result of information given to the Sub-Inspector by the appellant, but the police were promiscuously carrying out searches in the houses of the goldsmiths and in the course of one of such searches they recovered the jewellery from Wadhawa Singh who, in order to save himself, has falsely implicated Harnam Singh. There is absolutely no evidence in support of the assertion that the police were promiscuously searching the houses of the goldsmiths or that Wadhawa Singh has falsely implicated the appellant. In this connexion it is important to bear in mind that the accused was arrested at a distance of 40 or 45 miles from the village Kalsian Khurd and the police could not possibly have any suspicion against Wadhawa Singh who does not reside anywhere near the scene of the occurrence and against whom there was no reason to entertain any suspicion otherwise. The fact that the appellant made a statement to the Sub-Inspector of Police in a place about 40 miles from the house of this goldsmith and that as a result of that information stolen property was recovered from the house of Wadhawa Singh is to my mind a very good guarantee of the bona fides of the recovery made by the police.

The learned counsel, however, contends that the statement made by Harnam Singh to Wahab Din, Sub-Inspector, is not admissible in evidence under S. 27, Evidence Act. The portion of the statement objected to, and as mentioned in the deposition of Wahab Din, is as follows :

Harnam Singh stated before me that part of his share in the Kotli Moman dacoity had been sold by him to a goldsmith, whose name I do not now remember. On seeing the fard Ex. P/2-B I now remember that the name of the goldsmith was Wadhawa Singh of Kalsian Khurd, an original resident of Dal. I sent for Wadhawa Singh, goldsmith, and he came to Ajnala and produced the articles of jewellery alleged to have been sold to him by Harnam Singh.

Objection is taken to the portion underlined (italicized) by me. There is no difficulty in ascertaining from this deposition what was the actual statement made by Harnam Singh, though in my opinion it would have been more satisfactory if the learned Sessions Judge had elicited from the witness and recorded the actual words alleged to have been used by the appellant when giving information about the stolen property. The necessity of ascertaining from the witnesses and recording the exact words in which an accused person is alleged to have made a confession cannot in my opinion be impressed on the trial Courts in too emphatic terms. This has more than once been pointed out by this Court on many previous occasions. I need only add that disregard of these instructions may sometimes lead to grave miscarriage of justice. It may sometimes happen that the accused has given incriminating information in response to a question put to him by a police officer. In such a case both the question and the answer should be taken down in precise terms.

In the present case, as I have stated above, though the learned Sessions Judge has recorded the statement alleged to have been made by the accused in a narrative form in the third person, still there is no difficulty in ascertaining what was the exact statement made by him. Converted into the first person the statement was :

I have sold part of my share of the Kotli Moman dacoity to Wadhawa Singh, goldsmith of Kalsian Khurd.

The learned counsel objects to the admissibility of the words "part of my share of the Kotli Moman dacoity" and contends that the only portion of the information that is admissible under S. 27, Evidence Act, is :

I sold (some property) to Wadhawa Singh, goldsmith of Kalsian Khurd.

His contention is that the description of the property as the accused's share of the Kotli Moman dacoity was not such an information as led to the recovery of the property, but that it was the clue to the person who had it, that is, Wadhawa Singh, goldsmith of Kalsian Khurd, that led to its recovery and, therefore, only that portion of the statement is admissible which gave such a clue.

In support of his contention the learned counsel relies upon *Santa Singh* v. *Emperor* (1). *Tara Singh* v. *Emperor* (2) and *Gurdit Singh* v. *Emperor* (3) and finally on *Sulakhan Singh* v. *Emperor* (*A. I. R.* 1926, *Lah.* 138).

Before entering into a discussion of these cases it will be convenient at this stage to examine S. 27, Evidence Act, on which they are based. That section reads as follows :

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not as relates distinctly to the fact thereby discovered may be proved.

Now, it would be observed from the opening words of the section that it is really an exception to the sections immediately preceding it and which prohibit the use by the prosecution against the accused person of a confession made by the latter under certain specified circumstances. In its inception, therefore, this section is intended to enable the prosecution to prove against the accused a confession made by him, provided the conditions laid down therein have been complied with. The conditions are : (a) that in consequence of the information given by the accused person some " fact " is discovered—some fact of course which is relevant to the issue involved in the case ; and (b) that only so much of the information given by the accused is provable as relates distinctly to the " fact " thereby discovered. Within these limitations the prosecution is entitled to prove against the accused a confession made by him to a police officer or while in police custody. The reason for this exception to the general rule is that there exists in such a case an independent circumstance which provides a reliable test of the genuineness of the confession, that is to say a discovery of a relevant fact. We are, however, on the present occasion concerned with the extent of second limitation mentioned above. The question is how much of the information given by the accused in this case relates distinctly to the fact thereby discovered, such fact being the disposal or possession of stolen property by the prisoner. In my opinion the prosecution is entitled to prove the whole of the information which relates to the fact discovered ; in other words, the entire statement made by the accused which enabled the police to discover the fact and to connect or identify the same with the crime, is admissible against the accused.

Now to turn to the cases cited at the bar : the following passage quoted from the judgment in *Santa Singh* v. *Emperor* (1) briefly narrates the facts to which the learned Judges were called upon to apply the law and their decision on the legal point involved :

The third point urged in support of the conviction is that the appellant made certain admissions to Ishar Singh, Harnam Singh, and others, to the effect that he would point out the place where he had murdered the deceased and the place where he had buried the chhavi with which he had committed the murder. It is not denied that at the time when the alleged admissions were made the appellant was in police custody, but it is urged that as, in consequence of the information thus given a chhavi was discovered and earth and grass were found with colouring matter of blood thereon, the whole statement made by the appellant in respect of these matters is admissible in evidence against him under S. 27, Evidence Act. We cannot agree with the proposition. In our opinion, only so much of that statement is relevant as led to the discovery of the chhavi or the spots of blood and that that portion of it which went further and purported to be a confession of guilt was irrelevant. In other words, the prisoner's statement that he buried the chhavi in a certain spot would be relevant, but not the further statement that it was the chhavi with which he had committed the murder. So also the statement that he would point out a certain spot would be relevant, and evidence that at the spot indicated bloodstains would be found would be admissible, but not the further statement that it was at this spot that he had committed the murder.

In the present case it is in evidence that the chhavi was actually produced by the appellant himself, and it is not contended that it was found by the police or anyone else in consequence of information given by him. In these circumstances we hold upon the authority of *Queen-Empress* v. *Kamalia* (4) that though the fact that the appellant actually produced a chhavi at a particular place may be proved, the accompanying statement alleged to have been made by him to the effect that he buried the chhavi there is inadmissible in evidence.

It is to be observed that the learned Judges were of opinion that the prisoner's statement that he buried the chhavi in a certain spot would be admissible, but that the further statement that it was the chhavi with which he had committed

(1) [1916] 15 P. W. R. 1913 Cr.=19 I. C. 190 =171 P. L. R. 1913.
(2) [1915] 11 P. R. 1915 Cr.=29 I. C. 817=61 P. W. R. 1915 Cr.
(3) [1918] 9 P. W. R. 1918 Cr.=44 I. C. 967= 52 P. L. R. 1918.
(4) [1886] 10 Bom. 595.

the murder could not be proved. Much depends, of course, on the actual words used by the prisoner, but supposing he had stated :

> I have concealed the chhavi with which I killed the deceased under the heap of manure near my cattle shed,

and as a result of this statement the police dug up the manure heap and recovered the chhavi, I am unable to see any reason why the whole of this statement should not be admitted. It is the statement actually made by the prisoner that is to be proved against him and not what the Court considers he should have stated in order to enable the police to discover the chhavi. In my opinion there is no legal sanction for substituting a statement which the accused never made in place of the one actually made by him or for mutilating and splitting up a sentence used by prisoner when giving the information sought to be proved against him and thereby reducing it to a meaningless and vague piece of evidence detached from the context. Further the statement that the prisoner had buried " a chhavi " would be vague, meaningless and irrelevant unless it be assumed that he was referring to the chhavi with which the crime is alleged to have been committed Yet in practice such an assumption is always made if the statement is used against the prisoner. In other words, while the actual statement of the accused describing the chhavi as the weapon of offence is excluded the inference drawn from the discovery and the accompanying statement so far as it is admitted is precisely what is stated by the prisoner in the excluded part of his statement. The result is that though S. 27 permits the proof of a confession, yet it is the confessional part of the statement that is excluded. With great respect I am unable to accept as correct the exposition by the learned Judges of the law as contained in S. 27, Evidence Act. In my opinion they have put too narrow a construction on that section.

But the reported case does not really help the appellant as the learned Judges distinctly held therein that the statement that " prisoner buried the chhavi in a certain spot " would be relevant under S. 27, Evidence Act. It is true that they held that the entire statement was inadmissible because after it had been made the prisoner himself had actually produced the chhavi. The point does not arise in this case, but it seems to me that it was immaterial in what manner the recovery was made, i. e., whether the accused himself dug the place or some other persons did so was immaterial for the purpose of determining the admissibility of the statement made by the prisoner. The essential question to be determined was whether the chhavi was discovered in consequence of the information given by the accused.

In *Tara Singh* v. *Emperor* (2) the accused had stated : " I will point out the spot where I committed the murder" and thereafter he conducted the police and other witnesses to a spot where earth was found saturated with blood. The learned Judge held as follows :

> The words: "where I committed the murder" did not in themselves distinctly relate to the discovery of that spot, as the locus delicti could have been discovered just as easily had he merely stated: " I will show you the scene of murder," or " I will take you to a particular place where you will find blood." A person who had had no hand in the murder but had chanced to witness its commission might well have been able to lead the police to the spot in question.

It will be observed that the learned Judges ruled out the confessional part of the information by splitting up the statement of the prisoner.

In *Gurdit Singh* v. *Emperor* (3), which is a judgment by a Judge in Chambers of the Chief Court of the Punjab, the learned Judge remarked as follows :

> I must remark that in this case as in many others of his which I have seen, the Magistrate who evidently does not understand S. 27, Evidence Act, has systematically used the provisions of that section to cover inadmissible statements to the police. It is quite legitimate to record evidence that an accused person said: " I will point out certain property " if that statement of the accused leads to a discovery ; but it is not legitimate to record as evidence that an accused person said: " I will point out certain property which I obtained as my share of the booty in the dacoity.

Here again the learned Judge has sought to substitute a vague statement of his own in place of the more definite and intelligible statement made by the prisoner. These two cases, therefore, are open to the same criticisms as the case of *Santa Singh* v. *Emperor* (1).

Sulakhan Singh v. *Emperor* [*A. I. R.* 1926 *Lah.* 138] is not of much assistance in the present case because it appears from the judgment that the accused stated that he would point out the

place where the dead body was buried and then he said that he had buried it. The statement that he had buried the dead body was held inadmissible by the learned Judges, because it transpired that it was made by the accused on a question being put to him as to who had buried the dead body after he had offered to point out the place where it was buried. Obviously this statement was not admissible in evidence as it was not an essential part of the information which led to the discovery of the body. This case, therefore, affords no guidance on the present occasion.

Reference may also be made to *Emperor* v. *Turezi* a judgment of a Division Bench of this Court in Criminal Appeal No. 658 of 1919. The facts were somewhat similar to the case of *Sulakhan Singh* v. *Emperor* [*A. I. R.* 1926 *Lah.* 138.] In this case also the accused said that he would point out where the dead body was and in answer to a further question as to who had buried the dead body he admitted that he had done so. The learned Judges held that this last admission made by accused was not admissible against him. They expressed the opinion that there was a distinction between the statement actually made by the prisoner in that case and the following statement: "Come along, I will show you the dead body which I have buried," and it seems that they were inclined to hold that this last statement was admissible.

It appears, therefore, that so far as this Province is concerned the tendency of the Chief Court has been to put too narrow a construction on S. 27, Evidence Act, and to unnecessarily confine its operation within limits not contemplated by law. The later tendency both of the Chief Court of the Punjab and of this Court, however, has been to put a more logical construction on this section. In this connexion reference may be made to *Ishar Singh* v. *Crown*, a judgment of his Lordship the Chief Justice sitting with Mr. Justice Scott-Smith in Criminal Appeal No. 538 of 1915 in which it was held that a statement made by the accused that he had buried the article (a revolver in that case) in a particular place where it was subsequently discovered was admissible in evidence against him, as such a statement came within the four corners of S. 27, Evidence Act.

In my opinion, therefore, while on the one hand only so much of the statement made by an accused person can be proved as leads distinctly to the fact thereby discovered, on the other hand, there is no justification for the Court to split up a sentence used by the accused in giving the information or to substitute a different and a vague statement in place of the intelligible and connected statement of the prisoner. As I have already stated, though S. 27 is intended to enable the prosecution to prove a confession by the accused, yet what is sought in many cases to be excluded is the confessional part of the statement, and in some cases the tendency has been to exclude the statement altogether and yet to import a confession in the statement or to interpret the conduct of the accused in making the discovery as an admission of guilt. This I consider is not only unfair to the prosecution but also to the accused.

This question has recently been discussed by a Full Bench of the Madras High Court (see *In re. Sogiamuthu Padayachi* (5), where most of the previous cases decided by the other High Courts have been examined and, therefore, I do not think that any useful purpose will be served by my discussing them here again. In that case the prisoner had stated :

> Properties stolen from the Mutt were buried by me and others in the Cauvery bank

and had then taken the police officer to the place indicated and produced the property from there. It was held that the whole of this statement was admissible against the accused. Mr. Justice Wallace remarked as follows :

> The essence of the section is that the statement made by the accused must be a confession, that is, an admission or statement, suggesting an inference of guilt. If every word suggesting an inference of guilt is to be excluded and only words which directly disclose where the property is, are admissible, then the section has no application. It is clear that the Court is not intended to separate up the actual words used by the accused, which led to the discovery of the property, strike out some words here and admit some words there. So much of the statement, as was the immediate cause of the discovery, is admissible. In this case, if the property was discovered in a particular place, because the accused said: "I buried it there" that statement is certainly admissible.

(5) A. I. R. 1926 Mad. 638=50 Mad. 274.

Spencer, Offg. Chief Justice, expressed his opinion in the following terms :

> But if the accused did use the words then they are parts of the sentence in which he gave information which led to the discovery of the stolen property and parts of sentences cannot be excluded so as to have the effect of making the whole statement incomplete and less intelligible.

Similarly Mr. Justice Devadoss, after reviewing the judicial authorities on the subject came to the conclusion that the whole of the statement made by the prisoner was admissible under S. 27, Evidence Act. With this view I respectfully agree.

I hold, therefore, that as S. 27 is intended to enable the prosecution to prove a confession made under certain circumstances the whole of the information including the confessional portion thereof, given by the prisoner which relates to the fact discovered can be proved against him, and further that the fact includes not only the concrete thing discovered by the investigating officer, but also its description as given by the accused including its connexion with the crime which is under investigation. I also hold that while only so much of the information can be proved as has led to the discovery of the fact, there is no legal justification for splitting up or cutting down the statement of the prisoner so as to make it a vague and unintelligible statement and thus to defeat the very object with which S. 27 was enacted and, therefore, that the information must be proved in the precise terms in which it was given.

Consequently the statement made by Harnam Singh to the Sub-Inspector that he had sold part of his share of the Kotli Moman dacoity to Wadhawa Singh, goldsmith of Kalsian Khurd is admissible against him. It may, however, be stated that even if this statement be held to be inadmissible and the entire evidence relating to the discovery of the stolen property as a result of the information given by him be excluded, still there is ample evidence on the record to establish the guilt of the appellant. I would, therefore, affirm his conviction under S. 396, I. P. C.

The question of sentence presents no difficulty in this case. The weapons carried and used by the dacoits, the brutal nature of the assault on the inmates of the camp and the number of the injured persons and of the injuries received by them clearly lead to the inference that the culprits came deliberately prepared to kill anybody who came in their way and that it was in pursuance of this intention that Buta Mal deceased was brutally murdered. Under the circumstances I hold that the penalty of death was fully deserved by Harnam Singh convict. I would, therefore, dismiss his appeal and confirm the sentence of death awarded to him by the Sessions Judge.

Fforde, J.—I agree and have only a few remarks to make on the subject of S. 27, Evidence Act. The tendency of the prosecution in this province has been to give no effect to that section. The statement leading to the discovery of an incriminating fact is hardly ever given in evidence, the prosecution contenting itself with proving the discovery only, and in those cases where the statement is proved the confessional part of it is nearly always omitted. The words of the section, " so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved," have been interpreted as though they read, so much of such information as leads to the discovery of the fact may be proved, provided it does not amount to a confession.

No doubt, the Judges in the past have been led to this construction by the rule of law which at one time prevailed in England. The rule as laid down by Eldon, C.J., in *R.* v. *Harvey* (6), was that where the knowledge of a fact was obtained from a prisoner under a promise which excluded the confession itself from being given in evidence an acquittal should be directed, unless the fact itself proved would have been enough to warrant conviction without any confession leading to it. That rule, however, was considerably relaxed in favour of the prosecution by later decisions and the rule of the common law now is as stated by Taylor on Evidence, Vol. 1, p. 614, in these terms :

> When in consequence of information unduly obtained from the prisoner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact, has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement as to his knowledge

(6) 2 East P. C. 658.

of the place where the property or other article was to be found, being thus confirmed by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement. It is, therefore, competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found, but it would not in such a case of a confession improperly obtained, be competent to inquire whether he confessed that he had concealed it there. So much of the confession as relates distinctly to the fact discovered by it may be given in evidence, as this part at least of the statement cannot have been false.

Phipson on Evidence, 6th edn. p. 270, expressed the same rule in this way :

Facts and documents disclosed in consequence of inadmissible confessions are receivable if relevant. And where property has been discovered or delivered up in this way so much of the confession as strictly relates thereto will be admissible, for these portions at least cannot be untrue but independent statements not qualifying or explaining the fact, though made at the same time, will be rejected.

The example given by Phipson to illustrate this principle is as follows :

A is charged with burglary, the fact that, after an improper inducement *A* confessed to having thrown a lantern into a pond, and the fact that the lantern was found there are admissible : *R.* v. *Gould* (7), *R.* v. *Harris* cited by Joy, 83, *R.* v. *Thurtell* (8) id. 84. Aliter as to other parts of the confessions.

As S. 27, Evidence Act has been drafted, as have been almost all the provisions of that Act, upon the English principles of law laid down in decided cases these principles are no doubt a very useful guide to the interpretation of the Evidence Act. But, in considering the effect of S. 27, it must be borne in mind that whereas in England a confession made to a police officer by a person in custody is admissible in evidence provided the prosecution first shows that it has not been obtained by any improper means such as coercion, threat or wrongful persuasion, S. 26, Evidence Act, prohibits such a confession being received in evidence at all, unless it comes within the four corners of S. 27.

In America the tendency of the Courts appears to be to admit the whole confessional statement, once it has been proved that some relevant fact has been brought to light in consequence thereof : see Wigmore on Evidence.

I can find no recent English authority on the subject probably due to the fact that in England this question now very rarely arises.

In India the Courts have recently given a wider construction to the terms of S. 27 than has hitherto been the practice. In addition to the Madras case cited by my learned brother there are two recent cases decided by the Bombay and the Patna High Courts respectively. In *Shivabhai Becharbhai* v. *Emperor* (8), the Court held that a statement made by an accused person while in the custody of the police, to the effect that he had burnt the deceased's clothes and would point out where he had done so, is admissible in evidence under S. 27, Evidence Act, on the discovery of the clothes in the place pointed out. The Court went so far as to hold that such a confession, if it affects a co-accused could be taken into consideration against the latter under S. 30. In *Lalji Dusadh* v. *Emperor* (9) it was held that where, in answer to the investigating police officer, the accused stated that he threw the weapon with which he assaulted the deceased at a certain place, and the weapon was discovered as the result of the disclosure, the statement consisting of the assertion that the weapon had been thrown at a particular place and that it was the weapon with which the offence was committed, was admissible in evidence under S. 27. With these decisions, which are to the same effect as the Madras decision, I am in complete agreement. The Indian Evidence Act, in express terms, puts the law on the subject on a wider basis than does the common law in England. It seems to me that if an accused person in custody of a police officer says to that officer, I buried the chhavi with which I murdered *X* at such and such a place," and the chhavi is in fact found concealed in that place, the whole of the statement is admissible in evidence. The words, " with which I murdered *X*" relate as distinctly to the object discovered, namely the chhavi, as does that portion of the statement which discloses where the weapon may be found. There may, of course, be other remarks of a confessional nature included in the statement which would be inadmissible, as, for instance, if the accused were to make a statement of his motives for murdering

(7) 9 C. & P. 364.

(8) A. I. R. 1926 Bom. 513=50 Bom. 683.

(9) A. I. R. 1928 Pat. 162=6 Pat. 747.

X and introduced details of the crime in which no reference to the weapon used appeared, and then ended by saying, "the chhavi with which the murder was committed will be found hidden at a certain spot", and the chhavi is found hidden at that spot, then only the latter part of the statement could be proved as that would be the only part of the confession which related distinctly to the fact discovered. In every case of this nature the Court has to consider how much of the information given by the accused does relate distinctly to the fact discovered.

In the case before us the statement of the accused, that he had sold part of his share in the Kotli Moman dacoity to Wadhawa Singh, goldsmith of Kalsian Khurd, is in my opinion clearly admissible as soon as articles are found in the possession of the goldsmith Wadhawa Singh which are proved to be the proceeds of the Kotli Moman dacoity, as the whole statement relates distinctly to the discovered fact.

D.D. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 316

SHADI LAL, C. J., AND BROADWAY, J.

Simla Banking and *Industrial Company Limited, Ambala City*—Defendant—Appellant.

v.

Mt. Bhagwan Kuar—Plaintiff—Respondent.

Letters Patent Appeal No. 199 of 1925, Decided on 16th March 1928, from decree of Zafar Ali, J., D/- 20th May 1925, in Civil Appeal No. 433 of 1925.

* *Contract Act, S. 171—Amount due under fixed deposit receipt, and payable to either or survivor—Bank cannot appropriate the money towards debt due by one of them alone.*

A bank issued a fixed deposit receipt for Rs. 500 in favour of *B* and *R*, the amount being payable to either or survivor. *R* obtained an overdraft from the bank. The bank credited the amount due under the fixed deposit receipt to this overdraft and on *B* demanding payment informed him of the action taken on it and refused to pay. *B* thereupon brought an action against the bank for the recovery of the amount due under the fixed deposit receipt.

Held: that the bank could not appropriate the money towards the debt due by *R* alone.

[P 316 C 2]

Jagan Nath Aggarwal and *Badri Das*—for Appellant.

Lakshmi Narain Singh—for Respondent.

Judgment.—The Simla Banking and Industrial Company Limited, issued a fixed deposit receipt for Rs. 500 on 23rd February 1922 in favour of Shrimati Bhagwan Kaur and her son Raghunandan Singh, the amount being payable, on 6th January 1923 to "either or survivor."

Subsequent to 22nd February 1922 Raghunandan Singh succeeded in obtaining an overdraft from the bank, and, on 6th January 1923 was indebted to it in the sum of Rs. 33,000 or the reabouts. The bank credited the amount due under the fixed deposit receipt to this overdraft on 6th January 1923 and, on Shrimati Bhagwan Kaur demanding payment, informed her of the action taken on it, and refused to pay. Shrimati Bhagwan Kuar, thereupon, brought an action against the bank for the recovery of the amount due under the fixed deposit receipt.

The bank pleaded a "general lien" and claimed to have acted within its rights in appropriating the amount as it had done. The trial Court, however, decreed the plaintiff's claim and an appeal by the bank having been dismissed by the District Judge, it came up to this Court in second appeal. This appeal was dismissed by Zafar Ali, J., and the bank has preferred an appeal under Cl. 10, Letters Patent, through Mr. Jagan Nath Aggarwal.

It was contended that as in the present case the presentation of the receipt was not essential, and either of the two could demand payment at the due date, the "general lien" held by the bank entitled it to regard the money as belonging to Raghunandan Singh and to appropriate it towards the debt due by him alone.

No authority was cited in support of the contention and neither in law nor in equity am I able to see any reason to give effect to it. In my judgment the claim was rightly decreed and I would dismiss this appeal with costs.

R.D. *Appeal dismissed.*

A. I. R. 1928 Lahore 317 (1)

HARRISON AND TEK CHAND, JJ.

Muhammad Bakhsh and *another*—Defendants—Appellants.

v.

Nathu and *another*—Plaintiffs — Respondents.

Second Appeal No. 1742 of 1923, Decided on 19th October 1927, from decree of Dist. Judge, Gurdaspur, D/- 14th May 1923.

Limitation Act, Art. 144 — Overt act by trespasser—Admission by him of plaintiff's title—Admission cancels overt act.

An admission of another's title by a person claiming land adversely cancels the effect of any overt act that he has committed and it cannot be inferred or presumed that that admission carries with it an assertion of adverse title. [P 317 C 1]

Niaz Muhammad—for Appellants.

J. L. Kapur and *Badri Das*—for Respondents.

Judgment.—Plaintiffs brought this suit for possession of 10 kanals 18 marlas of land now situate within the abadi of their village and formerly agricultural land. The only issue in the case was whether the plot belonged to the plaintiffs and had been in their possession within the last 12 years. Both these points were decided in their favour by the District Judge and a decree was given.

On second appeal counsel does not contest the title of the plaintiffs beyond saying that his clients have acquired an adverse title, which is indefeasible and that the plaintiffs had not been in possession within 12 years. He relies upon an overt act committed by his clients in the year 1909, when they attempted to build a wall on this land, and in a criminal case, which followed thereon, admitted the title of the plaintiffs. Such an admission cancels the effect of any previous act that they had committed and it cannot be inferred as presumed that that admission carried with it an assertion of adverse title. No overt act since 1909 is alleged and the appeal must, therefore, fail and is dismissed with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 317 (2)

AGHA HAIDAR, J.

Muhammad Azim and *others*—Accused—Petitioners.

v.

Niaz Muhammad—Complainant—Respondent.

Criminal Misc. Petn. No. 251 of 1927, Decided on 6th January 1928, for transfer of case from 1st Class Magistrate, Hissar, to some other Court.

Criminal P. C., S. 526—Possibility of Magistrate not giving effect to a certain legal objection which might be taken in the trial is no ground for transfer.

An application for transfer cannot be granted simply because it is apprehended that in the ultimate judgment which the Magistrate would deliver in the case, he would not give effect to a certain legal objection which might be taken at the trial. [P 318 C 1]

Niaz Muhammad—for Petitioners.

Ghulam Mohy-ud-Din—for Respondents.

Order.—This is an application for the transfer of a case which has been pending in the Court below for a very long time. Uunder my order dated 18th November 1927, a copy of the affidavit and the application for transfer was sent to the Magistrate concerned and also to another Magistrate whose name unfortunately seems to have been dragged in the application. Both these Magistrates have submitted very full and satisfactory explanations. I may observe that the case was originally filed in the Court of a Tahsildar, it was transferred to the Court of Sardar Bishan Singh, Magistrate. The applicants now desire to get the case transferred once again from the Court of this Magistrate to that of some other Magistrate. The affidavit read along with the explanation submitted by the two Magistrates does not make out a sufficiently strong case for my taking the extreme step of ordering the transfer of the case from the Court of the Magistrate where it is pending. It is urged by Mr. Niaz Muhammad, the learned advocate for the petitioners, that his clients have been already acquitted of the same or similar offences with which they are now charged and that under the provisions of S. 403 they cannot be tried again on the same set of facts. The Magistrate has not so far recorded his judgment. If this point has any substance there is not the slightest doubt

that the learned Magistrate would give effect to it. But I have never heard of any application for transfer being successfully made simply because it is apprehended that in the ultimate judgment which the Magistrate would deliver in the case, he would not give effect to a certain legal objection which might be taken at the trial. As stated above no substantial ground has been made out and the affidavit of Mr. Muhammad Sharif, the gentleman who is mentioned in my order dated 18th November 1927, is not forthcoming although Mr. Niaz Muhammad gave me to understand that Mr. Muhammad Sharif would give his affidavit in support of the incident mentioned in para. 3. (d) of the application. The case has been hanging on for a very long time and it is time now that it should come to an end so far as this Magistrate's Court is concerned. I reject this application and at the same time order that this case should be disposed of at the earliest possible opportunity.

N.K. *Application rejected.*

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* A. I. R. 1928 Lahore 318

ZAFAR ALI, J.

Wadhawa Singh — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 6 of 1928, Decided on 12th March 1928, from order of Dist. Magistrate, Gurdaspur, D/- 31st October 1927.

(a) *Criminal P. C., S. 496 — No bail bond can be taken from a third person — Where no undertaking is taken from the principal offender no surety can be made liable.*

A police officer acting under S. 496 has the power to demand a bail from person arrested or to accept his own bond without sureties. But under no provision of law the police officer can take a third party's bond for such person's appearance. [P 319 C 1]

There can be no surety without a principal. Where therefore no undertaking has been given by the person arrested to appear when called upon to do so, it is not possible for any person to declare himself surety for his appearance. [P 319 C 1]

* (b) *Criminal P. C., S. 496 — The bond must be in accordance with form 42—Otherwise no liability arises.*

The terms of a bond or bail bond executed under S. 496 should be in accordance with form 42 of schedule. That form indicates what the contents of a bond with sureties should be. In order to be enforceable a bail bond must be in accordance with the form. Where the bond is not in accordance with the form, the person executing the same incurs no legal liability by executing it. [P 319 C 1]

(c) *Criminal P. C., S. 514-B—A bond may be executed on behalf of minor but not of a major.*

Section 514-B specifically provides that when the person required to execute a bond is a minor, the Court or police officer may accept in lieu thereof a bond executed by a surety or sureties only. There is no such provision for a major. [P 319 C 1]

Nawal Kishore—for Petitioner.

Judgment.—In the course of a police enquiry under S. 110, Criminal P. C., against one Teja Singh, his uncle Wadhawa Singh at the bidding of the investigating officer gave a bond of Rs. 1,000 for his appearance whenever he should be called upon to attend. It was, however, not stated in the bond where and before whom he was to appear, and no machalka or recognizance was taken from Teja Singh himself for his appearance. This bond is dated 10th February 1927, but the police chalan was sent up on 5th June 1927, and the Mag strate recorded an order under S. 112, Criminal P. C., on 27th June 1927. It was subsequently discovered that Teja Singh had left for China. The Magistrate then proceeded to take action under S. 514, Criminal P. C., and eventually forfeited the bond of Wadhawa Singh. There is no specification of the bond in the order of the Magistrate nor in that of the District Magistrate dismissing Wadhawa Singh's appeal against forfeiture, but presumably the bond described above was the one that was forfeited. Wadhawa Singh now seeks revision of that order.

It is clear that S. 55, Criminal P. C., empowers an officer in charge of a police station to arrest any person who is by repute an habitual thief,.etc., but if such person is prepared to give bail he must be released on bail as laid down in S. 496 of that Code That section in its relation to police officers runs thus :

When any person other than a person accused of a nonbailable offence is arrested or detained without warrant by an officer in charge of a police station. and is prepared at any time while in the custody of such officer * * * to give bail, such person shall be released on bail ; provided that such officer if he thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as herein after provided.

The police officer in the present case appears to have acted under S. 496, and what he had the power to do under that section was to demand a bail from Teja Singh or to accept his own bond without sureties. Under no provision of law the police officer could take a third party's bond for Teja Singh's appearance.

Further it is obvious that there can be no surety without a principal. In the present case no undertaking having been given by Teja Singh to appear when called upon to do so, it is not possible for any person to declare himself surety for his appearance. The terms of a bond or bail bond executed under S. 496 should be in accordance with Form 42, of Schedule to the Criminal Procedure Code. That form and form 25 for a bail bond under S 169, Criminal P. C., and forms of bail bonds executed under other provisions of the Code indicate what the contents of a bond with sureties should be. In order to be enforceable a bail bond must be in accordance with these forms. As the bond in question is not, Wadhawa Singh incurred no legal liability by executing it.

In this connexion a reference may be made to S. 514-B, Criminal P. C., which specifically provides that when the person required to execute a bond is a minor, the Court or police officer may accept in lieu thereof a bond executed by a surety or sureties only. There is no such provision for a major.

I, therefore, set aside the order forfeiting the bond.

R K. *Order set aside.*

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* A. I. R. 1928 Lahore 319

JAI LAL, J.

Muhammad Bakhsh and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1592 of 1927, Decided on 20th December 1927, from order of Addl. Dist. Magistrate, Amritsar, D/- 22nd August 1927.

* *Practice—Court has no power to cut short counsel's argument unless they are irrelevant and involve repetition—Legal practitioner.*

So long as he is not guilty of unnecessary repetition or of irrelevant arguments a counsel is entitled to present his client's case as he thinks best and it is no ground for a Judge to decline to hear him or to cut short his argument merely because he is expected by the superior Courts to turn out a certain amount of work within a fixed time. [P 319 C 2, P 220 C 1]

Mohsin Shah—for Petitioners.

Judgment.—Notice was issued in this case on the ground that it was alleged by the petitioners, which allegation was supported by an affidavit of the counsel, who appeared for them before the lower appellate Court, that counsel was not allowed to argue the appellants' case by the Additional District Magistrate. An explanation has been submitted by the Additional District Magistrate from which it appears that proper opportunity was given by the lower appellate Court to the counsel. There may be a difference of opinion as to the sufficiency of the opportunity given between the counsel and the Court, but having regard to the explanation of the Additional District Magistrate, I must hold that there is no substance in the complaint. The lower appellate Court has discussed the evidence produced in support of the prosecution case and agreeing with the trial Court has held the guilt of the petitioners proved. I am unable to arrive at a different conclusion in these proceedings.

The petition for revision is, therefore, dismissed The petitioners were released on bail pending the disposal of the petition. They must surrender to their bail and serve out the remaining sentence awarded to them.

Though I have accepted as correct the version of the Additional District Magistrate as to what happened in this case, I desire to point out to him that, as appears from his explanation, he holds an opinion about the respective positions of the Bench and the Bar which, to say the least of it, is peculiar; he relies in support of his view upon an extract from some extra-judicial remarks made by a learned Judge of another High Court without regard to the context or the occasion on which it was made. He apparently entertains exaggerated notions as to the alleged tendency of a class of legal practitioners to waste the time of the Courts. The learned Additional District Magistrate must bear in mind that, so long as he is not guilty of unnecessary repetition or of irrelevant arguments a counsel is entitled to present his client's case as he thinks best and it no ground for a Judge to decline to hear

him or to cut short his argument merely because he is expected by the superior Courts to turn out a certain amount of work within a fixed time.

S.J. *Petition dismissed.*

A. I. R. 1928 Lahore 320 (1)

SHADI LAL, C. J. AND BHIDE, J.

Allan Robert Shaw—Plaintiff—Appellant.

v.

Mrs. Emyly May Shaw—Defendant—Respondent.

First Appeal No. 2703 of 1926, Decided on 24th November 1927, from decree of Dist. Judge, Rawalpindi, D/- 28th April 1926.

Divorce Act, S. 13—Petition for, divorce five years after knowledge of adultery of wife—Petition should be dismissed.

An application by husband for dissolution of marriage on the ground of wife's adultery, submitted five years after the fact had come to his knowledge should be dismissed even though adultery of the wife has been established.

[P 320 C 1]

Anant Ram—for Appellant.

Judgment.—The District Judge of Rawalpindi has dismissed the petition of one Allan Robert Shaw, for dissolution of his marriage with his wife, on the ground that, while the adultery of the wife had been established, the husband has been guilty of unreasonable delay in presenting the petition. The evidence on the record shows that the offence complained of was committed in the summer of 1921, and that it came to the knowledge of the husband shortly afterwards. He did not, however, make the application for divorce until after the expiry of five years. It is not disputed that there was unreasonable delay in presenting the petition, and the explanation offered by the husband to account for the delay has been considered by the trial Judge and found to be unsatisfactory.

The learned counsel for the appellant has again put forward the explanation which has already been rejected by the District Judge, but we do not think that any ground has been established, such as would justify our dissent from the conclusion of the trial Judge. We accordingly dismiss the appeal, but as there is no appearance by or on behalf of the respondent we make no order as to costs in this Court.

S.J. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 320 (2)

FFORDE AND JAI LAL, JJ.

Ram Nath—Accused—Appellant.

v.

Emperor—Opposite Party.

Appeal No. 1375 of 1927, Decided on 19th January 1928, from order of Addl. Sess. Judge, Lahore, D/- 19th November 1927.

* (a) *Criminal P. C., S. 337 (1)—Approver's disclosure of facts may be oral.*

Section 337 (1) nowhere lays down that the disclosure of facts shall be reduced to writing. If such disclosure is made orally the verbal testimony of the person to whom it has been made will be sufficient to prove the statement. As a rule of caution, however, the approver's statement is always formally reduced to writing, a practice which it is obviously very desirable to observe so that no dispute may subsequently arise as to what the exact terms of the statement were. [P 322 C 1]

(b) *Evidence Act. S. 24—Admission under S. 339 (2), Criminal P. C., contemplates a full and true disclosure made upon the inducement or promise of a pardon and not a disclosure induced as a result of undue pressure.—S. 24 does not exclude such statement made under Criminal P. C., S. 339 (2).*

An approver's disclosure is in its very nature always the result of an inducement or promise, namely, the inducement to confess upon a promise of pardon; but should it appear that it was extorted as the result of undue duress, such as threats or violence, to that extent the provisions of S. 24 would be applicable and the confessional statement would have to be ruled out of evidence. S. 339 (2) can only contemplate the admisson of a full and true disclosure made upon the inducement or promise of a pardon, and not a disclosure induced as a result of undue pressure. Such a statement is not excluded from evidence by S. 24, Evidence Act: 5 *A. L. J.* 691, *Foll.* [P 322 C 2]

(c) *Criminal P. C., S. 337 (2)—Approver's disclosure not true and full—His not being examined at the trial of the persons he has implicated is not a breach on the part of the Crown so far as the trial of the approver himself is concerned.*

The fact that the approver has not been examined at the trial of the persons he has implicated is not a breach on the part of the Crown of the conditions upon which the disclosure was made and the pardon granted so far as the trial of the approver himself is concerned. The approver has failed to comply with the condition on which a tender of pardon was made, as soon as it is established that the disclosure is not a true and full one, and that it is not a true and full disclosure becomes apparent as soon as he is shown to have made a statement entirely inconsistent with the one upon the strength of which the pardon was granted. [P 323 C 2]

(d) *Evidence Act, S. 24—Approver tried on the basis of his statement—Statement retracted must be corroborated by other evidence.*

Where a statement made by approver is relied upon by the prosecution as an admission

of guilt in respect of the crime for which the approver has been tried, it is a confession and if withdrawn before the Committing Magistrate must be regarded in the light of a retracted confession and must be corroborated by extrinsic evidence. [P 324 C 1]

B. R. Puri, Rattan Lal and *Ishar Das*—for Appellant.

Des Raj Sawhney—for the Crown.

Fforde, J.—The appellant Ram Nath has been tried by the Additional Sessions Judge of Lahore, for having on the evening of 4th May 1927, at Machi Hatta Bazar, Lahore, together with other persons murdered one Piran Ditta a tonga driver. He has been convicted of the offence charged and has been sentenced to death, and he now appeals against that conviction and sentence. The facts shortly stated are as follows:

On the evening of 4th May 1927, a police constable named Shahan Khan discovered in the Machhi Hatta, a tonga with a wounded man in it on the point of death. The constable got into the tonga and drove it to the City Kotwali. On the same evening the dead body of this man, who is alleged to be Piran Ditta, was sent to the Mayo Hospital together with three other dead bodies in the charge of police constable Fateh Din. On the following day, that is, 5th May 1927, the post mortem on all these bodies was carried out by A. F. Mathews, Assistant to the Civil Surgeon, Lahore. When the post mortem on these bodies was performed no person identified the corpse of the person now alleged to be Piran Ditta. The statement of the Assistant to the Civil Surgeon on the point is as follows:

> Before commencing post mortem I also asked which constable got the body and in the case of Piran Ditta there was no constable forthcoming.

I may add that all the bodies examined by the Assistant Civil Surgeon on this occasion were those of persons alleged to have been murdered. The learned Sessions Judge has come to the conclusion that the dying man found in the tonga on the evening of 4th May has not been proved to be Piran Ditta. The learned Judge in the course of his judgment says that there is no satisfactory proof that the body examined by Dr. Mathews was the same body that had been taken from the tonga. This conclusion appears to be quite justified by the state of the evidence. It is of course not necessary for the purposes of this case to decide whether or not the man found injured in the tonga was named Piran Ditta, but it is necessary for the purpose of proving the nature of the injuries which that man is alleged to have received to establish that the body examined by Dr. Mathews was the body of that man in the tonga. The lack of satisfactory evidence on this point leaves us in the position of being unable to conclude what are the exact injuries which that man received. But one point is clear and that is that the dying man found in the tonga, whatever may be his name or the nature of the injuries which he received, was murdered on the evening of 4th May. The question which we have to decide is: Has the appellant Ram Nath been satisfactorily proved to have had a hand in that murder.

No clue to the murder appears to have been discovered until 9th June, when as a result of certain information which the police received, Ram Nath and his brother Baij were called to the investigation.

On the 10th a person called Ganesh Das also appeared, and on that date both Ganesh Das and Ram Nath alleged to have made some statements in connexion with the affair. Ram Nath was then arrested and detained in the C. I. D. barrack. On 14th June, Ram Nath is alleged to have expressed a desire to become an approver, and he was thereupon brought before Mr. Keough, then acting as Additional District Magistrate, Lahore, who offered him a pardon conditional upon his making a full and true disclosure of all he knew about the crime in question. This tender of pardon was accepted by Ram Nath who, on the following day, i. e., 15th June, was brought before Mr. Phailbus, a Magistrate of the first class, who recorded his statement. The document recording this statement has been put in evidence and it is upon the admissions appearing therein that the prosecution principally rely to convict the appellant.

On 23rd June, Ram Nath was brought before the committing Magistrate as a witness against the persons whom he implicated in his statement, but when put in the witness-box he alleged that that statement was totally false, that it was extorted by police pressure and that in fact he knew nothing about the death of

Piran Ditta, the tonga man. The trial of the persons whom he implicated was proceeded with and resulted in their acquittal. Thereupon the public prosecutor having granted a certificate that Ram Nath had not complied with the condition on which the tender of pardon was made, the latter was committed to trial for the offence in respect of which that pardon was tendered, in accordance with the provisions of S. 339, Criminal P. C. It is in respect of the conviction and sentence at this trial that the present appeal has arisen.

Mr. Puri for the appellant has contended that the statement made by the appellant to Mr. Phailbus referred to as Ex. P. A., is not admissible in evidence, becuase, it is a confessional statement and the document recording it does not comply with the provisions of S. 164, Criminal P. C., and the departure from those provisions has not been cured by the evidence of the Magistrate who recorded the statement. His second contention is that the pardon has not been forfeited and may be pleaded in bar, as the appellant not having been examined before the Sessions Judge at the trial of the other accused, the terms upon which the disclosure was made and the pardon granted have not been fulfilled by the prosecution. So far as the first point raised is concerned, I have no doubt the statement made by the appellant to Mr. Phailbus is admissible in evidence under the provisions of S. 339 (2), Cr. P. C., provided it has not been shown to have been induced as aresult of threats or of violence. S. 337 (1), Cr.P.C., provides that certain Magistrates may

> at any stage of the investigation or enquiry into, or the trial of the offence, with a view to obtaining the evidence of ony person supposed to have been directly concerned in, or privy to, the offence under enquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, and to every other person concerned, whether as principal or abettor, in the commission thereof.

The section nowhere lays down that such disclosure shall be reduced to writing. I have no doubt that if made orally the verbal testimony of the person to whom it has been made will be sufficient to prove the statement. As a rule of caution, however, the approver's statement is always formally reduced to writing, a practice which it is obviously very desirable to observe so that no dispute may subsequently arise as to what the exact terms of the statement were. The section contemplates that the "full and true disclosure" may be made anterior to the enquiry before the committing Magistrate and may also be made at the enquiry or at the trial. It is the disclosure inducing the pardon which is the statement referred to in S. 339 (2). The pardon may be offered before any enquiry has been commenced before the Committing Magistrate (as in the present case), or it may be offered when the person is himself an accused person at the enquiry or it may be offered when he is under trial. It is not made under the provision of S. 164, Criminal P. C., and in my judgment that section in no way governs such a statement. I also agree with the view expressed in *Emperor* v. *Sultan Khan* (1), that such a statement is not necessarily excluded from evidence by the provisions of S. 24, Indian Evidence Act. Sub-S. (2), S. 339, Criminal P. C., in my opinion makes by necessary implication a statement of this nature an exception to the rule of evidence enacted in S. 24, Indian Evidence Act, as far as that section excludes confessions made as the result of the inducement or pardon An approver's disclosure is in its very nature always the result of an inducement or promise, namely, the inducement to confess upon a promise of pardon; but should it appear that it was extorted as the result of undue duress, such as threats or violence, I have no doubt that to that extent the provisions of S. 24 would be applicable and the confessional statement would have to be ruled out of evidence. S 339 (2) can only contemplate the admission of a full and true disclosure made upon the inducement or promise of a pardon and not a disclosure induced as a result of undue pressure. This appears to have been the view taken by the Court in *Emperor* v. *Sultan Khan* (1), for the learned Judges, after holding that the approver's confession was not excluded by S. 24, Evidence Act, proceeded to discuss the further question whether or not the statement had been made of his own free will and accord.

The learned Sessions Judge, in regard to this aspect of the case, has made the following remarks in his judgment :

(1) [1903] 5 A. L. J. 691=(1908) A. W. N. 259.

Ram Nath alleges that Ganeshi's statement was read over to him and used to influence him. Faiz Ullah denies this. There is no evidence which I regard as satisfactory to prove whether this was so or not. I think it very likely that the two men were played off against each other.

Ram Nath alleges that Hargopal was beaten, and that he was threatened. There is no proof of this on the record.

The learned Judge in the next line says :

Reference to the Zimnis does not lead me to disbelieve this statement;

that is to say, that Hargopal was beaten and that Ram Nath was threatened. The learned Judge further remarks :

I find that there is no reason to support any undue influence by the police before Ram Nath gave a statement purporting to be a disclosure, except : (1) that he may have been told that Ganeshi had implicated him and others and that a statement by him might lead to his pardon; and (2) he may have been threatened with a beating.

I find that Ram Nath was certainly kept under direct police control both before and after his acceptance of pardon, and that he may well have been in fear (justified or not justified) of some form of reprisal, if he did not repeat the statement already made by him.

I am not prepared to disagree with the above expressions of opinion of the learned trial Judge. There was undoubtedly material before him upon which he was justified in coming to the conclusion at which he arrived. As I am unable to disagree with that conclusion I think I am bound to reject the statement of the approver as having been induced by undue pressure ; that is to say, I cannot regard it as a voluntary statement made solely upon a promise of pardon.

So far as Mr. Puri's second argument is concerned, namely, that the conditional pardon granted to the approver is a bar to the present trial as he was not examined before the Sessions Judge I am of opinion that that argument cannot be sustained. The provision contained in S. (2), S. 337, Criminal P. C., that every person accepting a tender under that section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial if any, no doubt makes it essential that at the trial of the persons against whom the approver is testifying the approver must be examined as a witness. The decisions cited by the Public Prosecutor to the effect that the approver need not be examined in the Sessions Court were arrived at before the amendment to S. 337. Sub-S. (2) formerly ran as follows :

Every person accepting a tender under this section shall be examined as a witness in the case.

and the authorities cited by Mr. Sawhney decided that it was a sufficient compliance with this provision if the approver were examined in the Court of the committing Magistrate. The amendment in the Act appears to have been introduced for the purpose of making it clear that the approver must be examined both in the Court of the committing Magistrate and in the subsequent trial. Whether non-compliance with this statutory provision renders trials of the persons against whom the approver's evidence is to be tendered illegal is a question which need not be decided here as those persons have been acquitted. But when it comes to the trial of the approver himself for the offence in respect of which the pardon was tendered, I do not think that the fact that he has not been examined at the trial of the persons he has implicated is a breach on the part of the Crown of the conditions upon which the disclosure was made and the pardon granted. The approver has failed to comply with the condition on which a tender of pardon was made as soon as it is established that his disclosure is not a true and full one, and that it is not a true and full disclosure becomes apparent as soon as he is shown to have made a statement entirely inconsistent with the one upon the strength of which the pardon was granted. That situation was reached in the Court of the committing Magistrate when Ram Nath declared that his statement of the 15th June was entirely false and that he knew nothing about the affair in respect of which he purported to have given a true account. The conclusion of the learned trial Judge that the pardon cannot now be pleaded in bar is in my judgment sound.

Although I am of opinion that the confessional statement of the approver should be excluded from consideration in view of the circumstances under which it was obtained, yet assuming it may be admitted it undoubtedly requires corroboration by extrinsic evidence. The learned Public Prosecutor has not contended that such corroboration is not required and, indeed, I do not think that

it could be so contended. As I have already said the statement in question is relied upon by the prosecution as an admission of guilt in respect of the crime for which the appellant has been tried. In other words it is a confession, and having been withdrawn before the committing Magistrate it must be regarded in the light of a retracted confession. It therefore becomes the duty of the Court to satisfy itself before acting upon them that the incriminating admissions of the appellant are true. This the prosecution has sought to establish by the evidence of Shamas Din, Allah Bakhsh, Muhammad Hussain, son of Karim Bakhsh, Muhammad Hussain, son of Karim Bakhsh, Muhammad Hussain son of Fazal Din, and Muhammad Taqi, P. Ws., 12, 13, 14, 15 and 24. The appellant in his statement first of all describes certain attacks made by himself and others upon certain Mahomedans who happened to be in the Machhi Hatta Bazar. (After discussing the evidence of prosecution witnesses the judgment continued).

On the whole I am not satisfied that the approver's story, even if it may be admitted in evidence, has received that corroboration in material particulars which as a rule of caution the Courts require in cases of retracted confessions. The circumstances under which that disclosure was obtained, added to the fact that it was retracted on the first moment that the appellant was brought before a Court, make it essential that the corroboration relied upon should be free from doubt which is far from being the case here. For the reasons which I have given I am of opinion that the guilt of the appellant has not been proved with that degree of certainty which the law requires, and I would accordingly accept his appeal and set aside the conviction and sentence.

Jai Lal, J.—I agree.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 324

DALIP SINGH, J.

G. P. C. Holmes—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Ref. No. 1786 of 1927 Decided on 16th December 1927 by Sess. Judge, Ambala.

Penal Code, S. 225-B—Resistance — Knowledge of the accused that he is being arrested is essential.

An offence under S. 225-B is committed only when the resistance to arrest is intentional and that can only be when the person who makes the resistance knows that he is being or is about to be arrested. [P 324 C 2]

Report.—On Sunday, 22nd May 1927, at Kasauli, the accused, G. P. C. Holmes, came out of the church after the service and as the military church party were preparing to move off he took up a position in the centre of the road near the church gate and he began to preach in a loud voice and obstructed the departure of the military party. The District Magistrate ordered the arrest of the accused under S. 118, Cantonment Act. The European Inspector of Police, Mr, Phillips, being in plain clothes ordered Sub-Inspector Kuldip Singh to make the arrest. The latter went up to the accused and took him by the hand and tried to remove him but he struggled. With the help of a head constable, Zakka Husain, and Sergeant Grundy he then removed the accused to a bench on the side of the road where he sat and continued shouting. Captain Hepburn then came up to the accused because he was delaying the marching off of the church party and succeeded in persuading the accused to go down a side road. Captain Hepburn accompanied him for some way and then advised him to go home. Sub-Inspector Kuldip Singh then followed the accused and informed him that he had been arrested and ordered him to come to the police station. The accused then turned and went back with the Sub-Inspector to the police station without any further trouble. The Magistrate has held that during the episode at the church gate Sub-Inspector Kuldip Singh arrested the accused by placing his hand upon him and saying in Urdu: "I arrest you;" and that by continuing to struggle after his arrest had thus been effected the accused committed an offence under S. 225-B, I. P. C.

An offence under S. 225-B, I. P. C., is committed only when the resistance to arrest is intentional; that can only be when the person who makes the resistance knows that he is being or is about to be arrested.

In the case under consideration the whole trend of the evidence strongly suggests that the accused had no under-

standing of the fact that he was being arrested, but supposed that he was merely being pushed aside to allow the troops to march away. That statement of the accused himself to the Magistrate was also to the effect that he had no knowledge of any arrest of himself at the church gate, but that he was arrested later on his way home and that he offered no resistance to that arrest.

The trend of the evidence referred to above is apparent from the following extracts :

Mr. Phillips, Inspector (P. W. No. 1) :

Kuldip Singh caught the accused by the arm and said : ' I arrest you '.

Sergeant Grundy, P. W. No. 2 :

I never heard the Sub-Inspector utter the words ' I arrest you. '

I and the Sub-Inspector caught hold of the accused and tried to remove him. He was still preaching when sitting on the bench. He was very much agitated. He was swinging his arms about and nearly knocked me over.

Zakka Hussain, Head Constable P. W. No. 3:

The Sub-Inspector took the accused by the hand and said : ' I arrest you. ' He said it in Urdu.

Sub-Inspector Kuldip Singh, P. W. No. 4.

" I placed my hand on the accused and said: " Holmes Sahib, I arrest you, ' but he took no notice owing to his excitement. His arrest was ordered after he started preaching. "

Captain Hepburn, D. W. No. 1 :

I should not say that the accused intentionally wished to resist the police as he was engrossed in his message to the public. The reason why I went up to the accused was because he was delaying the marching off of the church party and I thought I could persuade him to move out of the way. I think the accused was sitting on the bench on the side of the road when I went up to him. He continued to speak loudly. It was I who suggested that the accused be taken down the road. I had no idea that the accused had been lawfully apprehended, otherwise I should not have interfered. I was ten yards away when the police went up to Mr. Holmes in the first instance outside the church.

The accused in his revision petition had laid particular stress on the evidence of Captain Hepburn.

In my opinion, it is clear from the evidence that the accused was so engrossed in his preaching that he continued to preach even when forced on to a bench by the side of the road and that he was in a state of considerable excitement. In such a condition it is very probable that the words " I arrest you " spoken by the Sub-Inspector in Urdu made no impression on his attention and that he attributed the handling, which he received from the Police Officer to a desire to move him out of the way of the troops rather than to an attempt to arrest him.

It is recommended that the conviction of G. P. C. Holmes under S. 255-B, I. P. C., be quashed and that the fine be remitted. The fine has not yet been paid. The imprisonment in default of of payment has been undergone.

Order.—The case has been referred by the learned Sessions Judge. The accused was convicted under S. 225-B, I. P. C., and sentenced to pay a fine of Rs. 50 and in default to suffer one month's simple imprisonment.

For the reasons given by the learned Sessions Judge I agree in thinking that the intention which constitutes the essence of the offence under S. 225-B has not been proved against the accused. He has already undergone the imprisonment in default. I accept the reference and quash the conviction and sentence.

S.J. *Revision accepted.*

A. I. R. 1928 Lahore 325

TEK CHAND AND BHIDE, JJ.

Dial Singh—Plaintiff—Appellant.

v.

Gurdwara Sri Akal Takht—Defendant—Respondent.

First Appeal No. 692 of 1927, Decided on 29th February 1928, from order of Sikh Gurdwara Tribunal, Lahore, D/- 16th December 1926.

(a) *Civil P. C., O. 6, R. 17—Sikh Gurdwaras Act (8 of 1925), S. 12.*

The provisions of O. 6, R. 17, Civil P. C., apply to the trial of cases before the Sikh Gurdwaras Tribunal. [P 327 C 1]

(b) *Sikh Gurdwaras Act (1925), S. 2 (4) (iv) —The person holding the office on 1st January 1920 should have been holding it by hereditary right.*

The definition of "hereditary office" in S. 2 (4) (iv) of the Act does not contemplate that the office should have devolved on the applicant himself according to hereditary right or by nomination, but it means that the office should have devolved on the person who was holding it on the first day of January 1920 (whether he be the applicant himself or his ancestor or guru) by hereditary right or by nomination. [P 328 C 1]

(c) *Sikh Gurdwaras Act* (1925), *S.* 2 (7)—*Presumptive successor—Meaning explained.*

Where the succession to office descends from father to son, the son is a "presumptive successor," even though the father had died on the date of application by the son, under S. 6.

In common legal parlance an "heir presumptive" or a "presumptive successor" is a person, who, if the ancestor should die immediately, would be his heir, but whose right to the inheritance may be defeated by the birth of a near relation or by some other contingency, but this is not the sense in which this expression is used in the Act. [P 328 C 2]

(d) *Interpretation of Statutes—Word defined in an Act must be deemed to be used in the Act only in that sense.*

When a word or phrase is defined as having a particular meaning in an enactment, it is that meaning alone which must be given to it in interpreting a section of the Act, unless there be anything repugnant to the context. [P 328 C 2]

(e) *Interpretation of Statutes—Construction leading to anomaly should be accepted only if no other construction is possible.*

A construction which leads to an anomaly can be given effect to only if the words of the statute are clear and unambiguous and admit of no other interpretation. [P 329 C 1]

Sardha Ram—for Appellant.

Bhagat Singh and *Man Singh* — for Respondent.

Tek Chand, J.—This is an appeal under S. 34, Sikh Gurdwaras Act (8 of 1925) preferred by one Dial Singh against the order of the Sikh Gurdwaras Tribunal rejecting his claim for compensation on the preliminary ground that he had no locus standi to apply under S. 6 of the Act.

The relevant facts are, that by Notification No. 892 dated 28th April 1926, the Punjab Government, acting under the provisions of sub-S. (2), S. 3, Sikh Gurdwaras Act, declared Akal Takht Sahib (Akal Bunga) as a "Sikh Gurdwara" and this notification was published in the Punjab Gazette of the 30th April 1926. On the 23rd July 1926, the appellant Dial Singh presented to the Punjab Government through the Secretary, Transferred Departments, a petition under S. 6 alleging that from the time of the Mughal Emperors his ancestors had held the office of manager and lambardar of Sri Akal Takht Sahib and had been enjoying the offerings and emoluments connected therewith, that the said office had descended in the family from father to son, that in 1920 he (applicant) was unlawfully and illegally removed from the office by the Akalis and the possession of the Gurdwara passed into the hands of the Shromani Gurdwara Prabandhak Committee, that pecuniary loss to a very large extent (was caused) for which he was entitled to be compensated under S. 6 of the Act, and that he assessed the amount of compensation at Rs. 1,52,762-8-0.

On the application coming up for hearing before the Tribunal on the 16th December 1926, the appellant's counsel made a statement modifying the averments in the application in several material particulars. He stated that it was not the appellant but his father, Sunder Singh, who had been forcibly removed by the Akalis, that the alleged removal took place in 1922 and not in 1920 as stated in the application and that Sundar Singh had died on 7th April 1926. On these allegations counsel claimed that the applicant Dial Singh was entitled to apply for compensation under S. 6, being a "past hereditary office-holder" as well as a "presumptive successor." He later on took up the somewhat inconsistent position that his client could also apply as a "present hereditary office-holder." The respondent does not seem to have objected to the applicant modifying his allegations in the manner above mentioned, and the Tribunal proceeded to decide forthwith, whether on the case as put forward before it by counsel, the applicant had a locus standi to claim compensation under S. 6. The President and the two members were agreed that the applicant was neither a "past" nor a "present hereditary office-holder" as defined in the Act, but they differed on the question whether on the allegations made by him, he was "presumptive successor" to such office-holder. Mr. Kharak Singh held that as the applicant's father had died before the date on which the application was made, he was not "a presumptive successor," but was "an actual heir" and, therefore, not entitled to apply under S. 6. Mr. Munna Lal concurred with the learned colleague in this view and also expressed the opinion that the office, to which the applicant lay claim, could not be called an "hereditary office" within the meaning of that expression as used in the Act,

because, if did not devolve upon him before the first day of January, 1920, when his father was himself admittedly alive.

The President, Coldstream, J. held, on the other hand, that assuming the statement of facts as given by the applicant's counsel on the 16th December 1926, to be correct, the applicant was a "presumptive successor" to a "past hereditary office-holder" and as such had a locus standi to apply under S. 6. He, therefore, recorded the opinion that the case should be proceeded with and the applicant's allegations enquired into on the merits. In accordance with the opinion of the majority of the Tribunal the application was, however, dismissed in limine.

At the hearing of the appeal Mr. Man Singh, on behalf of the respondent, raised the objection that the appellant should be confined to the claim as laid in his application of the 23rd July 1926, and that he should not be allowed to argue on the basis of the position taken up in the oral statement made before the Tribunal on the 16th December 1926. There is no doubt that the allegations in the application materially differed from those subsequently made, inasmuch as the appellant originally alleged that it was he himself who had been unlawfully removed by the Akalis in 1920, whereas later on he stated that it was his father who was so removed and that the removal took place in 1922 and not in 1920. It would have been much more satisfactory if, on the 16th December 1926, when the appellant wanted to modify the allegations in the original application, he had been directed to present an amended application or to file a better and further statement as provided for in the Civil Procedure Code. If the respondents objected to the proposed amendment their objections should have been noted on the record, and a formal decision given. It is clear, however, that though this was not done, the Tribunal allowed the case to proceed on the basis of the allegations made in the statements dated the 16th December 1926, and there is no doubt that the decision of the President and the members was given on those allegations. Under O. 6, R. 17, Civil P. C., the provisions of which apply to the trial of cases before the Sikh Gurdwaras Tribunal, it was competent to the Tribunal to allow a party to alter or amend his pleadings in such manner and on such terms as it thought just and this alteration or amendment could be made at any stage of the proceedings. By adopting the course it did, the Tribunal must be presumed to have acted under this Rule and to have allowed the amendment. The preliminary objection must, therefore, be overruled and the locus standi of the appellant determined on the allegations as put forward before the Tribunal on 17th December 1926.

Before us it was very fairly and properly conceded by Sardha Ram for the appellant that as his client never held the "office" himself, he could not claim as a "past" or a "present hereditary office-holder" as defined in the Act, and that he was unable to support the case on these grounds. He, however, strenuously argued that on the case as put forward before the Tribunal, the appellant is a "presumptive successor" to a "past hereditary office-holder" and as such entitled to apply for compensation under S. 6.

Now in order to bring his claim within S. 6 the applicant must allege and establish:

(a) That the Sri Akal Takht is a Sikh Gurdwara in respect of which a notification has been published under the provisions of sub-S. (2). S. 3, of the Act declaring it to be a Sikh Gurdwara;

(b) that in this Gurdwara there was an "hereditary office";

(c) that this office was held by his father Sundar Singh on the 1st January 1920, by hereditary right;

(d) that Sundar Singh was unlawfully removed from the office after the 1st day of January, 1920, and before the date of the publication of the notification mentioned in (a) above;

(e) that the applicant is the "presumptive successor" to Sundar Singh in the aforesaid office; and

(f) that he has suffered or will suffer pecuniary loss in consequence of Sri Akal Takht having been declared to be a Sikh Gurdwara.

There is no dispute as to (a), it being admitted that the required notification in respect of this Gurdwara has been properly issued by the Local Government. For the respondent it is also conceded that the allegations made by the applicant cover (c), (d) and (f). But it is contended that the office to which the applicant lays claim is not an "hereditary office" within the meaning of the Act and that on the date when he presented the application he was not a "presumptive successor" to a "past hereditary office-holder." It is accordingly argued that (b) and (e) are not satisfied and consequently the applicant had no locus standi to file the application. In sup-

port of the first of these contentions the respondent's learned counsel has relied upon the opinion recorded by Mr. Munna Lal that this office:

cannot be said to be a hereditary office because it did not devolve upon him (applicant) before 1st day of January 1920 when his father himself was admittedly alive.

In my opinion this contention is unsound and is based on a misreading of the definition of "hereditary office" in S. 2 (4) (iv) of the Act, according to which "hereditary office" is an office

the succession to which before the first day of January 1920 devolved according to hereditary right or by nomination by the office holder for the time being.

This does not contemplate that the office should have devolved on the applicant himself according to hereditary right or by nomination, as aforesaid; but what it means is that the office should have devolved on the person who was holding it on the first day of January 1920 (whether he be the applicant himself or his ancestor or guru) by hereditary right or by nomination. The wording of Cl. (iv), S. 2 (4), is plain and explicit and cannot possibly bear the interpretation sought to be put on it by the respondent. The allegation on behalf of the plaintiff is that his ancestors held the office of a manager and a lambardar of Sri Akal Takht from the time of the Mughal Emperors, that succession has all along devolved in the male line from father to son and that, on the 1st day of January 1920, his father Sundar Singh was the holder of this office. If he succeeds in proving these allegations there can be no doubt whatever that Sundar Singh was an "hereditary office-holder" as defined in the Act.

The next question to be decided is whether the applicant is "presumptive successor" to Sundar Singh who was ex hypothesi a "past hereditary office holder." The expression "presumptive successor" is thus defined in S. 2 (7):

Presumptive successor, where the succession to the office devolves according to hereditary right, means the person next in succession to an hereditary office-holder, or, where the succession to the office devolves by nomination, made by the hereditary office-holder for the time being, means any chela so nominated before the first day of December 1924.

Now there can be no doubt that if the allegations of fact made by the applicant are correct, he is the person next in succession to his father Sundar Singh, and, but for the alleged unlawful dispossession of Sundar Singh and the declaration of Sri Akal Takht as a Sikh Gurdwara under the Act, he would have succeeded to the office on Sundar Singh's death. He is, therefore, clearly a "presumptive successor" to a "past hereditary office-holder," as defined in the Act and as such entitled to apply for compensation under S. 6. The majority of the Tribunal seem to think, that as on the date on which the application was made Sundar Singh had died and succession had opend out the applicant had stepped into the shoes of his deceased father, and could no longer be regarded as a "presumptive successor," but had become an "actual heir." This argument is, however, fallacious and loses sight of the fact that the expression "presumptive successor" has been given a peculiar meaning in the Act. It is no doubt true that in common legal parlance an "heir presumptive" or a "presumptive successor" is a person, who, if the ancestor should die immediately, would be his heir, but whose right to the inheritance may be defeated by the birth of a near relation or by some other contingency (Wharton's Law Lexicon). But as pointed out already this is not the sense in which this expression is used in the Act. When a word or phrase is defined as having a particular meaning in an enactment, it is that meaning and that meaning alone which must be given to it, in interpreting a section of the Act, unless there be anything repugnant in the context. No such repugnancy is pointed out in this case.

It is clear that the view taken by the majority of the Tribunal is supported neither by the plain and explicit phraseology used in S. 6, nor by the general scheme of the Act. Indeed, it seems to me that the interpretation of S. 6, which has commended itself to them will lead to startling results. According to that interpretation, if Sundar Singh had been alive on the date on which the application was made, he and his son (appellant) would both have had the concurrent right to apply for compensation, the former as a past "hereditary office-holder" and the latter as his "presumptive successor." But as Sundar Singh died in the interval between the date on which the Act came into force and that on which the notification under S. 3 (2) was issued, entitling him to apply for compensation, his death had the effect of not

only putting an end to his own right to apply but also of depriving his son of the right which the latter formerly possessed to claim compensation. A construction, which leads to such an anomaly can be given effect to only if the words of the statute are clear and unamiguous and admit of no other interpretation. The members of the Tribunal do not state that this is so, and the respondent's learned counsel has not been able to urge any valid ground to support this construction.

I have no doubt that if the allegations of fact, made by the appellant be on enquiry found to be correct, he would be a "presumptive successor" to a "past hereditary office-holder" and as such entitled to be compensated under S 6. He must, therefore, be given an opportunity to substantiate these allegations. I would accordingly hold that the conclusion arrived at by the majority of the Tribunal (Messrs Kharak Singh and Munna Lal) cannot be sustained, and upholding the view taken by the President (Coldstream, J.), I would accept the appeal, set aside the order of the Tribunal and remit the case to it for decision in accordance with law. The Court-fee on appeal shall be refunded and other costs shall be costs in the cause.

Bhide, J.—I agree.

D.D. *Case remanded.*

A. I. R. 1928 Lahore 329 (1)

TEK CHAND, J,

D. Johnstone, Notary Public of Lahore —Defendant—Petitioner.

v.

Mt. Jan Bibi and *another*—Plaintiff and Defendant—Respondents.

Misc. Petn. No. 576 of 1927, Decided on 13th January 1928, in Appeal No. 1293 of 1927 for stay of execution proceedings in the 2nd Class Sub-Judge's Court, Lahore.

Civil P. C., O. 41, R. 5—Decree-holder a woman possessed of no property—Execution cannot be stayed on that ground.

Stay of execution cannot be granted on the ground that the decree-holder is a woman possessed of no property. The judgment-debtor's interest can be amply safeguarded by taking security for restitution from the decree-holder.

[P 329 C 2]

Ram Lal Anand—for Petitioner.

J. G. Sethi—for Respondents.

Order.—The plaintiff-respondent, Mt. Jan Bibi, has obtained a money decree against the defendant-appellant carrying future interest at Re. 1 per cent. per mensem. She having applied for execution of the decree the appellant has moved this Court to stay execution on the ground that the decree-holder is a woman possessed of no property. This, however is no ground for stay of execution. The appellant's interests can be amply safeguarded by taking security for restitution from the respondent.

Accordingly I direct that Mt. Jan Bibi, plaintiff-respondent, shall execute the decree under appeal only after she has furnished security to the satisfaction of the lower Court for the refund of the deceretal amount together with interest at Re. 1 per cent. per mensem, in the event of the appeal being accepted.

There will be no order as to costs of today's hearing.

N.K. *Order accordingly.*

A. I. R. 1928 Lahore 329 (2)

BHIDE, J.

Pala Singh and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 108 of 1927, Decided on 30th November 1927, from order of 1st Cl. Magistrate, Lahore, D/- 10th December 1926.

(a) Evidence Act, S. 30—Retracted confession of co-accused is not sufficient for conviction.

The mere retracted confession of a co-accused cannot be sufficient to sustain the conviction of another accused: 30 *P. R.* 1914 *Cr. Ref.*

[P 331 C 1]

(b) Evidence Act, S. 24—Conviction on retracted confession is not illegal but in the absence of corroboration in material particulars conviction is not safe.

It is not illegal to base a conviction even on the retracted confession of an accused person; but in the absence of corroboration in material particulars, it is not safe to convict on a confession, unless from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine: 30 *P. R.* 1914 *Cr. Foll.*

[P 331 C 1]

Pindi Das—for Appellants.

Khurshed Zaman for *Govt. Advocate*—for the Crown.

Judgment.—These six appeals (Nos. 108, 109, 255, 256 and 286 and 287 of 1927) are connected and will be disposed of together.

Six persons, viz., Gagi Santa Singh, Chanan Singh, Pala Singh, Bachan Singh and Mohan Singh, were prosecuted for two dacoities committed by them on the evening of the 7th October 1925. The trials were held separately, but the facts being connected, the learned Magistrate has disposed of the cases in one judgment. In each case, all the accused except Mohan Singh were convicted under Ss. 395/397, I. P. C, and sentenced to rigorous imprisonment for seven years, the sentences to run concurrently. From this decision Santa Singh, Bachan Singh, Pala Singh, and Gagi have appealed in each case Bachan Singh and Pala Singh having filed a joint appeal there are thus six appeals before me for disposal.

The facts are briefly as follows :

(1) On the evening of the 7th October 1925, Harnam Singh of Mandi accompanied by Kundan Singh and Fauja Singh, when on the way near Purana Kahna he was set upon by five or six dacoits. He was belaboured with lathis and was robbed of his gun and a belt of cartridges. Harnam Singh went on to the village and lodged a report at the Thana. Harnam Singh's skull was injured and the injury appearing serious he was sent to the Mayo Hospital for treatment. He eventually died from the effects of the injury after some four months, but before the culprits could be traced. This will be referred to hereafter as the "gun" case.

(2) On the same evening one Bhag Singh of Ladhoke Bhullar was returning to his village on his mare from the same Mandi. He was followed at a short distance by two men Sadar Din and Khuda Bakhsh. When Bhag Singh came near the road to the village Sajjada, he was attacked by four men. He was dragged down from the mare and belaboured with lathis. When he raised an alarm one of the robbers fired a gun and hence none came to his rescue. The robbers eventually decamped with the mare, saddle and a blanket. Bhag Singh went to the thana to report the matter, but the munshi at the Thana wanted money and as Bhag Singh was not willing to bribe him he merely recorded a report about the mare having gone astray. This will be referred to hereafter as the "mare" case.

No trace of the culprits in the above two cases was forthcoming till Gagi, appellant, who was arrested on the 5th January 1926, in connexion with certain dacoities gave information relating to them. Gagi mentioned the present appellants and Mohan Singh as having been responsible for the two robberies committed on the 7th October 1925. The gun and the mare were found and after investigation six persons were prosecuted under Ss. 395/397, I. P. C., as stated already.

The commission of the robberies as alleged appears to have been established beyond any doubt. The report as regards the "gun" case was recorded immediately after the occurrence and Harnam Singh's story was supported by the injuries on his person. In the case of Bhag Singh no report as regards the robbery was taken down by the Police, but there seem no good reasons to doubt the genuineness of the story put forward by Bhag Singh. The report about the astraying of the mare seems rather suspicious for reasons given by the learned Magistrate. The identity of the mare has been established beyond any doubt. If the mare had really gone astray, it does not appear why a false story as to dacoity should have been concocted either by Gagi or the police. There was another case against Gagi and the appellants and the Police had no motive for setting up a false case at all.

The guilt of the appellants in these cases rests mainly on the evidence of certain eyewitnesses who are alleged to have seen them at the time of the commission of the offences and identified them after their arrest and in the case of Pala Singh also on a retracted "confession." I shall first deal with the cases of Santa Singh, Bachan Singh and Gagi, who have not made any confession.

Santa Singh.—In the "gun" case, Harnam Singh died before the culprits were traced as already mentioned. The only two persons who were on the spot and might have been expected to identify the assailants were the companions of Harnam Singh, Fauja Singh and Kundan Singh. Neither of these witnesses was able to identify Santa Singh. Fauja Singh is said to have identified Santa Singh at an identification parade, but he

has definitely stated in Court that he could not identify him and hence the previous identification, if any, is of no assistance. The only other evidence to which counsel for the Crown drew my attention was the retracted confessions of Pala Singh and Chanan Singh co-accused. I shall discuss the admissibility and value of these confessions presently, but assuming that the confessions are genuine and admissible, it seems clear that the mere retracted confession of a co-accused cannot be sufficient to sustain the convictions of Santa Singh. Santa Singh's conviction in the "gun" case cannot, therefore, be upheld : *Jawan* v. *Emperor* (1).

In the "mare" case, Bhag Singh (P.W. No. 7), identified Santa Singh as one of the dacoits who struck him with lathis. Bhag Singh had opportunity of seeing him at close quarters and has no motive for implicating him falsely. The name of Santa Singh was disclosed by Gagi and it has not been shown that Gagi or any other person had any motive for implicating Santa Singh. In fact he has offered no explanation of the evidence against him. (His Lordship then discussed the cases against Bachan Singh and Gagi and proceeded.)

Pala Singh.—Lastly, I come to the case of Pala Singh. This appellant was not identified by anyone in the "gun" case. Not only this, but Bhag Singh has definitely stated that he did not see Pala Singh amongst his assailants. In the "mare" case also, there is no evidence as regards his identification. The learned Magistrate has solely relied upon the retracted confession of Pala Singh, and it is, therefore, necessary to examine it carefully.

There is no doubt that it is not illegal to base a conviction even on the retracted confession of an accused person ; but as pointed out in *Jawan* v. *Emperor* (1) :

> Experience and common-sense show that, in the absence of corroboration in material particulars, it is not safe to convict on a confession unless, from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine.

Now, looking at the facts of this case, I do not think, this is one of those exceptional cases, wherein a conviction may be justifiable even on a retracted confession. Pala Singh, accused, is aged only about twenty. In the story put forward by him, he has denied having taken any active part in the commission of the offence. Bhag Singh denies in the "mare" case that he was amongst the persons who attacked him. He withdrew the confession not long after it was made. The learned Magistrate has held that the confession was not withdrawn at the earliest possible opportunity, but I am not satisfied on this point. The confession was made on the 12th March 1927, but (according to the Magistrate) was not retracted in Court till the 6th October 1926, when the statements of the accused were recorded. But the learned Magistrate concedes that from the trend of the prosecution witnesses it was apparent that the confessions were going to be withdrawn. There are actually two applications dated 3rd June 1926, retracting the confession on the record, but the learned Magistrate considers that these were smuggled in some time and his order "*shamil misl howe*" thereon was obtained thereon somehow without his knowledge. But when it is apparent from the cross-examination of the Magistrate who took down the confession on 12th March 1926, that the confessions were going to be withdrawn, I do not see why it should be considered improbable that the applications were put in about that time. The papers on a judicial record are placed in chronological order and entered in the index, and I am not at all convinced that these applications were antedated and "smuggled" at a later date. The accused were not questioned till the 6th October 1926, and had, therefore, no other opportunity of retracting the confessions.

The circumstances of the retracted confession are, therefore, by no means so exceptionally free from suspicion as to justify a conviction based upon that confession alone.

For reasons given above I accept the appeals of Bachan Singh and Pala Singh and acquit them in both the cases. I accept the appeal of Santa Singh in the "gun" case (Criminal Appeal No. 256 of 1927) and acquit him.

As regards the "mare" case, I have found that there is sufficient evidence to justify the convictions of Santa Singh

(1) [1914] 80 P. R. 1914 Cr.=50 P. W. R. 1914 Cr.=25 I. C. 634=264 P. L. R. 1914.

and Gagi, but the convictions should have been under S. 395, I. P. C., as, according to Bhag Singh's own statement, only four persons attacked him. I accordingly set aside the order of the learned Magistrate and alter the convictions of Santa Singh and Gagi in the "mare" case to those under S. 394, I. P.C. I sentence Gagi, who appears to have played a prominent part, to seven years' rigorous imprisonment including three months' solitary confinement under S. 394, I. P. C. I sentence Santa Singh to four years' rigorous imprisonment including three months' solitary confinement under the same section.

In the "gun" case, I alter Gagi's conviction to one under S. 414, I. P. C., and sentence him to rigorous imprisonment for three years including three months' solitary confinement. The sentences of Gagi in the two cases will run concurrently.

R.K. *Order accordingly.*

A. I. R. 1928 Lahore 332 (1)

ADDISON, J.

Sobha Mal and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1545 of 1927 Decided on 9th December 1927, from order of Addl. District Magistrate, Multan, D/- 10th May 1926.

Criminal P. C., S. 403—Acquittal—Conviction on same facts for another offence is not legal.

An accused once acquitted cannot be convicted for another offence in respect of the same facts. [P 332 C 2]

H. D. Bhalla—for Petitioners.

Judgment.—A complaint against the petitioner for erecting a small portion of their new building on public land was preferred by the Small Towns Committee of Kahror. It was under S. 447, I. P. C. It was dismissed and the petitioners were acquitted under the provisions of S. 247, Criminal P. C. On the same facts the Committee decided to institute a fresh complaint but to change the section to 291 I. P. C. The petitioners have been sentenced after trial on the new complaint to Rs. 10 fine each under S. 38, Small Towns Act, the maximum penalty under that section being Rs. 20. It is clear that a conviction could have been had under S. 38, Small Towns Act, on the first complaint. That being so, the petitioners could not be tried again, as laid down in S. 403, Criminal P. C. I accept the petition, set aside the convictions of the petitioners, and direct that the fines, if paid, be refunded.

S.J. *Petition accepted.*

A. I. R. 1928 Lahore 332 (2)

TEK CHAND, J.

Dasondhi and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1454 of 1927, Decided on 16th November 1927, from order of 1st Cl. Magistrate, Jullundur, D/- 30th August 1927.

(a): Punjab District Boards Act, S. 30—Haisiyat tax—Rate varying accordiag to income of assessee—Tax is of the nature of tax on income and Governor-General in Council's sanction is necessary—Otherwise assessee is not liable to pay.

The haisiyat tax not fixed at a flat rate for particular profession, calling or trade, but varying according to the income of such individual assessee, is in the nature of a tax on income, and can only be imposed with the previous sanction of the Governor-General in Council and if this is not done, the assessees are not legally liable to pay it: *A. I. R.* 1928 *Lah.* 53, *Foll* [P 333 C 2]

(b) Penal Code, S. 225-B—Tax imposed illegal—Warrants issued for nonpayment of the tax—Resistance to such warrants is not illegal.

Under S. 225-B resistance or obstruction to the apprehension of a person is made punishable only if the apprehension was "lawful," but where the imposition of the tax, for the nonpayment of which the warrants are issued, is itself illegal and ultra vires, the resistance to their execution cannot be punishable. [P 333 C 2]

(c) Penal Code, S. 225-B—Warrant not bearing Court seal—Resistance to such warrant is no offence under S. 225-B.

The omission of the seal of the Court on a warrant renders it void and a person offering resistance to apprehension on such a warrant does not commit an offence under S. 225 B: 42 *Cal.* 708 and 18 *Bom.* 636, *Ref.* [P 333 C 2]

Faqir Chand—for Petitioners.

Mulkh Raj for *Govt. Advocate*—for the Crown.

Judgment.—The petitioners have been convicted under S. 225-B, I. P. C., for having offered illegal obstruction to their apprehension by certain tahsil peons in execution of warrants issued

for their arrest and have been sentenced each to undergo rigorous imprisonment for two weeks and pay a fine of Rs. 50.

The facts found by the lower Courts are as follows : In May 1924, the District Board, Jullundur, with the permission of the Local Government, imposed a haisiyat tax on the total annual income derived by all persons carrying on any trade or following any profession or calling within that district. Notification No 3162 was issued on 30th April 1924, and will be found printed at p. 280 and 281 of Part I-A of the Government Gazette, Punjab, published on 2nd May 1924. The assessment was not fixed at a flat rate for a particular profession, calling or trade, but to vary according to the income of each individual assessee. Three of these assessees, Dasondhi, Dheru and Basanta, goldsmiths of village Uchha, refused to pay the tax on demand and under S. 70, District Boards Act, steps were taken to recover it as if it were arrears of land revenue. Accordingly, on 14th August 1926, the Tahsildar, Jullundur, issued warrants under S. 69, Punjab Revenue Act, for the arrest of the defaulters. Five tahsil peons accompanied by a number of zaildars and safedposhes went to the village to effect the arrest. The execution of the warrants was, however, obstructed by the persons named in the warrants and their friends and relations all of whom offered resistance to the peons, with the result that the persons apprehended escaped. Accordingly they and their companions who had rescued them were prosecuted under S. 225-B, I. P. C and convicted as described above. Their appeal having been dismissed they have come up on revision to this Court.

The first point urged on their behalf is that the haisiyat tax for the nonpayment of which the warrants for the arrest of the assessees had been issued, had been illegally imposed by the District Board, Jullundur. It was argued that the tax was in substance a tax on income and, as such, it could not, under S. 30, District Boards Act, be imposed by a local body without the previous sanction of the Governor-General in Council, which had not been obtained in this case. It is conceded for the Crown that the District Board had imposed the tax with the sanction of the Local Government only. There is, therefore, no doubt that the tax imposed under the notification aforesaid was ultra vires. The question has been recently considered by a Division Bench of this Court (Addison and Coldstream, JJ.) in *District Board, Sialkot* v. *Sultan Muhammad Khan* (1), decided on 31st October 1927, where the legality of a similar tax imposed by the District Board, Sialkot, was involved. The learned Judges, in an exhaustive judgment held that the haisiyat tax imposed in Sialkot District under a notification the terms of which were identical with those of the notification now before me, was in the nature of a tax on income and could only be imposed with the previous sanction of the Governor-General in Council and as this had not been done, the assessees were not legally liable to pay it. Following that authority I hold that the action of the District Board, Jullundur, in assessing haisiyat tax on Dasondhi, Dhera and Basanta, petitioners was illegal and ultra vires and they were not legally liable to pay it. It follows, therefore, that the warrant under which it was sought to apprehend these petitioners had not been legally issued and the act of the petitioners in offering resistance to the execution of such warrants did not constitute an offence under S. 225-B. Under that section resistance or obstruction to the apprehension of a person is made punishable only if the apprehension was "lawful" but where (as here) the imposition of the tax for the nonpayment of which the warrants were issued was itself illegal and ultra vires the resistance to their execution cannot be punishable.

Various other defects in the warrants were pointed out by the learned counsel for the petitioners, but I think it necessary to refer only to one of these, namely, that the warrants in this case did not bear the seal of the Court issuing them. Under S. 75, Criminal P C., every warrant must bear the seal of the Court and there is authority for holding that the omission of the seal on a warrant renders it void and a person offering resistance to apprehension on such a warrant does not commit an offence under S. 225-B, I. P. C. Reference may in this connexion be made to *Mahajan Sheikh* v. *Emperor* (2) and *Alter Caufman* v. *Government of*

(1) A. I. R. 1928 Lah. 53.
(2) [1915] 42 Cal. 708=28 I. C. 672=19 C. W. N. 224.

Bombay (3) and to the decision *In re Phipps* (4), on which the rulings were based. For this reason also I hold that the petitioners were not guilty under S. 225-B, I. P. C.

Accordingly I accept the petition for revision set aside the conviction and direct that the petitioners be acquitted. The fine, if paid, will be refunded.

R.K. *Conviction set aside.*

(3) [1894] 18 Bom. 635.
(4) [1863] 11 W. R. 730.

A. I. R. 1928 Lahore 334 (1)

ZAFAR ALI, J.

Ram Diya and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 255 of 1927, Decided on 13th January 1928, for transfer of the case from 1st Class Magistrate, Rohtak.

Criminal P. C., S. 526—Magistrate conducting a trial on a gazetted public holiday in compliance with the request of a police officer constitutes sufficient ground for the case being transferred.

It is highly objectionable on the part of the Magistrate to commence the trial on a gazetted public holiday and to examine all the prosecution witnesses on a public holiday. And when he does so in compliance with the request of a police officer, it is sufficient to create an impression in the mind of the accused that they will not have a fair and impartial trial at his hands and it is a fit ground for transfer. [P 334 C 2]

D. C. Ralli—for Petitioner.

Abdul Rashid—for the Crown.

Order.—This is an application under S. 526, Criminal P. C., for the transfer of a case which is now pending in the Court of Sardar Dilbagh Singh, Magistrate, 1st Class, at Rohtak.

As appears from the record of the case, the petitioners are charged with an offence punishable under S. 304, I. P. C. They were produced before the said Magistrate for the first time on 4th October 1927, which was a public holiday. He proceeded to record evidence because a police officer asked him to do so. After examining one witness he adjourned the case to the next day i.e., the 5th October, which was also a public holiday being the Dashera day and he examined the remaining witnesses on that day.

It was highly objectionable on the par of the Magistrate to commence the tria on a gazetted public holiday and to examine all the prosecution witnesses on a public holiday. As he did so in compliance with the request of a police officer it was sufficient to create an impression in the mind of the accused that they would not have a fair and impartial trial at his hands.

I, therefore, accept this application and direct the District Magistrate to send the case to some other Magistrate subordinate to him who may be competent to try it.

N.K. *Transfer ordered.*

A. I. R. 1928 Lahore 334 (2)

ADDISON, J.

Dina Nath and *another*— Plaintiffs—Petitioners.

v.

Bir Singh and *others*— Defendants—Respondents.

Civil Revn. Petn, No. 411 of 1927, Decided on 10th January 1928, from order of Dist. Judge, Hoshiarpur, D/- 2nd April 1927.

Punjab Tenancy Act (16 *of* 1887), *S. 77—Suit for possession against co-tenant — Civil Court has jurisdiction.*

A suit for possession by one of the occupancy tenants against another occupancy tenant is cognizable by civil Court though the occupancy tenant in question is one of the landlords. [P 335 C 1]

Fakir Chand—for Petitioners.

Sundar Das—for Respondents.

Judgment.—The plaintiffs and one Lalu were joint occupancy tenants of land. According to the plaint the tenancy was partitioned between them and an area of 251 kanals 3 marlas was allotted to the plaintiffs. Though the plaintiffs claim to have been in possession of this area yet the khata entry continued to show joint possession of all the occupancy tenants in the revenue records. Lalu died and was succeeded as heir by one Lal Chand, who is also one of the proprietors of the land. Lal Chand's name was mutated in the revenue records in place of Lalu's the occupancy holding still being shown to be possessed jointly. The plaintiffs' case is that this Lal Chand has taken possession of the area allotted to them in his capacity of occupancy tenant.

They have, therefore, sued in the civil Court for a decree against him for possession of the land in question, and in the alternative they have prayed that, if this cannot be granted, they should be given their proper share of the whole khata. The two Courts below have held that this is a case of dispossession of an occupancy tenant by a landlord and that the suit is, therefore, cognizable by the revenue Courts. Against this finding this revision petition has been preferred,

It is quite clear that the case of the plaintiffs is that Lal Chand, one of the occupancy tenants has dispossessed the plaintiffs, who are the other occupancy tenants. It is not their case that they have been dispossessed by the landlords though the occupancy tenant in question is one of the landlords. It is obvious that he does not represent the body of landlords. The suit is against him alone in his capacity of a joint occupancy tenant in the same khata with the plaintiffs. As such it is clearly cognizable by the civil Courts.

In the circumstances I accept the revision, set aside the order of the Courts below and direct the Subordinate Judge, 4th Class, to receive the plaint and proceed with the suit in accordance with law.

S.J. *Petition accepted.*

A. I. R. 1928 Lahore 335

BROADWAY AND JAI LAL, JJ.

Chhajju—Accused—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 1242 of 1927, Decided on 14th December 1927, from order of Sess. Judge, Lyallpur, D/- 1st August 1927.

Penal Code, S. 302—Murder—Discovery of hatchet and dang, through the instrumentality of the accused, from a tury*heap accessible to anybody—Presence of injuries on the person of the accused—Proof cannot be said to be sufficient to hold the accused guilty.*

The mere facts that the accused pointed out a heap of *tury* belonging to some unknown zamindar which was accessible to anybody and from which were recovered a hatchet and a dang which turned out to be bloodstained and that the accused had some injuries on his person were held to be not sufficient to prove him guilty of being concerned in the murder.

[P 336 C 2]

Shamair Chand—for Appellant.

Mackay for *the Government Advocate*—for the Crown.

Broadway, J.—Chhajju, son of Mangu, a Teli of Chak No. 256 G. B. has been found guilty of the murder of one Mali of the same village and, under S. 302, I. P. C., has been sentenced to death. He has appealed through Mr. Shamair Chand and the case is also before the Court for orders as to the confirmation or otherwise of the death penalty.

The facts of the case are given in great detail in the judgment of the learned Sessions Judge and need only be briefly recapitulated here. It is said that one Dulla had a sister named Mt. Jaina who was married to a man named Buta who some twenty-five years ago migrated to Australia and has not been heard of for several years. Latterly Mali, the deceased, who lived in this village, and who had a wife and some five children, began to pay attentions to Mt. Jaina, his wife having become blind. Dulla objected to the friendship between Mt. Jaina and Mali and removed the former to Haripur in the Jullundur District where her father-in-law lived. Mali, however, followed her there and took up his abode at Haripur for some time. About two years before this occurrence, however, he took Mt. Jaina to Chak Makhdum, a village some two *kos* from Chak No. 256 G. B. and made her his wife. At the same time he used to pay visits to his former hak No. 256 G. B. In addition to cultivation he plied a cart for hire. On the night of 13th February 1927, he was driving his cart from Chak No. 256 G. B. to Toba Tek Singh. Behind him another cart was being driven by Wir Din and Rahmat Ullah. After going a few miles, the night being a moonlit one, two men suddenly appeared, and, it is said, attacked Mali. One of these men was armed with hatchet and the other with a dang. Wir Din and Rahmat Ullah at first are said to have attempted to assist but, on being threatened, they ran away. Wir Din returned to the village and informed Nizam Din, brother of Mali, that the latter had been attacked by two men of whom he had identified Dulla, brother of Jaina, as one, and as the one armed with a hatchet, and, when they had collected the lambardar Abdullah and a party of other men, they proceeded to the spot. There, according to Abdullah and Nizam Din, they found Mali lying on the road by the side of his cart. Nothing in the cart had been taken away, and it is

therefore, clear that robbery was not the motive of the attack. After a little time Nizam Din was sent to make a report at the police station, which is some five or six miles away, and in this report Nizam Din clearly mentioned the fact that he had been told by Wir Din that he (Wir Din) had recognized Dulla alone. It is also stated in the first report that Wir Din and Rahmat Ullah, cartmen, had stated that Dulla had threatened them that if any one of them would move a pace forward his death would be certain. For this reason they did not go near him. From this it is apparent that Rahmat Ullah was present at the spot when Abdullah and Nizam Din, etc., arrived and was questioned by them. When the police arrived at the scene they found the appellant Chhajju in the custody of the lambardar and others and it then transpired that Rahmat Ullah claimed to have identified not only Dulla but Chhajju as well, Chhajju being the man who attacked Mali, armed with a dang.

The police investigation proceeded, and 16th February 1927, Chhajju was sent to the doctor for examination as he was said to have received injuries. The usual statement of injuries prepared by the police is dated 14th February 1927, but the Sub-Inspector admits that no mention of any injuries or of the preparation of this statement of injuries was made in the zimni or police diary of the 14th February. Nor is there any mention of it on the 15th February, and it is only on the 16th February that the police diary shows that Chhajju was sent for examination by the doctor on account of his injuries. This omission is said to have occurred owing to the large amount of work which the Sub-Inspector had to do. During the enquiry Chhajju also is said to have pointed out a heap of *tury* belonging to some zamindar and from it were recovered a hatchet and a dang which turned out to be bloodstained. Gennu tracker was also examined and says that he compared the tracks and found one of the tracks coincided with those of the aplant. Dulla was absconding, and, as Wir Din and Rahmat Ullah had mentioned the fact that there was a third man lurking in the bushes on the wayside when the attack on Mali was made and as the tracker had discovered the tracks of three persons and claimed to identify one of those tracks as being those of a man named Kaka, Chhajju and Kaka were sent up for the murder of Mali. Kaka was acquitted but Chhajju was convicted and sentenced as already stated.

Now, admittedly the case against Chhajju rests mainly on the testimony of Rahmat Ullah, supported by the fact that he is said to have produced a hatchet and a dang and that he had injuries on his person. So far as the injuries are concerned, a reference to the medical evidence, to my mind, clearly shows that they were not received as suggested or alleged by the prosecution. The fact the appellant was not sent for medical examination till the 16th February lends considerable support to his assertion that he received these injuries in the course of the investigation when efforts were being made to force him to disclose the whereabouts of Dulla in whose *ihata* the appellant resides and has resided for some two years or more.

So far as motive is concerned: it is true that in 1925 Mali lodged a complaint under S. 107, Criminal P. C., asking the Court to take security from Dulla and three other persons including the appellant. That complaint was, however, allowed to be dismissed in default. Whatever motive there may have been on the part of Dulla, the motive so far as the appellant is concerned, is a very meagre one indeed.

Turning next to the question of discovery by him or through his instrumentality of the hatchet and the dang: the first point to be noticed is that the *tury* heap was situated in the field of a zamindar whose name has not been given Obviously the place was one accessible to anybody, and it is quite possible that Chhajju saw Dulla or some other person placing these articles there and on being pressed by the police told them so. The fact that he was instrumental in obtaining the discovery of these articles is not, in my opinion, sufficient in this case, to prove him guilty of being concerned in this murder. The real case against him rests on the testimony of Rahmat Ullah and, after due consideration, I am of opinion that this witness's evidence as against this appellant cannot be accepted. He accounts for his silence between the attack and the departure of Nizam Din to the police station by saying that, after he had been threatened by Dulla and

Chhajju, he ran away towards the village, that on the way he fell into a water-course and got wet, with the result that he became very benumbed through cold, and although he has a reputation in the village, and has had it since his childhood, of being a *gappi* or a person addicted to telling stories and somewhat of a gossip and a liar, he asked us to believe that it was not until Nizam Din had gone away and he was on his way back with the lambardar from the scene of the occurrence to the village that the lambardar mentioned to him that Dulla's name was to be given in the report and that he then said that he had also recognized Chhajju I cannot believe that, had Rahmat Ullah recognized Chhajju, he would not have stated that fact to the lambardar and others on the spot prior to the departure of Nizam Din for the thana. Abdullah and Nizam Din were well aware from Wir Din's statement that Rahmat Ullah was an eye witness and they naturally would have questioned him. The fact that Nizam Din stated in the first information report that both Vir Din and Rahmat Ullah had named Dulla shows that Rahmat Ullah had, as a matter of fact, been questioned by the people before Nizam Din went to make a report.

In these circumstances I am of opinion that the case against the appellant cannot stand. The evidence of Rahmat Ullah was not accepted by two of the four assessors and I agree with them in their estimate of this witness's testimony. I would, therefore, accept the appeal, set asid the conviction and sentence and direct the release of Chhajju forthwith

Jai Lal, J.—I agree.

S.J. *Appeal accepted.*

** A. I. R. 1928 Lahore 337

TEK CHAND AND BHIDE, JJ.

Gurdial Singh—Plaintiff—Appellant.

v

Central Board and Local Committee, Sri Darbar Saheb, Amritsar—Defendants—Respondents.

First Appeal No. 910 of 1927, Decided on 30th March 1928, from order of Gurdwara Tribunal, Lahore, D/- 17th January 1927.

* (a) *Sikh Gurdwaras Act* (8 *of* 1925), *S.* 6—*Tribunal can enquire as to custom of succession set up.*

There is nothing in the Sikh Gurdwaras Act or in any other Statute to support the view that in determining whether a claimant to compensation under S. 6 is the presumptive successor to a hereditary office-holder the Tribunal is not "expected by law" to make an enquiry into a special custom under which he claims to succeed On the other hand if such a custom is set up by one party and denied by the other, it is the duty of the Tribunal to enquire into its existence and validity and record its findings thereon. [P 339 C 1]

* (b) *Gurdwaras Act* (8 *of* 1925), *S.* 2 (4) (iv) —*Prevailing rule of descent should be determined in each case.*

The words "devolved by hereditary right" in S. 2 (4) iv) have not been assigned any special meaning and must, therefore, be interpreted literally as signifying "descended and capable of descending by inheritance from an ancestor to an heir at-law." The section does not prescribe any particular rule of inheritance and it is a matter for determination in each case as to what the prevailing rule of descen is. [P 339 C 1]

(c) *Sikh Gurdwaras Act* (1925), *S.* 2 (7)—*Succession opening before application—Applicant is not debarred from applying under S.* 6.

The expression "presumptive successor" has been given a peculiar meaning in the Act and the mere fact that succession had actually opened out before the application was made by the applicant does not deprive him of his right to apply for compensation under S. 6: *A I R.* 1928 *Lah.* 325, *Foll.* [P 339 C 2]

** (d) *Sikh Gurdwaras Act* (192), *S.* 6—*Office holder continuing in office till death—Successor prevented from succeeding—S.* 6 *does not apply.*

Section 6 does not and cannot cover the case in which the office holder continued in office till his death, and immediately after his death but before the person next in succession could actually get himself installed, the S. G. P. C. or some other such body intervened and unlawfully prevented him from succeeding. That section is so worded as to make unlawful removal of office holder a conditio precedent for the maintainability of an application for compensation. [P 340 C 1; 2]

(e) *Interpretation of Statutes—Courts cannot supply omission in an Act.*

Courts cannot aid the legislature's defective phrasing of the Act; they cannot add and amend, and by construction make up the deficiencies which are left there. Whether an omission in an Act flowed from forgetfulness of the draftsman or was intentional is no concern of the Courts and it is well-settled that a casus omissus cannot be supplied by a Court of Law for that would be to make laws: *Crawford* v. *Spooner*, (6 *Moor. P. C.* 1), *Foll.* [P 340 C 2]

(f) *Interpretation of Statutes—Debates in Council cannot be referred to.*

Courts, while interpreting an Act, cannot seek the assistance of the debates in the Legislative Council or the report of the Select Committee: *Rex* v. *West Riding of Yorkshire County Council*, (1906) 2 *K. B.* 676 (716) *Ref.* [P 340 C 2]

Nihal Singh—for Appellant.

Man Singh and *Bhagat Singh*—for Respondents.

Tek Chand, J.—On 23rd July 1926, the appellant Gurdial Singh presented to the Local Government through the Secretary, Transferred Departments, a petition claiming compensation under S. 6, Sikh Gurdwaras Act. In the petition it was alleged that the office of Granthi of the Sri Darbar Sahib (Golden Temple), at Amritsar had been held by hereditary right by members of the applicant's family for several generations, succession being governed by a special custom according to which the office descended on the eldest adult male member of the family living at the time. It was stated that the last holder of the office was the applicant's elder brother Bhai Gurbachan Singh, who died in May 1923, leaving him surviving two minor sons and a younger brother (applicant). As the applicant was at the time the only adult male member in the family he was the "legal heir" to the gaddi. But the Shiromani Gurdwara Prabandhak Committee, which had taken over the management of the Sri Darbar Sahib, appointed an outsider to the office and installed him as the Granthi in derogation of the old custom and the claims of the applicant. He, therefore, claimed to be the "presumptive successor" to a "past hereditary office holder" and as such applied for compensation under S. 6 of the Act.

This application was in due course forwarded to the Sikh Gurdwaras Tribunal for disposal in accordance with the provisions of the Act. The Tribunal after examining the applicant has dismissed the application in limine. One of the Members Rai Bahadur Munna Lal was of opinion that the applicant had no locus standi to apply under S. 6, inasmuch as (i) he claimed to succeed to his deceased elder brother under a special custom "into which this Tribunal is not expected by law to make an enquiry," and (ii) on his own showing, the applicant was neither an "office holder" nor a "presumptive successor." The other Member, Sardar Kharak Singh, agreed in dismissing the application, and in doing so thus expressed himself :

> He (applicant) is neither a presumptive successor as the succession has actually opened out in the year 1923, when his brother died and he is actual successor nor he is an office-holder because he did not participate in the public worship in the management of rituals or ceremonies observed therein.

The President Coldstream, J., was

> not satisfied beyond any reasonable doubt that the intention of S. 6 was to exclude a presumptive successor whose predecessor was not removed from but died in an office.

He, however, did not think it necessary to pursue the matter further as the "case was decided by the orders of his colleagues." The application was accordingly dismissed, and against the order of dismissal Gurdial Singh has preferred an appeal to this Court.

It may be mentioned at the outset, that as in the application it was not specifically stated that the S. G. P. C. had "unlawfully removed" the last office-holder, the Tribunal examined the applicant on 17th January 1927, when he made contradictory statements on the point. He, however, ultimately admitted that Gurbachan Singh had not been unlawfully removed from his office but had continued to hold it till he died in 1923, and that after Gurbachan Singh's death, but before the applicant could get himself installed on the Gaddi the S. G. P. C. intervened him from succeeding to the office. This position has been adhered to before us by the applicant's learned counsel, who has conceded that in this case there has been no unlawful removal of an "office-holder," but that what has really happened is that the S. G. P. C. has unlawfully prevented the rightful heir from succeeding to a "hereditary office" after the death of the last incumbent.

On appeal three points have been argued before us by Mr. Nihal Singh. It has been contended :

(a) that it is incorrect to hold that in order to determine the applicant's right to succeed by hereditary right to his brother in the office of Granthi, the Tribunal is not "expected by law" to make an enquiry into the alleged custom by which he claims to succeed ;

(b) that the majority of the Tribunal are in error in rejecting the application on the ground that on his own showing the applicant is not a "presumptive successor" to a "past hereditary office-holder" ; and

(c) that the view which the learned President was inclined to take that under S. 6 compensation can be claimed by a "presumptive successor" whose predecessor was not removed from, but who died in office, was correct.

He has accordingly argued that the application ought not to have been dismissed without enquiry into the allegations of fact made by the applicant.

After hearing counsel for the respondent at length, I am of opinion that contentions (a) and (b) are wellfounded and must prevail. I can find nothing in the Sikh Gurdwaras Act or in any other statute to support the view that in determining whether a claimant to compensation under S. 6 is the presumptive successor to an hereditary office-holder the tribunal is not "expected by law" to make an enquiry into a special custom under which he claims to succeed. On the other hand, it seems to me that if such a custom is set up by one party and denied by the other, it is the duty of the tribunal to enquire into its existence and validity and record its findings thereon. In Cl. 4 (iv), S. 2 of the Act "hereditary office" and "hereditary office-holder" are defined as follows:

Hereditary office means an office the succession to which before "the first day of January 1920 devolved according to hereditary right or by nomination by the office-holder for the time being; and hereditary office-holder means the holder of an hereditary office."

In this clause the words "devolved by hereditary right" have not been assigned any special meaning and must therefore, be interpreted lit rally as signifying descended and capable of descending by inheritance from an ancestor to an heir-at-law.

It will be seen that the section does not prescribe any particular rule of inheritance and it is a matter for determination in each case as to what the prevailing rule of descent is. To take a few examples, in some Gurdwaras the rule of primogeniture may be recognized; in others succession may be according to the personal law. To some offices females may be eligible to succeed, while they may be excluded from others. In some shrines minority might be a bar to succession, the adult male member of the family being preferred as the fittest person to perform the religious duties pertaining to the office; in others the minor heir may be permitted to succeed and have the duties performed through a duly qualified Sarbrah. In all such cases succession devolves by hereditary right, though the mode of hereditary descent is different in each case. The legislature has purposely refrained from prescribing a particular mode of descent, the only limitation which it has laid down being that the person who held the office on the 1st June 1920 should not have been the first incumbent of the office, but should have succeeded to the office "by hereditary right or by nomination by the holder for the time being," It is, therefore, clear that in cases in which special custom, regulating the rule of succession to an "office" is set up by the claimant and it is alleged that succession had devolved according to that custom on the person who held it on 1st January 1920, and the opposite party doubts the existence of such custom, the tribunal is bound to frame an issue on the point and try it in the ordinary way.

Coming now to point (b) there can be no doubt that if the allegations of fact made by the appellant are established, he, being ex-hypothesi the next in succession to Gurbachan Singh, would certainly be a "presumptive successor" to a "past hereditary office-holder," as defined in the Act. The question has been recently discussed at length in *Dial Singh* v. *Gurdwara Sri Akal Takht Amritsar* (1), in which case also the same view had been taken by the majority of the tribunal, but was dissented from by this Bench. As pointed out in that judgment "presumptive successor" has been given a particular meaning in the Act (vide Cl. 7, S. 2), and the mere fact that succession had actually opened out before the application was made by the applicant does not deprive him of his right to apply for compensation under S. 6.

The decision of the majority of the tribunal is, therefore, erroneous on the grounds on which it proceeds, but I do not think it proper to remand the case for decision of the other points, as I am of opinion that the petition must fail on another ground which is not relied upon by either of the members of the tribunal but which is mentioned in the order of the President (Coldstream, J.). Assuming that the appellant succeeds in establishing the facts necessary to make him the "presumptive successor" of a "hereditary past office-holder" of the Gurdwara in question he can be allowed compensation under S. 6 only, if he further alleges and proves that the office-holder of whom he is the presumptive successor had been "unlawfully removed" from the office after the first day of Janu-

(1) A. I. R. 1948 Lah. 325.

ary 1920, and before the date of the publication of the notification and that he has suffered or will suffer pecuniary loss in consequence of the Gurdwara having been declared to be Sikh Gurdwara.

Now, as stated above, the plaintiff's case is that the last office-holder, Gurbachan Singh, was not unlawfully removed from but died in office, and what really happened was that the person next in succession was unlawfully prevented by the S. G. P. C. from succeeding to him. The learned President (Coldstream, J.) was inclined to hold that S. 6 of the Act would cover the case of such a person. But, with all deference, I find myself unable to agree. S. 6 runs as follows:

> Any past or present hereditary office-holder of a Gurdwara in respect of which a notification has been published under the provisions of Sub-S. (2), S. 3 declaring it to be a Sikh Gurudwara or a presumptive successor of such office-holder may forward to the Local Government, through the Secretary to Government, Transferred Departments, so as to reach the Secretary within 90 days from the date of the publication of such notification, a petition claiming to be awarded compensation on the grounds that such office-holder has been unlawfully removed from his office after the first day of January 1920 and before the date of the publication of the notification, and that such office-holder or his presumptive successor has suffered or will suffer pecuniary loss in consequence of the Gurdwara having been declared to be a Sikh Gurdwara.

It will be seen that one of the grounds, which the applicant, who is the presumptive successor of a past or present office-holder, must establish in order to succeed in his claim under this section is that such office holder should have been unlawfully removed from the office after the first day of January 1920, and before the date of the publication of the notification. The section does not and cannot cover the case in which the office holder continued in office till his death, and immediately after his death but before the person next-in succession could actually get himself installed, the S. G. P. C. or some other such body intervened and unlawfully prevented him from succeeding. It is, no doubt, highly anamalous that in a case in which the last office-holder had been unlawfully removed from office one day before his death, the person next-in succession to him should have a valid claim for compensation, but where, as here, the trespasser steps into office immediately after his death and before the successor could have possibly obtained charge of the office, his claim should be barred. But in view of the clear and unambiguous phraseology used by the legislature in S. 6, there seems to be no help for this conclusion. That section is so worded as to make unlawful removal of office-holder a condition precedent for the maintainability of an application for compensation, and we have to construe the statute as we find it and not as it ought to have been.

Mr Nihal Singh has been constrained to admit that if S. 6 is literally interpreted, his client's case does not fall within its purview. But he points out that there seems to be no good reason for the legislature making any distinction between unlawful removal of the last male-holder and unlawful prevention of his successor from succeeding immediately after his death and that the omission must have been unintentional. He urges, therefore, that we should take notice of this fact and so interpret the Act as to avoid an obvious hardship. I am, however, unable to accept this contention, for even if it is a casus omissus and does, in fact, lead to great hardship, we shall be going beyond our legitimate functions, if we were to appropriate to ourselves the duty of supplying the deficiencies of the legislature. As laid down by the Judicial Committee of the Privy Council in the well-known case of *Crawford* v. *Spooner* (2).

> We cannot aid the legislature's defective phrasing of the Act; we cannot add and amend, and by construction make up the deficiencies which are left there.

Whether the omission flowed from forgetfulness of the draftsman or was intentional is no concern of the Courts and it is well-settled that a casus omissus cannot be supplied by a Court of Law for that would be to make laws.

Mr Nihal Singh, further, asked us to refer to the debates in the Punjab Legislative Council the report of the Select Committee and to a speech made by His Excellency the Governor of the Punjab in the Council on 10th November 1924, where (it was alleged), the principles on which the Gurdwara legislation was to proceed had been outlined, and assurances given that provision would be made to compensate a person in the position of the claimant. In interpreting the

(2) [1864] 6 Moo. P. C. 1 (9).

Act we, cannot, however, seek any assistance from these proceedings or speeches. The law on this point is not open to any doubt and I do not think it necessary to discuss the question at any length It will be sufficient to refer to the remarks of Farwell, J, in *Rex* v. *West Riding of Yorkshire County Council* (3).

It was suggested that the view taken by us of the Act is not in accordance with the intention of the House of Commons or with public understanding of the effect of the Act; and reference was attempted to be made to the debates; but we have only to deal with the construction of the Act as printed and published. That is the final word of the legislature as a whole, and the antecedent debates and subsequent statements of opinion or belief are not admissible.

Considerations such as these cannot possibly prevail with Courts, and as pointed out at pages 10 and 11 of Maxwell's Interpretation of Statutes (Sixth Edition):

Nothing could be more dangerous than to make such considerations the ground for construing an enactment that is unambiguous in itself. To depart from the meaning on account of such views, is, in truth, not to construe the Act, but to alter it But the business of the interpreter is not to improve the statute; it is, to expound it. The question for him is not what the legislature meant, but what its language means; i. e., what the Act has said that it means. To give a construction contrary to, or different from that which the words import or can possibly import, is not to interpret law, but to make it, and Judges are to remember that their office is jus dicere, not jus dare.

The result may be unfortunate and may, in some cases, lead to obvious hardship, but the remedy of the aggrieved person is not to appeal to the Courts of Justice, but to approach the legislature to amend the Act.

The result is that while the decision of the majority of the Tribunal cannot be sustained on the grounds (a) and (b) on which it proceeds, the view which the learned President was inclined to take on the third point (c) is also unsound, and on the appellant's own allegations, there being no unlawful removal of the office holder, of whom he claims to be the presumptive successor, his application for compensation under S 6 must fail. I would accordingly dismiss the appeal, but in the peculiar circumstances of the case would leave the parties to bear their own costs throughout

Bhide, J.—I agree.

D D. *Appeal dismissed.*

(3) [1906] 2 K. B. 676 (716).

A. I. R. 1928 Lahore 341

DALIP SINGH, J.

Gopal Singh and *another*—Plaintiffs—Appellants.

v.

Mangal Singh—Defendant—Respondent.

Misc. Second Appeal No. 1299 of 1927, Decided on 19th October 1927.

Civil P. C., O. 41, R. 23—Remand under O. 41, R. 23 though really it should have been under S. 151—Appeal is competent from it—Civil P. C., S. 151.

Right of appeal is determined by what the Court purported to do, and not by what the Court should have done and so when the Court purported to make a remand under O. 41, R. 23, Civil P. C., though in reality it should have been under S. 151, Civil P. C. an appeal from such a remand is competent. [P 241 C 2]

Faqir Chand—for Appellants.

Sunder Das—for Respondent.

Judgment * In this case the appellate Court remanded the case under O 41, R 23, Civil P. C., in a judgment, which is perfectly impossible for me to follow.

So far as the counsel for the respondent has been able to support it, he says that certain persons have not been made necessary parties to the suit and that the question is whether the relationship of landlord and tenant is proved and that there are certain documents which are to be legally proved and others whose admissibility is in question. So far as the necessary parties are concerned there is no reason why they should be considered necessary parties at all The other reasons given are questions of fact or law which the appellate Court decided without any question of remand arising. It has been urged by counsel for the respondent that the remand is not under O. 41, R. 23, but under S. 151 and, therefore, no appeal lies. But the right of appeal is determined by what the Court purported to do, and not by what the Court should have done and, therefore, this objection has no force

I accept the appeal. The respondent will pay the costs of this hearing. The case is sent back to the learned Senior Subordinate Judge to dispose of according to law.

S J. *Case remanded.*

* [Letters Patent Appeal No. 189 of 1927 against this judgment was dismissed on 12th March 1928.]

A. I. R. 1928 Lahore 342

TEK CHAND AND AGHA HAIDAR, JJ.

Abbas Khan and *another*—Plaintiffs—Appellants.

v.

Ram Das and *another*—Defendants—Respondents.

First Appeal No. 294 of 1923, Decided on 10th May 1927, from decree of Senior Sub-Judge, Attock at Campbellpur, D/- 27th November 1920.

(a) *Transfer of Property Act, S. 61—Mortgage money—Interest due under a mortgage is a charge.*

A mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property, in the absence of any contract to the contrary: *A. I. R. 1924 P. C., 183, Foll.* [P 343 C 2]

(b) *Interest—Post Diem—No express stipulation to pay interest after the period fixed for redemption—Same rate should be presumed to continue after the period fixed.*

Where there was a provision in a mortgage-deed to pay interest at a certain rate and the mortgage was to be redeemed within a certain period but there was no express stipulation that after the expiry of that period interest should be paid.

Held: that the same rate of interest (whether simple or compound) shall be payable after the expiry of the period: *A. I. R. 1922 Lah. 254 (F. B.)* and *19 All. 39 (P. C.), Foll.* [P 344 C 1]

Muhammad Iqbal and *C. L. Gulati*—for Appellants.

M. S. Bhagat and *G. D. Bhagat*—for Respondents.

Agha Haidar, J.—This is a plaintiff's appeal arising out of a suit for redemption. The trial Court has decreed the suit conditional upon the plaintiffs paying a sum of Rs. 8,791-12-3, in default whereof the suit is to be dismissed. The plaintiffs have come up to this Court in appeal. The facts are briefly these:

One Sultan Ahmad, the predecessor-in-title of the plaintiffs, executed a mortgage on 18th June 1900 in favour of defendant 1 for a sum of Rs. 600. The mortgage-deed in suit has not been printed and we are obliged to look into the vernacular document on the record. The main condition of this document which are relevant for the purpose of deciding this appeal, are as follows: Possession was to remain with the mortgagor and he was to pay the land revenue and appropriate the produce. It is further provided that on the mortgage money interest at the rate of Re. 1-4-0 per cent. per mensem shall be payable at the end of each year and, on default, interest shall be compoundable at the same rate. Further, it is provided that when the mortgage money with interest and compound interest due shall be paid then the mortgagor shall be entitled to have the mortgaged property redeemed. The term of the mortgage was fixed at eight years and it was stipulated that within that period on payment of the principal sum of money together with interest and compound interest, the mortgagor shall be entitled to redeem the property. If within that period the property is not redeemed then on the expiry of that period, the mortgagor shall put the mortgagee in possession and the mortgagee also shall be competent to obtain possession from the mortgagor. And when the mortgagee shall have obtained possession of the mortgaged property, then whatever may be the balance (due) as regards the principal mortgage-money together with interest and compound interest, interest on the same shall be counterbalanced with the produce of the land. The document ends with the important clause that until the mortgagee obtains formal possession, interest shall continue to run as heretofore.

Nothing was paid during the first eight years of the mortgage and possession was neither given nor obtained by the parties concerned at the expiry of the period of eight years. The plaintiffs brought the present suit on 19th April 1921 and claimed that they were entitled to redeem the mortgage on payment of the mortgage money together with simple interest for the period expiring with the termination of the first eight years. They stated that they had paid Rs. 329-8-0 to defendant 1 on various occacasions on account of the mortgage. They further alleged that they had paid a sum of Rs. 500 to the mortgagees in respect of the interest on the mortgage money. Consequently they claimed redemption of the mortgaged property on payment of Rs. 990. They also added a prayer for possession of the property although it is admitted that possession has all along been with them. Defendant 1 filed a written statement in which he pleaded that the sum of Rs. 500 was not paid to him but he was prepared to allow credit for the sum of Rs. 329-8-0 which he admits having received from the mort-

gagors. He pleaded that according to the terms of the mortgage deed he was

entitled to recover interest and compound interest on the principal sum from the date of the mortgage-deed till the acquisition of the possession of the land mortgaged.

He said that up to the time of the institution of the suit, the sum due to him was Rs. 7,351-4-0 which ought to be treated as a charge upon the property and on payment of which only the plaintiff could be entitled to redeem the mortgage. In para. 7 he stated that he was not bound under the terms of the mortgage to take possession of the land mortgaged, after the expiry of the eight years and he further claimed that he was entitled to interest and compound interest according to the terms of the document, seeing that the plaintiffs had been enjoying the produce of the land. As already stated the learned Judge of the trial Court decreed the plaintiffs' suit on payment of the sum of Rs. 8,791-12-3.

So far as the sum of Rs. 500 is concerned the evidence on the record is very flimsy and the learned Judge of the trial Court did not believe it. The learned counsel for the appellants at the very outset properly stated that he was not prepared to press his appeal with respect to this sum of Rs. 500. So far as this finding of the Court below is concerned it cannot, therefore, be disturbed.

The learned counsel for the appellants raised three points in his arguments. At first he contended that for the period of the first eight years his clients were not liable to pay compound interest, but subsequently he had to admit in the course of his arguments that this contention could not be seriously pressed. His second contention was that after the expiry of the first eight years of the mortgage it was incumbent upon the defendant-mortgagee to take possession of the mortgaged property and since he had not done so, he could not claim any interest whatsoever for any period subsequent to the first eight years. We have considered the contents of the document and in our opinion the document does not bear the construction which the learned counsel for the appellant has sought to place upon it. We do not see any words in it which would show that it was incumbent upon the defendant to take immediate steps on the expiry of the first eight years to obtain possession of the property. On the other hand, we have the fact that the plaintiffs have remained all along in possession of the property without ever having made any offer to deliver possession to the mortgagee. Under this contention the learned counsel for the appellants, raised two subsidiary points. In the first place he urged that no interest should be charged on the amount which was due under the mortgage at the expiry of the period of eight years. His argument was based upon the contention that the amount of interest and compound interest could not technically be treated as "mortgage money" and therefore it was not a charge upon the mortgaged property This argument cannot be accepted, in view of the leading case on the subject *Ganga Ram* v. *Natha Singh* (1). There, their Lordships held that a mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property, in the absence of any contract to the contrary. In the present case there is no contract to the contrary which would take it out of the principle laid down in the above-noted Privy Council case.

His second point was that there was no express stipulation in the document that after the expiry of the first eight years, simple interest or compound interest should be paid, and in any case he claimed that his clients were not liable to pay compound interest. I cannot accede to this contention as I find that this point is covered by the Full Bench decision in *Mohan Mal* v. *Muhammad Bakhsh* (2). In this connexion I may also refer to the case of *Mathura Das* v. *Raja Narindar Bahadur* (3). The terms of the deed are given at p. 46 in their Lordships' judgment and are in substance the same as those in the deed in the present case. The judgment of their Lordships on the point before us is to be found at pp. 48-49 and is as follows :

The covenant to pay within a year ties up the hands of the mortgagee for that year and protects the mortgagor ; but it rarely happens, and is rarely contemplated that the mortgagor should actually pay by that time. The provision for applying payments to reduction of interest points strongly to the expectation of the parties that the transaction will not be closed

(1) A. I. R. 1924 P. C. 183=5 Lah. 425=51 I. A. 377 (P. C.).
(2) A.I.R. 1922 Lah. 254=3 Lah. 200 (F.B.).
(3) [1896] 19 All. 39=23 I.A. 138=7 Sar. (P.C.).

when the fixed day of payment arrives. The construction of the High Court ascribes to the parties an intention that, however payment may be delayed beyond the fixed day the debt shall carry no interest, that the creditor shall have no remedy provided by contract but shall be driven to treat the contract as broken, and to seek for damages, which lie in the discretion of a jury or a Court, and are subject to a different law of prescription. It appears to their Lordships that though contracts are not unfrequently found to be of that imperfect nature, it is more reasonable to ascribe to the parties the intention of making a perfect contract, especially when such a contract is of a very common kind, and suitable to the ordinary expectations of persons entering into a mortgage transaction.

Having regard to these authorities, it is, in my opinio , not open to the appellants to challen e the finding of the Court below on this point and the mortgagee is therefore entitled to charge compound interest on the amount due at the xpiry of the period of eight years

The third contention raised by the learned counsel for the appellants is based upon the following facts :

On 4th October 1920 the mortgagee obtained a decree against the mortgag r for possession of the mortgaged property. After the obtaining of that decree and up to this moment it does not appear from the record that the mortgagee decree-holder took any steps whatsoever to execute the decree and to obtain possession of the property.

The contention of the learned counsel for the appellants is to the effect that since the mortga ee in spite of obtaining his decree for possession of the mortgaged property has not taken any steps to obtain possession of that property, he is not entitled to any interest for the period subsequent to 4th October 1920. There is some force in this argument and the learned counsel for the respondent could not give any satisfactory answer to this contention except that the plaintiffs have been in possession and cannot keep back the interest and at the same time enjoy the usufruct of the property This argument does not really meet the situation created by the defendant's sleeping over the decree which he obtained, about seven years ago

After considering the fa ts and circumstances of the case I think that the mortgagee after 4th October 1920, the date when he obtained the decree for possession, is entitled only to simple interest at the rate of Re 1-4 0 per cent. per mensem on the amount which was due to him on that da e, till the payment in full by the plaintiffs-mortgagors of the same. We have calculated the amount ourselves and rougnly speaking it comes to Rs 6,520. He is, therefore, entitled to simple interest at Re 1 4 0 per cent. per mensem on this sum from 4th October 1920 onwards. I, therefore, allow the appeal to this extent only and order that a preliminary decree for redemption be passed in terms of O. 34, R. 7, Civil P. C. As the appeal has succeeded only to a small extent I order that the defendant-respondent shall get his proportionate costs in both the Courts

Tek Chand, J.—I agree with the conclusions arrived at by my learned brother.

R.D. *Appeal partly allowed.*

A. I. R. 1928 Lahore 344

BROADWAY AND TEK CHAND, JJ.

Suba—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1112 of 1927, decided on 16th December 1927, from order of Sess. Judge, Multan, D/- 8th September 1927.

(a) Penal Code, S. 302—Blow aimed at one killing another—Murder is committed.

Where a blow aimed at one person alights upon another and kills him the offence committed by the assailant is the same as it would have been if blow had struck the intended victim. 8 *W. R Cr.* 78, *Foll.* [P 346 C 1]

Nihal Singh—for Appellant.

The Government Advocate—for the Crown.

Tek Chand, J.—The appellant, Suba, an Indian Christian of Chak No. 68/10 R, has been convicted by the Sessions Judge, Multan, under S. 302, I P C. for having committed the murder of Mt Fini, of the same village and has been sentenced to death He has appealed and the record is also before us under S. 374, Criminal P. C.

The facts are very simple. The wedding of a daughter of Labhu Ram Jhiwar (P. W No 2) was being celebrated in the village and on the evening of 8th May 1927, a number of women had assembled in the court-yard of Labhu's house and were singing Among those present were Mt. Barkati, the wife of the appellant and Mt. Fini deceased, a woman 18 years of age, who had been married to Tabu (P. W. No. 5). The ap-

pellant came to Labhu's house and asked his wife to go back to her own house as the children were crying. She said that she would go after a short time. He repeated his request three times but she gave the same reply. He accordingly went back. About an hour after, he returned to Labhu's house with a toka in his hand and again asked Mt. Barkati to go along with him. She replied that she would go after the sweetmeats had been distributed He repeated his request and she said "go and I will come" On this he got excited and struck the toka at Mt. Barkati, but she evaded it by ducking her head and the blow struck Mt Fini, who was sitting close to her. Mt Fini lost consciousness at once and about 10 p m she was taken to her own house. On the third day she was removed to the hospital at Khanewal and on 12th her statement (Ex. P D) was recorded by Altaf Hussain, Sub-Divisional Officer. She remained in the hospital till her death on 15th May.

The post-mortem examination was conducted by Dr. S C Lal (P W. No. 1) who found the following injuries on her body.

(1) An incised wound on the left side of the head above the temple cutting through the skull.

(2) A granulating incised wound on left forearm.

(3) An incised wound on the left thigh skin deep.

(4) A fresh incised wound on the bend of the right elbow.

The witness expressed the opinion that death was due to an abscess in the brain following upon a compound fracture of the skull caused by injury No. 1. It was found that the skull had a cut under the wound 3¼ inches long and there was also a small loose piece of bone lying embedded in a small thin blood clot on the outer surface of the dura. The witness was of opinion that this injury (No. 1) had been caused by a direct blow struck with a fair amount of force, but that the other injuries were of a simple nature and were probably caused by the falling of the chopper from the assailant's hand on the body of the victim.

The main facts of the story are fully established by the evidence of Labhu Ram (P. W. No 2) and Mt. Jhandi P. W. No. 3) and the dying declaration of Mt. Fini (Ex. P-D) recorded on 12th May. Both these witnesses are absolutely disinterested persons and counsel could not urge anything against their veracity It is not necessary to discuss their evidence at length as the appellant in the grounds of appeal which he submitted to this Court from jail practically admitted all the facts. After describing his first visit to Labhu's house, he states that as Mt. Barkati had not returned to the house after having promised to do so he felt much excited and made a search for a lathi but as he could not find one he picked up a toka and left for Labhu's house so that he might fetch her a ter holding out threats to her. On her refusing to return he got still more excited and was about to strike her with a back side of the toka when Labhu came behind him and seized him. In the course of the struggle

he tried to strike his wife with the back side of the toka out she escaped and it hit Mt. Fini deceased with the sharp side.

It will be seen that the appellant's version of the occurrence differs from that of the prosecution in one particular only, viz., that he suggests that he aimed a blow at his wife with the back side of toka but that Labhu seized him and in the struggle Mt. Fini was hit. There is, however, no reason to suppose that the prosecution witnesses have not told the truth on this point The nature of the injury caused to the head puts the matter absolutely beyond doubt that the appellant struck the blow with blade of the toka with considerable force. The sole question to be decided is whether on these facts the appellant has been rightly convicted under S 302, I P C There is no doubt that the appellant had no intention to cause the death of Mt. Barkati but at the same time, it is clear that he attacked her with a heavy lethal weapon in such a manner that he must be presumed to have known that he was likely to cause such bodily injury as would result in death. If, therefore, Mt. Barkati had not ducked her head and the blow had struck her, the appellant would have been guilty of an offence under S. 302, I. P. C. The fact that Mt. Barkati evaded the blow and it fell upon the unfortunate woman, Mt. Fini, who was sitting next to her, does not in any way affect the guilt. Such a case is provided for in S. 301, I. P. C., which embodies a well-established principle of

criminal jurisprudence based on the doctrine of "transferred malice." It is settled law that where a blow aimed at one person lights upon another and kills him, the offence committed by the assailant is the same as it would have been if the blow had struck the intended victim. The case is very similar to *Queen* v. *Phomonee Ahun* (1) where the accused aimed a blow with a sharp dao to B but instead of killing B it struck the child in his arms and killed it and it was held that the offence was of murder punishable under S. 301, I. P. C.

For the foregoing reasons I am of opinion that the conviction under S. 302, I. P. C. must be maintained. But I think that the circumstances of the case are such that the lesser penalty should be imposed on the appellant. He did not strike the blow with the intention of killing his wife and had been provoked by her repeated refusal to go home and take care of the children. I would, therefore, commute the sentence to one transportation for life.

Broadway, J.—I concur.

S.J. *Sentence commuted.*

(1) 8 W. R. Cr. 78.

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* A. I. R. 1928 Lahore 346

HARRISON AND JAFAR ALI, JJ.

John Vectis Carew Wyllie—Plaintiff—Appellant.

v.

Secretary of State—Defendant—Respondent.

First Appeal No. 925 of 1924, Decided on 29th February 1928, from decree of the 1st Cl. Sub-Judge., Lahore, D/- 11th March 1924.

* *Tort — Public nuisance — A gate out of repair by the side of a playground—was held to be a public nuisance.*

Two wings of an old gate, which had fallen into disrepair were allowed by defendant to stand by the side of a public garden used by children as a playground. The lower hinge had ceased to exist and the gates hung by the upper hinges only. The plaintiff was playing inside the garden. While he was so playing, one wing of the gate fell and broke his leg. The leg was set immediately by a doctor. Plaintiff, however, left for England and there got his leg reset. Plaintiff claimed damages together with the travelling expenses for England.

Held : that the gate was a public nuisance and the cause of the injuries to the plaintiff.

Held : further, that the plaintiff was not entitled to charge the party responsible with the expense of a journey to London to consult an eminent specialist. [P 347 C 1, 2]

O'Conner and *Obedullah*—for Appellant.

Carden Noad and *Jagan Nath Bhandari*—for Respondent.

Harrison, J.—The plaintiff in this case is Master John Wyllie and the suit is one for damages assessed at Rs. 5,050/- and claimed on account of the injury caused to him by the falling of a gate in the Lawrence Gardens, Lahore, which fractured his leg. At the time the accident occurred he was nearly eight years of age The leg was set by Major Bott immediately after the accident. He, the plaintiff, went home to England in the following February, was admitted to St. Thomas Hospital on 18th April 1922, and was operated on by Sir Percy Sargent who rebroke and reset the leg. The suit has been dismissed on the finding that although the gate which fell on the boy's leg had been in need of repairs and the defendant's servants had been negligent, yet there was such contributory negligence on the part of the plaintiff as to defeat his claim to damages. On appeal it is urged by Mr. O' Conner that it is not as much a question of negligence as of the gate in question having been a public nuisance, that the plaintiff merely touched it and it fell and broke his leg, that the place where this occurred, namely, the Bandstand in front of the Lawrence Hall, is a place which for many years has been frequented by children and treated as a playground and that he has proved the items which constitute his claim for damages.

The admitted facts are that there is a railing surrounding the circular platform on which the band plays in the Lawrence Gardens, Lahore. To this there is a gate which is always kept open. Facing that gate there are the two wings of an old gate, which has fallen into disrepair, and since the accident these are kept together with a piece of wire. The lower hinges admittedly had ceased to exist and the gates hung by the upper hinges only. The plaintiff boy was playing inside the Bandstand. There were other children outside. There was a little girl playing with him, as he says

himself, and one wing of the gate fell and broke his leg.

The story put forward by the defendant is that the gate could only have been moved by the use of considerable force, that several boys were playing there, that the plaintiff was sitting astride the gate and this must have brought it down. On the one side we have the evidence of the boy himself and Miss North, a nurse who was sitting near the Bandstand, on the other, the evidence of Ghulam Kadir as to what actually happened, and the evidence of Mr. Hardie as to the condition of the gate. The trial Court has accepted the statement of this man Ghulam Kadir as to what he saw when he passed the Bandstand and what he heard of the accident, which took place forty feet behind him, as against the statements of the boy himself and of Miss North. It is true that there is a contradiction between Miss North's statement and the boy's which admits of an obvious explanation, but there is no reason in our opinion for discrediting it and accepting the evidence of Ghulam Kadir, as the trial Court has done. We find that the story told by the plaintiff is true, that he came inside the Bandstand through the usual open gate, touched this old broken down gate and one wing of it fell and broke his leg. We find that he did not sit astride it and that he and others did not pull it down. We have studied the authorities relied on by both sides and are of opinion that this gate, in the condition in which it was at the time, was a public nuisance. The facts are practically identical with those of 2 *Q. B.* 1898, 320, and as there laid down the gate was a nuisance and the cause of the injuries to the plaintiff. This Bandstand and the ground round it forms playground in the public gardens used by children when not occupied by the band. The gate was in a dangerous state and we are of opinion that the official in charge should have known the fact and therefore the defendant is liable.

The question of the measure of the damages is far from easy. In the plaint Rs. 2,000/- have been claimed on account of travelling expenses, whereas in her statement Mrs. Wyllie puts the figure as Rs. 3000/-. The child's leg was at once set by Major Bott and either soon after or at a later stage crookedness developed as portion of the smaller bone did not join correctly, and although the child could run about, the foot was not straight. Major Bott saw him last at the beginning of January and he was taken to England on 27th February or some two months afterwards It would appear that at the time the seriousness of the state of things was not realised for he was not taken to Major Bott within a month and a half of going to England, and allowing some 24 days for the journey he must have arrived in England about the 23rd March but he was not taken to St. Thomas Hospital until the 18th April. This does not agree with the statement that immediately on arrival in England he was taken to the Hospital. This boy being destined for the Navy, it appears that he must have been taken home anyhow at about the time when he did go, that is to say, when about eight years of age. Not only is there a discrepancy between the figures and dates but throughout the charge has been for going home and not for Mrs. Wyllie's return journey which is now included in the claim by counsel. The further question arises of whether any parent in the circumstances is entitled to charge the party responsible with the expense of a journey to London to consult an eminent specialist, and, if the most eminent specialist on the particular trouble be in America or Madagascar, would the injured party be entitled to charge the expense of going to either place. We think not, unless and until it is positively shown that the trouble could not have been put right in India. We have been struck by the absence of important particulars and important evidence on both sides and we find it impossible to supply the gaps. We have held that the statements of Miss North and the plaintiff are sufficient to establish what actually happened, but we have ignored that portion of the evidence of Miss North which consists of a wholly inadmissible written statement put in by her. The claim in the plaint is divided as follows :

Medical charges and Doctor's fees.	Rs. 278-3-0
Hospital charges	Rs. 106-0-0
Travelling expenses and other charges	Rs. 2000-0-0
Damages	Rs. 2665-3-0

Out of the first item, Rs 200/-, the fees of Major Bott, have admittedly not been paid, though six years have elapsed. If we allow the other small charges for hospital, X Rays etc, they amount to Rs 247/-. The general damages of Rs. 2,665/- for a badly fractured leg are not by any means excessive and there can be no doubt that other expenses were incurred although the surgeon of St Thomas' Hospital gave his services free

We, therefore, allow Rs. 3,500- damages to the plaintiff and accept the appeal to the extent of giving a decree for this amount with proportionate costs throughout.

R.K. *Appeal partly accepted.*

A. I R. 1928 Lahore 348

COLDSTREAM, J.

Ram Nath—Plaintiff—Appellant.

v.

Badri Nath—Defendant—Respondent.

Second Appeal No. 1500 of 1927, Decided on 2nd November 1927, from decree of Addl. Dist. Judge, Lahore, D/- 5th May 1927.

Landlord and Tenant—Lease providing for a notice to quit to be of a certain period—Period of notice need not expire with the end of tenancy month.

A lease dated 9th October 1923 under which a house was let out for 11 months provided that the rent should be paid monthly and that if the landlord wished to have the house vacated, he should give two months' previous notice. The landlord gave a notice to the tenant on 21st January 1924 to vacate the house.

Held: that the notice given by the landlord was not invalid though it did not expire with the end of a month of the tenancy: *A.I.R.* 1924 *Nag.* 220 and *A. I. R.* 1924 *Lah.* 643, *Foll.*; *A. I. R.* 1923 *Lah.* 659, *Dissented from.*

[P 349 C 1]

Amolak Ram Kapur—for Appellant.

Bishan Nath—for Respondent.

Judgment.*—Badri Nath, the defendant in the suit from which this appeal arises, took on lease from Ram Nath, the plaintiff, a house, a kothri and a vacant site with effect from 9th October 1923. He executed a deed providing that the rent Rs 9 per mensem., would be paid monthly and that if the landlord wished to have the house vacated he should give two months' previous notice. The deed of lease ended with a statement that the lessee had executed the deed of rent for 11 months

On 21st July 1924 the plaintiff served a notice on the defendant asking the latter to vacate the house within two months from the date of the receipt of the notice at the risk of being charged double rent The defendant did not vacate the premises.

In May 1925 the plaintiff sued the defendant for ejectment and arrears of rent. The defendant contested the suit on the grounds inter alia that he had never been given possession of the vacant plot and that the notice was invalid because it did not mention the kothri and the vacant site and because it did not expire with the end of a month of the tenancy The trial Court decreed the rent but refused a decree for ejectment holding that the notice was invalid because it did not expire with the end of the month of the tenancy. On appeal the Additional District Judge, Lahore, confirmed this order agreeing with the trial Court's view regarding the invalidity of the notice. The plaintiff has preferred a second appeal contesting the correctness of the lower Courts's decision on this point.

The Courts below have based their decision on the Single Bench judgment of this Court in *Chuni Lal* v. *Chuni Lal* reported as *A I. R* 1923 *Lah.* 659. Mr. Kapur for the appellant questions the correctness of this judgment and relies on the Nagpur judgment in *Saik Kasim* v *Jasif Karim Abu* (*A. I. R.* 1924 *Nagpur* 220) which dealt with a case on all fours so far as the point at issue here is concerned with the present case.

The Transfer of Property Act has not been extended to this Province and neither in *Pirbhu* v *Ramchand* (1) nor in *Radha Kishan* v *Ratan Lal* (2) referred to in *Chuni Lal* v. *Chuni Lal* do I find authority for the strict application in the Punjab of the technicalities required by S 106 of the Act Assuming, however, that S 106 of the Act did govern the matter of notice here, the present case appears to me to be one in which the matter of notice is provided for by the contract itself and therefore, one to

*[Letters Patent Appeal against this decision was dismissed in *limine*—Ed.]

(1) [1 04] 5 P. R 1904 = 42 P. L. R. 1904.
(2) [1920] 56 I. C. 7.

be decided according to the agreement between the parties Read as a whole the lease is one terminable at any time on two month's notice, that is to say, similar, so far as the point at issue is concerned, to the lease in the Punjab case *Rure Khan* v *Ghulam Mohammad* A I.R. 1924 *Lah* 643, decided by Campbell, J. In that case, as here the lease was for 11 months, a provision in the present case obviously intended to avoid the necessity of registration (the rent in the present case being Rs. 99 for 11 months) and the lessor was to give the lessee notice of a fixed period. In that case the period was one week. There too the rent was payable monthly and the lessor had asked the lessee to vacate the property within one week. It was held that the stipulation for the monthly payment of rent had no effect upon the condition by which the lessor could serve the lessee with notice at any time and that a week's notice to vacate given on 3rd June 1921, (the 11 months' term of tenancy having begun on 8th August 1920) was not invalid merely because it did not expire on the 7th of any calendar month Following this ruling and the Nagpur ruling cited above I accept this appeal holding that the notice given by the plaintiff appellant was not invalid because it did not expire with the end of a month of the tenancy, and on this finding remand the appeal to the lower appellate Court for disposal after decision of the points left undetermined. The suit and appeal remained pending in the lower Courts for two years and the appeal should be disposed of as soon as possible. The appellant will get his costs of this appeal in this Court.

S.J. *Case remanded.*

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* A. I. R. 1928 Lahore 349

TEK CHAND AND BHIDE, JJ

East Indian Railway —Defendants—Appellants.

v.

Rahimullah Ilahi Bakhsh and *another* —Plaintiffs—Respondents.

First Appeal No. 756 of 1925, Decided on 13th February 1928, against decree of Senior Sub Judge, Delhi, D/- 16th December 1924

(a) Limitation Act, S. 15 (2)—Suit against several defendants — Plaintiff entitled to deduct time against one defendant—He is entitled to deduct the period against all defendants.

In a single suit brought against several defendants if the plaintiff is entitled to deduct a certain period from the period of limitation in respect of one defendant, he is also entitled to the same period of limitation in the case of the other defendants : *A. I. R.* 1922 *Pat.* 549 : and *A. I. R.* 1927 *Pat.* 344, *Foll.* [P 350 C 2]

* *(b) Railways Act, S. 72—Risk-note protects the company only if loss occurs between stations covered by the Risk-note (obiter).*

Plaintiff despatched his goods from A to K and executed Risk Notes for the same. When the goods arrived at K, they were rebooked for S as per telegraphic instructions from plaintiff. The goods were damaged during the journey from K to S. Plaintiff sued for damages.

Held : that the Risk-Notes covered the journey between A and K and protected the Railway only if loss occurred between A and K. No Risk-Note being executed when the goods were rebooked, the Railway Co. was liable for the loss between K and S. [P 351 C 1, 2]

Nawal Kishore (for *Moti Sagar*) and *Bishen Narayan*—for Appellants

Kishen Dayal and *Bishen Narain*—for Respondents

Tek Chand, J.—The suit, which has given rise to this appeal, was instituted on 1st October 1921, by the firm Rahim Ullah-Ilahi Bakhsh, fruit merchants, Sabzimandi, Delhi, against (1) the Secretary of State for India in Council, as owning the E B. S Ry , and (2) The E. I. Ry. Co., Calcutta, claiming the sum of Rs 6,000 as damages for loss caused to the plaintiffs by "careless handling and detaining for an undue length of time" a consignment of 300 maunds of green cocoanuts despatched on 11th August 1920, from Akra railway station on the E. B. S Ry , to Katni and thence rebooked to Sabzimandi (on the E I. Ry.,) near Delhi. The cocoanuts admittedly arrived at Sabzimandi on 2nd October 1920, in a rotten condition and the consignees (plaintiffs) refused to take delivery.

The defendants resisted the suit on various grounds pleading inter alia that the suit was barred by time and that the consignment having been booked under Risk-Notes A and B they were protected from liability. The plaintiffs in their replication did not admit the execution of the Risk-Notes and traversed the other pleas raised by the defendants.

The Subordinate Judge decreed the claim in full against the E. I. Ry., hold-

ing that the execution of the Risk-Notes had not been proved, and that the loss resulted from the negligence of this defendant. He found that the E. B. S. Ry., being the contracting party was technically liable, but he dismissed the suit against it, as the goods had left its jurisdiction within four days.

The E. I Ry., has appealed and the case has been fully and ably argued before us by Mr. Nawal Kishore for the appellant and Mr. Kishen Dayal for the respondents.

The first contention raised before us is that the suit is barred by time, being governed by Art. 30 and not Art. 31 as held by the lower Court. It has also been argued that the E. B. S. Ry., was not a necessary party, and the plaintiffs cannot take advantage of the additional period of two months requisite for a notice to the Secretary of State under S. 80, Civil P. C. There is no controversy now as to the facts bearing on the question of limitation. It is admitted by both counsel that the goods were delivered to the E. B. S. Ry., at Akra on 11th August 1920, for being carried to Katni on the E. I. Ry On the 13th August the wagon containing the consignment arrived at Naihati Junction and on 15th August 1920, it started on the E. I. Ry., for Katni reaching there on 15th September 1920. The next day it was rebooked from Katni to Sabzimandi in accordance with the telegraphic instructions sent by the plaintiff beforehand. The wagon reached Delhi Junction on the E. I. Ry. on the 29th September and as it was found in a damaged condition the goods were transhipped into another wagon which arrived at Sabzimandi on 2nd October 1920. It is admitted that the cocoanuts were in a rotten condition and the plaintiffs refused to take delivery. The usual notices followed and the suit was instituted against both the Railways on the 1st October 1921.

On these facts I am of opinion that the suit is clearly within time. It was instituted within 14 months of the despatch of the goods and as one of the defendants was a State Railway the plaintiffs were under S 15 (2), Lim. Act entitled to deduct the period of two months required for nctice to the Secretary of State for India in Council under S. 80, Civil P. C. Mr. Nawal Kishore contends that the E. B. S. Ry., was not a necessary party as the consignments had left the jurisdiction of the E. B. S. Ry., within four days of its despatch and that the telegram (Ex. D. 5) sent by the plaintiffs to the E. I. Ry., on 15th September 1920 indicates that the plaintiffs knew that the loss had occurred on the line of the latter railway. In my opinion this contention is devoid of all force. In view of the fact that the E. B. S. Ry., was the contracting party and that the plaintiffs could not at the time of the institution of the suit be sure as to where the loss had occurred and which of the defendants was really responsible for it, it was necessary for them to implead both the railways. The circumstance that ultimately the Court found that the E. B. S. Ry., was not guilty of any undue delay or negligence in carrying the goods or that the loss occurred when the goods were in the possession of the E. I. Ry., cannot deprive the plaintiffs of the benefit of S. 15 (2), Lim. Act. It is settled law that in a single suit probably brought against several defendants, if the plaintiff is entitled to deduct a certain period from the period of limitation in respect of one defendant, he is also entitled to the same period of limitation in the case of the other defendants. If authority were required for this proposition it will be found in *A. I. R.* 1922 *Pat.* 549 *and A. I. R.* 1927 *Pat.* 344. In this view of the case it is not necessary to decide whether Art. 30 or 31 governs the suit as brought. I hold that the suit is not barred by limitation.

The next question to be decided is whether the goods were booked under Risk-Notes A and B and if so, whether the Risk-Notes covered the entire journey or only the portion between Akra and Katni. The appellant relies upon Exs. D. 1 and D. 2 which are respectively Risk-Notes in the approved Forms A and B, purporting to have been signed by one Abdul Ghaffar Khan, who had delivered the goods to the station master at Akra for despatch to Katni. Abdul Ghaffar Khan was admittedly the agent of the plaintiffs and if the signatures are proved to be his, the plaintiffs are clearly bound by the Risk-Notes : *Ardeshir Bhikaji* v. *G. I. P Ry* (1).

(1) A. I. R. 1928 P. C. 24.

The plaintiffs, however, deny that the signatures on Exs. D. 1 and D. 2 are those of Abdul Ghaffar Khan and the lower Court has found in their favour on this point. Mr. Nawal Kishore has addressed us at length on this point but after giving full consideration to his arguments I am of opinion that the finding of the lower Court must be sustained. Abdul Ghaffar Khan, the person who is alleged to have signed the Risk-Notes, is dead, and the appellant in order to prove that the Risk-Notes in question were signed by him, has relied on the testimony of Narendra Nath Bannerjee, Station Master, Akra, who booked the goods. He gave evidence $2\frac{3}{4}$ years after the alleged execution of the Risk-Notes and cannot be expected to remember as to who had actually signed them. The lower Court has given good reasons for rejecting his evidence and I do not think it necessary to recapitulate them. The other witness Abdul Wahid admittedly was not present when the Risk-Notes were signed and his evidence is of no assistance in coming to a decision on this point. The plaintiffs have, on the other hand, produced three persons, Fakir Muhammad, Abdul Ghani and Ahmad Hussain, who were acquainted with the handwriting of Abdul Ghaffar Khan and who stated that the alleged signatures are not his. I have examined the signatures on the Risk-Notes and also the admitted signatures of Abdul Ghaffar Khan and agree with the lower Court in holding that they appear to be in a different handwriting.

The appellant's counsel next relied upon the document Ex. D. 3, which is the forwarding note of the consignment in question. This document has not, however, been proved. The proper person to prove it was Narendra Nath Bannerjee, the station master of Akra and though this document was sent to the local commissioner at Calcutta, who examined that witness, no question was put to him in respect of it. After fully considering the evidence I agree with the lower Court in holding that the execution of the Risk-Notes by Abdul Ghaffar Khan has not been proved.

This finding is sufficient to dispose of the appeal, but I may point out that even if the Risk-Notes D. 1 and D. 2 had been found to be duly executed by the plaintiffs, the appeal would still have failed. The Risk-Notes covered the journey between Akra and Katni and could have protected the Railway only if the loss had occurred between these two stations. The learned counsel for the appellant has admitted that there is no proof that any risk-note was executed by or on behalf of the plaintiffs when the goods were rebooked from Katni to Sabzimandi. He has also conceded that there is no evidence on the record to show that the loss occurred between the two stations covered by the Risk-Notes in question. In my opinion the suit has been rightly decreed and I would dismiss the appeal with costs.

Bhide, J.—I concur.

R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 351

TEK CHAND, J.

Nanak Chand and *another*—Plaintiffs—Appellants.

v,

Gaman—Defendant—Respondent.

Second Appeal No. 1371 of 1927, Decided on 22nd November 1927, from decree of Dist. Judge, Gujranwala, D/- 19th February 1927.

Landlord and tenant—Encroachment upon adjoining land by tenant during continuance of tenancy—Presumption is that the land so encroached upon forms part of the holding and on termination of tenancy the tenant must render it up to the landlord.

Where during the continuance of the tenancy a tenant encroaches upon land belonging to a third person, his possession of the land so encroached upon is prima facie for the benefit of the landlord. In such cases the presumption is that encroachments made by the tenant are a part of the holding and on the termination of the tenancy the tenant must render them up to the landlord whether he has directly undertaken to do so or not: *Andrews v. Hailes*, (1858) 28 *L. J. Q. B.* 409; *Earl of Lisburne* v. *Davies*, (1866) 1 *C. P.* 259, 19 *C. W. N.* 772 and (1918) *M. W. N.* 38, *Foll.* [P 352 C 1]

Sahib Dayal—for Appellants.

Iftikhar Ali—for Respondent.

Judgment*— This dispute relates to a small plot of 14 marlas in area, being a part of Khasra No. 1057 which represents the abadi of the village. The facts found by the learned District Judge are as follows:

The plaintiffs-appellants are the owners of Khasra Nos. 1512, 1513 and 1514 the

* [Letters. Patent Appeal No. 208 of 1927 against this judgment was dismissed on 14th March 1928.]

last of which adjoins the abadi. In 1914 they leased these fields to one Fazal Din tenant for cultivation and it appears that at that time Fazal Din encroached upon the adjoining portion of the abadi This encroachment was, however, removed soon after Later, Fazal Din ceased to cultivate the land and the plaintiffs let fields Nos 1512, 1513, and 1514 to Gaman respondent as tenant under them Gaman also encroached upon the abadi which adjoined these fields and took possession of the plot measuring 14 marlas which is now in dispute. Gaman has since been ejected by the plaintiffs from fields Nos 1512, 1513 and 1514 but he still continues in possession of the portion of the abadi encroached upon.

The plaintiffs sued to recover possession of this plot from Gaman but the learned District Judge has dismissed the suit, holding that the plaintiffs had acquired no proprietary right in it and cannot oust the quondam tenant even though his possession is unlawful

In my opinion the learned District Judge's decision cannot be sustained as on the findings of facts arrived at by him the plaintiffs were legally entitled to a decree. The proposition of law is firmly established that where during the continuance of the tenancy a tenant encroaches upon land belonging to a third person, his possession of the land so encroached upon is prima facie for the benefit of the landlord. In such cases the presumption is that encroachments made by the tenant are a part of the holding and on the termination of the tenancy the tenant must render them up to the landlord whether he has directly undertaken to do so or not. See *Andrews* v *Hailes* (1) where Lord Campbell has elaborately discussed the principles underlying the rule and the judgment of Willes, J., in *Earl of Lisburne* v *Davies* (2). The law on the subject is thus summed up by Woodfall in his standared work on Landlord and Tenant (20th Edition) at page 891:

> Encroachments made by a tenant from the adjoining waste during the term are prima facie for the benefit of the tenant and afterwards of his landlord, unless it appears by some evidence that the tenant at the time they were made intended them for his own exclusive benefit.

(1) [1853] 22 L. J. Q. B 409=17 Jur. 761=2 El. & Bl. 349=1 W. R. 366.
(2) [1866] 1 C. P 259=35 L. J. C P. 193=12 Jur. (N S.) 340=14 W. R. 333=13 L. T. 795.

The view taken by the Indian Courts is in accord with this rule See *Tepu Mahammad* v. *Tefayit Mahammad* (3) and *Ammu Ammal* v. *Puthiaparambath Moidin* (4). In this case Gaman respondent has led no evidence to displace this presumption and there are no materials on the record from which it can be inferred that he intended to make the encroachments for his sole benefit I, therefere, accept the appeal and setting aside the decree of the learned District Judge, decree the plaintiffs' suit with costs throughout.

S.J. *Appeal accepted.*

(3) [1915] 19 C. W. N. 772=29 I. C. 216.
(4) [1918] M. W. N. 38=43 I. C. 677.

A. I. R. 1928 Lahore 352

BROADWAY, Ag. C. J. AND BHIDE, J.

Rab Nawaz and *another*— Defendants —Petitioners.

v.

Zaman and *others*— Plaintiffs — Respondents

Civil Revn No 412 of 1927, Decided on 16th June 1927, from decree of Dist. Judge, Attock at Campbellpur, D/- 10th November 1922

Civil P. C. S. 100—Suit compromised in appeal—Judgment omitting certain terms of compromise—Order correcting the omission can be made under S. 152 and is not appealable.

In an appeal from the dismissal of a suit by certain reversioners challenging a sale, the parties came to terms and the appellate Court recorded judgment as follows: "Plaintiff's suit and appeal are dismissed without costs of both Courts, defendants having promised to pay plaintiffs one hundred rupees within four months from today". Subsequently an application was filed by the plaintiffs in which it was pointed out that the whole terms of the compromise had not been given effect to in the judgment and the appellate Court was asked to exercise its powers under S. 151 to correct the omission. Accordingly in the presence of the parties the Court passed an order in which it added to its judgment the following words: If payment is not made within four months the defendants shall have no claim left to the land and the appeal shall be considered accepted

Held: that no second appeal was competent against this order: 24 *Mad.* 646, *Diss. from.* 28 *Cal.* 171; 7 *All.* 875; 15 *All.* 121 and 31 *Bom.* 447, *Foll.*

Held: further, that the Court had jurisdiction to make the order it did under S. 152. 4 *P. L. J.* 20[illegible], *Cons.* [P 353 C 2]

Syed Mohammad Amin — for Petitioners.

Broadway, Ag. C. J.—Certain reversioners instituted a suit challenging a sale. It was held by the trial Court that the sale was for necessity and the plaintiffs' suit was dismissed. An appeal was filed by the plaintiffs which was heard by the District Judge of Attock. On 9th November 1922 an application was filed by the parties in the Court of the District Judge alleging that the parties had come to terms and stating what those terms were. On 10th November 1922 the learned District Judge recorded a brief judgment in which he stated the parties had compromised and in accordance with those terms he accepted the appeal in part and modified the decree of the lower Court. He went on to say :

> Plaintiffs' suit and appeal are dismissed without costs and parties are to bear their own costs of both Courts, defendants having promised to pay plaintiffs one hundred rupees within four months from today.

The sum of Rs. 100 was not paid within the prescribed period. On 29th May 1923 an application was filed before the learned District Judge by the plaintiffs in which it was pointed out that the whole terms of the compromise had not been given effect to in the judgment and the learned District Judge was asked to exercise his powers under S. 151, Civil P. C., to correct the omission. Accordingly on 16th July 1923 in the presence of the parties the learned District Judge passed an order in which he added to his judgment the following words :

> If payment is not made within four months the defendants shall have no claim left to the land and the appeal shall be considered accepted.

Against this order the defendants have preferred a second appeal to this Court.

Obviously the learned advocate had doubts in his own mind as to whether an appeal was competent, for at the foot of the memorandum of appeal he added a note asking that in the event of it being held that no second appeal lay, this should be treated as a revision. The first point for decision is whether a second appeal was competent or not. In this connexion Mr. Syed Muhammad Amin referred to *Visvanatham Chetti* v. *Ramanathan Chetti* (1) which is undoubtedly an authority in his favour. On the other hand, a contrary view was taken in *Sourindra Mohun Tagore* v. *Siromani Debi* (2) ; *Surta* v. *Ganga* (3) ; *Hasan Shah* v. *Sheo Prasad* (4) and *Bai Vaktuba* v. *Agarsangji Raisingji* (5), and after hearing the learned advocate I am unable to see any reason to take a view contrary to that taken by the Calcutta, Allahabad and Bombay High Courts. I would, therefore, hold that the second appeal is not competent.

The next question for determination is whether treating this as an application for revision, there is any force in the contentions urged by Mr. Syed Muhammad Amin. It has been urged that in the case of a consent decree no clerical or arithmetical mistakes, etc., can be rectified either under S. 151 or 152, Civil P. C., In support of his contention the learned advocate referred to *Ram Lagan Sahu* v. *Ram Birich Koeri* (6). A reference to that authority, however, appears to me to support the contrary view. At p. 207 occurs the following :

> No doubt as long as the decree remains in the form of a memorandum on the minutes of the Court it is open to the Court in the exercise of its jurisdiction to make any amendment it thinks fit in the minutes. But once the decree has been passed and signed then the remedy is except in cases to which S. 152, Civil P. C. applies to institute a suit to set aside that decree on one of the grounds for said.

Section 152, Civil P. C., provides

> Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

It is obvious that in the present case there was an accidential omission, in the judgment of the learned District Judge—an accidental omission which he had the power to remedy under S. 152, Civil P. C., and which he did actually remedy in the order now attacked. In my judgment therefore the learned District Judge had jurisdiction to make the order he did and I would therefore dismiss this petition but as there is no appearance on the opposite side I would pass no order as to costs.

Bhide, J.—I concur.

R.D. *Petition dismissed.*

(1) [1901] 24 Mad. 646.
(2) [1901] 28 Cal. 171=5 C. W. N. 307.
(3) [1885] 7 All. 875=(1885) A. W. N. 256 (F. B.).
(4) [1893] 15 All. 121=(1893) A. W. N. 44.
(5) [1907] 31 Bom. 447=9 Bom. L. R. 547.
(6) [1919] 4 Pat. L. J. 205—50 I. C. 497.

A. I. R. 1928 Lahore 354

ADDISON, J.

Paras Ram and *another*—Insolvents—Appellants.

v.

Amir Chand and *others*—Creditors—Respondents.

Misc. First Appeal No. 888 of 1927, Decided on 6th February 1928.

Provincial Insolvency Act. S. 7— Members of joint family can be adjudged insolvents only for a joint debt or joint act of insolvency.

Members of joint family can be adjudged insolvents in respect of debts for which they are jointly liable. Members of a joint Hindu family can be adjudicated insolvents in single petition by a creditor if they are liable on a joint debt or have been guilty of a joint act of insolvency but the debts must be debts due by the family : *A. I. R.* 1924 *Lah.* 44 and *A. I. R.* 1928 *Lah.* 103; *A. I. R.* 1925 *Lah.* 141, *Foll.*

There is no distinction between a suit and an application for insolvency as to proof of necessity for the debt. [P 355 C 1]

Mukand Lal Puri—for Appellants.

Nandlal—for Respondent 1.

Judgment*.— One Amir Chand applied to adjudicate a father and two sons, namely, Paras Ram, Kanhaya Ram and Sajan Ram, who were alleged to be members of a joint Hindu family, insolvents on the ground that they could not pay their debts and that the father had committed an act of insolvency by selling his land in order to prefer certain creditors and defeat other creditors. The father and sons claimed that the debt was due by Kanhaya Ram, only, who was not a member of a joint Hindu family with the others. while Kanhaya Ram, who admitted that he could not pay his debts, denied that he had committed any act of insolvency. The District Judge framed three issues as follows :

(1). Has Paras Ram, separated his sons from him ?

2. If not, was the sale of the land by Paras Ram, made with a view to defeat the creditors ?

3. If the first issue is found against the respondents, has the petitioner a locus standi against the joint family ?

The District Judge held that separation had not been proved, that the father had committed an act of insolvency and that, therefore, the petitioning creditor could proceed against the entire family. He, therefore, adjudged the father and two sons insolvents. Against this decision the father Paras Ram, and one of the sons, Sajan Ram, have appealed. Kanhaya Ram has not appealed, though he denied in the Court below that he had committed an act of insolvency.

There is no doubt an entry in a bahi dated 4th of Katak, Sambat 1977, corresponding to 19th October 1920, by which a separation took place. It is, however, unnecessary for me to go into the question whether the father and two sons are still joint, as the appeal can be disposed of on another ground namely, on the third issue. It will be best in the interest of all parties that I should not go into the question of jointness of the family in the present appeal as better evidence might well be adduced by both sides. This question is left open.

It is clear from the record that the petitioning creditor Amir Chand, is, according to his own books, a creditor of Kanhaya Ram, only. The copy of the account, which has been put in, shows that his account is headed : "Lekha Kanhaya Ram" and every balance struck after 19th October 1920 has been struck by Kanhaya Ram. It is true that Amir Chand, has said that the account was once in the name of the father Paras Ram, but he has not produced the account which was in the name of Paras Ram, before October 1920. In any case, it is clear that the substitution of Kanhaya Ram's name meant that the account became that of Kanhaya Ram alone and had no longer anything to do with the father.

Another creditor, who has given evidence, is Amar Singh who has produced his account with the father Paras Ram, from Sambat 1973. He has also produced the subsequent account, headed "Lekha Kanhaya Ram," after the date of the alleged separation, i. e., after the 19th October 1920. All balances after that date were struck by Kanhaya Ram and the account is headed as his account. The same remarks, therefore, apply in the case of this debt also.

The only other debt proved is that of Prem Singh. In his case also there was first an account with Paras Ram, the father, and later the account became that of Kanhaya Ram only. The balances have been struck by Kanhaya Ram alone after October 1920.

It follows that all that has been proved in this case is that Kanhaya Ram, owes certain creditors some money

* [Letters Patent Appeal No. 84 of 1928 against this judgment, was dismissed on 5th April 1928.

There is no proof anywhere on the record that his father and brother are liable for that debt as members of a joint Hindu family with Kanhaya Ram. It was held in *Khazana Mal* v. *Jagan Nath* (1), and *Sotam Ram* v. *Purchuman Ram* (2) that there is no presumption that a debt contracted by a manager of a Hindu family is contracted for the benefit of the family. A case very similar to the present is that reported in *Baru* v. *Balla* (3). There a suit was brought against the father and son on book account. The dealings started in the name of the father but ceased in his name and continued in the name of the son only for a certain period. The suit was brought against father and son on the allegation that the son had struck the balance as manager of a joint Hindu family. The District Judge held that no separation had been proved between them and decreed the claim. This Court accepted the appeal on the ground that even if separation had not been proved, the finding of jointness was insufficient to make the father liable until it was further established that the debt had been incurred by the son as manager of the family and for family purposes. The present case is much stronger, for the father is treated as the karta of the family for the purpose of committing the act of insolvency, while the son is treated as the manager for purposes of incurring the debts, and there is no proof of any kind that the debts were incurred for family purposes by the son.

The same view is taken in Rustomji's Insolvency and Bakruputcy, 2nd edition, at p. 64, where it is said :

> Members of a joint family may be adjudged insolvents in respect of debts for which they are jointly liable. Members of a joint Hindu family can be adjudicated insolvents in a single petition by a creditor if they are liable on a joint debt or have been guilty of a joint act of insolvency.

Again,

> the debts must be debts due by the family.

An attempt was made to argue that an insolvency case was different from an ordinary suit and that though the plaintiff must prove in an ordinary suit the liability of the whole family, it was sufficient to prove jointness in the case of an insolvency petition. This is clearly wrong and there is no such distinction. It has, therefore, not been established in the present case that the debts are debts due by the joint family, that is for which the joint family is liable. The District Judge, therefore, erred in adjudicating Paras Ram and Sajan Ram, insolvents.

For the reasons given I accept the appeal with costs throughout and set aside the order of adjudication in the case of Paras Ram and Sajan Ram.

N.K. *Appeal accepted.*

(1) A. I. R. 1924 Lah. 44=4 Lah. 200.
(2) A. I. R. 1928 Lah. 103=8 Lah. 673.
(3) A. I. R. 1925 Lah. 141.

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* A. I. R. 1928 Lahore 355

TEK CHAND AND BHIDE, JJ.

Atma Ram—Defendant—Appellant.

.v.

Surjan and *others*—Plaintiffs—Respondents.

First Appeal No. 1074 of 1927, Decided on 29th February 1928.

* (*a*) *Civil P. C., O. 34, Rr. 7 and 8—Mortgage not purely usufructuary but mixed—Decree debarring the mortgagor from redeeming the land can be passed.*

Where a mortgage is not purely usufructuary but of mixed or anomalous character referred to in S. 98, T. P. Act the provisions of Rr. 7 and 8, O. 34, Civil P. C., are no bar to the passing of a decree debarring the mortgagor from redeeming the land. [P 357 C 1]

* (*b*) *Civil P. C., O. 34, R. 8—Order merely refusing to pass final decree in terms of preliminary decree but leaving it open to the mortgagee to file another application whether order is final (Doubted)—Civil P. C., S. 2 (2).*

Where in a suit by mortgagee for a final decree debarring the mortgagor from redeeming the mortgaged land the Court merely refuses to pass a final decree in terms of the preliminary decree but leaves it open to the mortgagee to file another application under O. 34, R. 8 (2), Civil P. C., for a final decree in some other form according to law, it is doubtful whether the order is a final order against which an appeal can lie: 42 *Mad.* 52, *Dist.* [P 356 C 1]

(*c*) *Transfer of Property Act, S. 58 (d)—Usufructuary mortgagee cannot sue for his debt.*

The essential feature of a pure "usufructuary" mortgage would appear to be that the mortgagee cannot sue for the payment of his debt, but is only entitled to remain in possession of the mortgaged property till the principal and interest are defrayed according to the terms of the agreement: 15 *P. R.* 1870, *Ref.* [P 356 C 2]

Shamair Chand and *Qabul Chand*—for Appellant.

Bishan Narain for *Gopal Chand*—for Respondents.

Bhide, J.—This appeal arises out of a suit for redemption of a mortgage. On 27th February 1925 a preliminary decree was passed directing the plaintiff to pay to the mortgagees a certain sum within six months and declaring that in case of

default the plaintiff shall be debarred from all rights to redeem the land in dispute. The plaintiff having failed to pay the amount accordingly an application was made by the mortgagees on 30th March 1926 under O. 34, R. 8 (2), Civil P. C., praying for a final decree debarring the plaintiff from redeeming the land. To this application a preliminary objection was raised on behalf of the plaintiff that the plaintiff could not be debarred from redeeming the land as the mortgage was an 'usufructuary' one. It was contended on his behalf that the preliminary decree passed was not in accordance with law and that according to the provisions of R. 7 as well as R. 8, O. 34, no decree declaring that the plaintiff shall be debarred from redeeming the land could be passed in the case of such a mortgage. This contention was upheld by the learned Senior Subordinate Judge and the application was dismissed. From this decision the present appeal has been filed.

A preliminary point was raised that no appeal is competent, the order in question not being included in the appealable orders specified in O. 43, Civil P. C. On behalf of the appellant reliance was placed on *Subbalakshmi Ammal* v. *Ramalinga Chetty* (1) in which it was held that an appeal lies from an order refusing to pass a final decree under O. 34, R 5. It was argued that on the analogy of that ruling an appeal will lie in the present case also inasmuch as the learned Senior Subordinate Judge has refused to pass a final decree and there has thus been a final adjudication of the matters in dispute between the parties. But the facts of the present case are distinguishable to some extent inasmuch as the learned Senior Subordinate Judge has merely refused to pass a final decree in terms of the preliminary decree. He left it open to the mortgagee to file another application under O. 34, R. 8 (2), Civil P. C., for a final decree in some other form according to law. The point is not free from doubt, and we do not think it necessary to express any definite opinion on it, as the appellant has also put in an application for revision and it is clear that an application for revision, at any rate would be competent as the learned Senior Subordinate Judge has failed to exercise jurisdiction vested in him by law.

On the merits, it was argued that the order under appeal was clearly wrong inasmuch as the mortgage in this case was not a 'usufructuary' one. It appears that the mortgage charge was created by two different mortgage deeds. The first deed was dated 10th June 1896 and by virtue of it the land in dispute was mortgaged for Rs. 200. The profits of the land were taken to be equal to interest on Rs. 100, while the balance was to cerry interest at Rs. 1-9-0 per cent per mensem. The mortgage was with possession and the mortgagor was at liberty to redeem the land by paying the principal and interest in the beginning of any year. The second mortgage deed dated 5th May 1897 created a further charge of Rs. 65 on the same land. Out of this additional charge only a sum of Rs. 50 carried interest at Re. 1-9-0 per cent per mensem. The amount of the further charge was payable by Katak 1964 and in case of default the mortgagee was entitled to realise the same by a sale of the mortgaged property as well as other property belonging to the mortgagor. It will thus appear that the mortgagee was not left to realize the mortgage charge merely from the rent and profits of the mortgaged land. The definition of usufructurary mortgage as given in S. 58, T. P. Act runs as follows:

> Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest and partly in payment of the mortgage money, the transaction is called an usufructuary mortgage.

It will appear from S. 67 of the same Act that an usufructuary mortgagee is not entitled to institute a suit for foreclosure or sale. The essential feature of a purely 'usufructuary' mortgage would thus appear to be that the mortgagee cannot sue for the payment of his debt, but is only entitled to remain in possession of the mortgaged property till the principal and interest are defrayed according to the terms of the agreement. *Soman Mull* v. *Kanhchund* (2) Ghose's Law of Mortgage in India, Vol. I, p. 99.

(1) [1919] 42 Mad. 52=35 M. L. J. 552=8 M. L. W. 526=48 I. C. 298=(1918) M. W. N. 792.

(2) [1870] 15 P. R. 1870.

In the present case the mortgage was clearly not a purely 'usufructuary' one inasmuch as the mortgagee had a right of sale in respect of the mortgaged property, at least with reference to the further charge created by the second deed. The mortgage was thus of a mixed or anomalous character referred to in S. 98, T. P. Act. Consequently the provisions of Rr. 7 and 8, O. 34, Civil P. C. were no bar to the passing of a decree debarring the plaintiff from redeeming the land.

We accordingly accept the revision with costs, set aside the order of the learned Senior Subordinate Judge, and remand the application for disposal on the merits.

S.J. *Revision accepted.*

A. I. R. 1928 Lahore 357 (1)

FFORDE, J.

Jattu Mal—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1638 of 1927, Decided on 3rd February 1923.

Criminal P. C., S. 481 (2)—Record silent as to state and nature of the proceeding interrupted—Conviction under S. 228, Penal Code, is not proper.

Section 481, Criminal P.C., provides that in the case of an offence under S. 228, Penal Code, the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult. [P 357 C 1, 2]

Where, therefore, the record does not comply with the provisions of S. 481, Criminal P. C., conviction under S. 228, is not proper. [P 357 C 2]

Shambu Lal Puri—for Petitioner.

Judgment.—The petitioner has been convicted under S. 228, I. P. C., of having intentionally insulted and interrupted a public servant sitting in judicial proceedings. The public servant in question is the Subordinate Judge of Bhillour, and the petitioner is a decree-holder who had appeared before the Subordinate Judge on the occasion in question, in response to an order directing him to appear and bring a receipt for the payment to him of a certain decretal sum. The petitioner on arriving in the Subordinate Judge's Court apparently behaved in an improper manner. The only question is whether this impropriety constituted contempt of Court under the Criminal Procedure Code. S. 481, Criminal P. C., provides that in the case of an offence under S. 228, I. P. C., the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted, was sitting, and the nature of the interruption or insult. But the record does not show the nature and stage of the judicial proceeding in the course of which the interruption was made. All that the learned Subordinate Judge says in his order on this point is "I was at that time busy with execution cases." The Ahlmad who was examined stated:

I was busy with my own work. I do not know when Jattu Mal appeared. I came to know only when the Court gave orders to send for a constable. I might be at a distance of 3 yards from the seat of the presiding officer of the Court. I was, however, busy arranging records.

The Reader of the Court has described the incident as follows:

Jattu Mal appeared today. The Naib Shariff asked him to bring a receipt and take his cheque. In reply, however, he said, 'Nobody listens to me in Court. Lawlessness prevails here.' Both the Subordinate Judge and I remonstrated with him but he did not mind this and made noise all the more. And at the "time he repeated such words as above, and went on talking impertinently."

The grievance of Jattu Mal appears to be that he could not get a hearing, but nowhere can I find what exactly was the stage of the proceedings and what particular proceedings the Subordinate Judge was engaged in when the incident in question occurred.

The result is that the record does not comply with the provisions of S. 481, Criminal P. C., and for that reason the conviction must be set aside. The fine, if realized shall be refunded to the petitioner.

R.K. *Conviction set aside.*

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* A. I. R. 1928 Lahore 357 (2)

ZAFAR ALI AND JAI LAL, JJ.

Mt. Banti—Plaintiff—Appellant.

v.

Mandu and *another*—Defendants—Respondents.

Second Appeal No. 978 of 1923, Decided on 13th March 1928.

* *Pre-emption — Covenant to indemnify vendee is personal and the pre-emptor cannot enforce it—T. P. Act S. 55.*

The remarks as to the nature of the right of pre-emption to the effect that the right of pre-emption is not a right of repurchase either from the vendor or from the vendee involving any new contract to sell, but it is simply a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of the rights and obligations arising from the sale under which he has derived his title, are to be deemed to be limited in their operation to the property actually con-

veyed by means of the sale-deed and the covenant to indemnify the vendee either by cash compensation or by delivery of other property of the vendor is not enforceable at the instance of the pre-emptor, because a covenant running with the land is to be distinguished from a personal covenant such as a covenant of indemnity entered into by the vendor in favour of the vendee and so, though the pre-emptor may be entitled to enforce the covenants running with land, he is not entitled to the same right with regard to covenant of indemnity which is deemed to be a personal covenant: 141 *P. R.* 1907; 7 *All.* 775 and 103 *P. R.* 1919, *Ref. to.* [P 358 C 2]

M. L. Puri—for Appellant.

Ghulam Rasul—for Respondents.

Jai Lal, J.—This second appeal arises out of a suit for possession 4 kanals and 7 marlas of land bought by plaintiff under the following circumstances: One Jamun sold 5 kanals and 3 marlas out of shamilat land to Mia Lal. The plaintiff instituted a suit for pre-emption of that sale and obtained a decree and apparently executed it. Partition proceedings were thereupon taken in respect of the entire land of which the land sold was a part and it transpired in those proceedings that Jamun had only 11 marlas of land in the shamilat land sold by him to Mia Lal. In the sale-deed executed by him he had covenanted with the vendee that if the area belonging to him in the land sold be found to be less than 5 kanals 3 marlas then he would make good the deficiency in such area to the vendee out of the other land belonging to him.

The plaintiff, the successful pre-emptor, instituted the present suit for the recovery of the deficiency out of the remaining land of Jamun. This suit has been dismissed by the trial Court and also on appeal by the District Judge on the ground that the covenant to make good the deficiency was a personal one between the vendor and the vendee and that the pre-emptor who was neither a legal representative of the vendor nor the assignee of the vendee, was not entitled to take advantage of that covenant. In arriving at the conclusion the Courts below have relied upon 141 *P. R.* 1907. In that case the covenant which the pre-emptor sought to enforce against the vendor was that the latter would pay damages to the vendee if any part of the land sold was lost to him owing to any defect of title of the vendor and the suit was dismissed on the ground that a personal covenant of the above nature does not enure for the benefit of the pre-emptor. The learned counsel for the appellant contends that the view taken in 141 *P. R.* 1907 is incorrect and in support of this contention relies upon a number of authorities the principal of which is *Gobind Dayal* v. *Inayatullah* (1), and in which it has been held that the right of pre-emption is not a right of re-purchase either from the vendor or from the vendee involving any new contract to sell, but it is simply a right of substitution entitling the pre-emptor by reason of a legal incident to which the sale itself was subject, to stand in the shoes, of the vendee in respect of the rights and obligations arising from the sale under which he has derived his title. These remarks have been cited with approval in several other cases decided afterwards where it has further been remarked that pre-emption is a right of substitution as if the name of the vendee had been rubbed out and that of the pre-emptor substituted in the sale-deed. With this statement of the law as to the nature of the right of pre-emption we have no quarrel.

The question that really arises in this case is to what property the right of pre-emption extends: whether the plaintiff is entitled to exercise it only with regard to the property described in the sale-deed or also with regard to the other property of the vendor that may not have been so described and which the vendee may under certain circumstances have become entitled to claim from the vendor. As it may happen in some cases that such property may not be initially subject to any right of pre-emption or the pre-emptor may not have a superior claim to that of the vendee with regard to it, I consider, that the remarks quoted by me from previous authorities are to be deemed to be limited in their operation to the property actually conveyed by means of the sale-deed and that the covenant to indemnify the vendee either by cash compensation or by delivery of other property of the vendor is not enforceable at the instance of the pre-emptor.

In *Bishan Singh* v *Mt. Bishni* (2) some doubt was expressed about the correctness of the view taken in 141 *P. R.*

(1) [1885] 7 All. 775 = (1885) A. W. N. 182 (F. B.).

(2) [1919] 103 P. R. 1919=53 I. C. 566.

1907. The matter was not, however, finally decided and the remark appears to be in the nature of an obiter dictum. In my opinion a covenant running with the land is to be distinguished from a personal covenant, such as a covenant of indemnity entered into by the vendor in favour of the vendee. While the pre-emptor may be entitled to enforce the covenants running with land he is not entitled to the same right which regard to covenant of indemnity which is deemed to be a personal covenant. Another way to put the same proposition is this. A pre-emptor when instituting a suit to pre-empt the land asserts that the vendor had good title to the land sold by him but that he, the pre-emptor, had a prior right to purchase it as compared with the vendee. The very nature of the suit for pre-emption, therefore, implies that there is no doubt as to the title of the vendor in the land described in the sale-deed, while in a suit for compensation, as in this case, a contrary assertion has to be made by the plaintiff. Such a situation is not permitted by law. Moreover, suppose the deficiency in area had been discovered by the vendee before the sale to him was pre-empted and such deficiency had been made good to him by the vendor by giving him some land which was not initially subject to the pre-emptor's right of pre-emption, could the latter claim such land in his suit for pre-emption. The answer to this question, in my opinion, must be in the negative. I hold, therefore, that for reasons already given the view taken by the Courts below is correct and this appeal must be dismissed with costs.

Zafar Ali, J.—I agree.

S J. *Appeal dismissed.*

A. I. R. 1928 Lahore 359

TEK CHAND AND BHIDE, JJ.

Roop Chand—Plaintiff—Appellant.

v.

Sardar Khan and *others*—Defendants—Respondents.

First Appeal No. 31 of 1924, Decided on 15th February 1928.

(a) *Civil P. C., O. 22, R. 4—Abatement of suit—Defendant dead long before the institution of suit—Suit cannot be said to abate.*

A suit or appeal "abates" against a defendant or respondent if he was alive at the time when the suit or appeal was instituted and has since died. The case of a person who had died before the institution of the suit or appeal and who was erroneously impleaded as a party does not fall under S. 22. [P 360 C 1]

(b) *Civil P. C., O. 22, R. 4—One of several defendants dead before the date of suit—Suit should not be dismissed but his name should be struck off—Civil P. C., O. 1, R. 10.*

Where a suit is brought against a number of defendants, one of whom happens to be dead at the time of the suit, the Court ought not to dismiss the suit against the other defendants but should strike off the name of the former under O. 1, R. 10 and proceed against the other defendants: *A. I. R. 1926 Lah. 153, Foll. 31 Mad. 86, Dist.* [P 360 C 2]

Sheo Narain and *Nanak Chand*—for Appellant.

Ram Chand Manchanda for *Jivan Chand* and *G. C. Narang* for *S. R. Laul*—for Respondents.

Tek Chand, J.—In proceedings before revenue officers for partition of the shamilat deh of Mauza Harnoli, District Mianwali, the plaintiff claimed a share proportionate to his khewat holding. The revenue officers disallowed the claim, holding that he was a malik Qabaz and not entitled to any share in the shamilat deh. On 24th October 1923, the plaintiff instituted the present suit in the civil Court for a declaration that he was not a malik qabza but was entitled to a share in the shamilat deh. In this suit he impleaded 1288 persons as defendants. The case came up for hearing before the Senior Subordinate Judge, Mainwali, on 4th December 1923, when it was pointed out that Zaman Khan, defendant 25, had died on 27th July 1922, i. e., about 16 months before the institution of the suit. On this, the Court following a decision of the Madras High Court reported as *Veerappa Chetty* v. *Tindal Ponnen* (1) held that "the suit should abate," and that as it was being "dismissed for a defect, parties should bear their own costs." The next day, on 5th December 1923, some of the defendants filed an application that the documents which the plaintiff had filed in Court with the plaint should not be allowed to be taken away from the record, as the order of 4th December 1923, was appealable and the documents should be kept in Court till the expiry of limitation for the institution of the appeal. On this the learned Subordinate Judge passed an order on 6th December 1923 stating that the word "abate" had been incorrectly used in the order of 4th December 1923 in lieu of "dismissal"

(1) [1903] 31 Mad. 86=17 M. L. J. 551.

and that what he had actually announced to the parties in open Court and what he really intended to do was to "dismiss the suit." He accordingly directed that the usual decree sheet should be prepared and the documents filed by the plaintiff with the plaint be not returned till the expiry of limitation for filing the appeal.

Against the orders passed by the learned Senior Subordinate Judge on 4th and 6th December 1923 the plaintiff has preferred a first appeal to this Court. Mr. Ram Chand Manchanda for the respondents has raised a preliminary objection that the appeal is incompetent as the order of 4th December 1923, did not amount to a "decree" and that of the 6th December 1923, did not really decide any matter in controversy between the parties, but was merely explanatory of the former order and was passed under a misapprehension of the law. In our opinion this preliminary objection is devoid of all force. The order passed by the Court on 4th December 1923, as explained by it in its order of 6th December 1923, clearly determined the rights of the parties to the suit and amounts to a "decree." The suit was dismissed and a decree formally passed. An appeal, therefore lay to this Court.

On the merits, the order of the lower Court holding that the suit "abated" against Zaman Khan and should be dismissed against the surviving defendants is obviously wrong. It is admitted by the plaintiff-appellant that Zaman Khan had died long before the suit was instituted, and that he was impleaded as a defendant by mistake. But the learned Subordinate Judge is wrong in supposing that the suit would "abate" as against him. A suit or appeal "abates" under O. 22, R. 4 against a defendant or respondent if he was alive at the time when the suit or appeal was instituted and has since died. Mr. Ram Chand Manchanda for the respondents concedes that the case of a person who had died before the institution of the suit or the appeal and who was erroneously impleaded as a party does not fall within the purview of O. 22, Civil P. C. and that in such circumstances no question of "abatement" arises. In such a case the suit cannot proceed against the dead person and the proper order for the Court to pass is to strike off his name from the record and then to see whether the suit can or cannot proceed against the other defendants beause of nonjoinder of the deceased. If the deceased was a mere pro-forma party the suit might proceed against the other defendants in the ordinary way. If, however, the deceased was a necessary party, the Court should see whether amendment of the plaint can be allowed to bring his heirs on the record, and if this cannot be allowed, it should determine whether the suit can proceed against the other defendants. It cannot dismiss the suit forthwith without examining this aspect of the case. As pointed out by Campbell, J, in *Palamal* v. *Fauja Singh* (2) where a suit is brought against two defendants, one of whom happens to be dead at the time of the suit, the Court ought not to dismiss the suit against the other defendant but should strike off the name of the former under O. 1, R, 10, and proceed against the other defendant. The learned Subordinate Judge has relied on *Veerappa Chatti* v. *Tundal Ponnen* (1), but in that case the suit had been brought against one defendant only who had admittedly died before the institution of the suit. The sole defendant on the record being a dead person, there was really no suit properly constituted and it was held that there was nothing in the Civil Procedure Code to authorize a Court to allow the plaint in such a case to be amended by substituting the names of the representatives of the deceased, even though the suit had been instituted bona fide and in ignorance of the death of the defendant. The position, however, is quite different where the deceased person is not the sole defendant but is one out of a large number of defendants.

We are, therefore, of opinion that the order passed by the lower Court cannot be sustained. We accordingly accept the appeal, set aside the judgment and decree of the lower Court and remand the case under O. 41, R. 23, Civil P. C. for disposal in accordance with law. Court-fee on appeal shall be refunded and other costs shall be costs in the cause.

S.J. *Appeal accepted.*

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(2) A. I. R. 1926 Lah. 153.

** A. I. R. 1928 Lahore 361
Full Bench

SHADI LAL, C. J., BROADWAY AND TEK CHAND, JJ.

Hem Raj and *others*—Objectors—Appellants.

v.

Krishan Lal and *others*—Creditors—Respondents.

Misc First Appeal No. 2955 of 1925, Decided on 4th May 1928, from order of Dist. Judge, Jhelum, D/- 21st July 1925.

** (a) *Prov. Ins. Act* (1920), *S.* 53—*Period of two years should be counted from order of adjudication.*

A transfer of property of the description given in S. 53 cannot be annulled if made by the insolvent more than two years before the date of the order of adjudication though within two years of the date of the presentation of the petition for insolvency: *A. I. R.* 1925 *Bom.* 480; *A. I. R.* 1924 *Lah.* 374; *A. I. R.* 1927 *Sind* 66, *Approved.*; 46 *Cal.* 991; *A. I. R.* 1927 *Mad.* 163 and 42 *All.* 433, *not Approved.*

[P 364 C 1]

* (b) *Prov. Ins. Act* (1920), *Ss.* 53 *and* 28 (7)—*Scope.*

Section 53 is not controlled by S. 28 (7).

[P 365 C 1]

* (c) *Interpretation of Statutes—Enactment postive—Previous Indian law or English law on the subject should not be referred.*

Tek Chand, J.—Where there is a positive enactment of the Indian legislature the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any considerations derived from the previous state of the law or of the English law upon which it may be founded: *A. I. R.* 1928 *P. C.* 2, *Foll.*

[P 368 C 2]

Shamair Chand, Man Singh and *Kabul Chand*—for Appellants.

Anant Ram Khosla and *Amar Nath Chona*—for Respondent.

Referring Order

Bhide, J.—One Dewa Singh filed a petition for insolvency on 25th January 1923, and was adjudged insolvent on 12th November 1923. Two transfers of immovable property made by the insolvent on 13th May 1921, and 2nd June 1921 have been set aside by the District Judge, Jhelum, under S. 53, Provincial Insolvency Act. It was contended before the learned District Judge that the sales having been made more than two years before the date on which the transferor was adjudged insolvent could not be set aside under S. 53, but the contention was overruled on the authority of *Rakhal Chandra* v. *Sudhindra Nath Bose* (1), and it was held that S. 53 was controlled by S. 28 (7), and that the order of adjudication was to be deemed to have been passed for purposes of that section on the date on which the petition of insolvency was presented.

The question of law which requires decision in this appeal is whether S. 53, Provincial Insolvency Act, authorizes the annulment of transfers of immovable property made by an insolvent more than two years before the actual date of adjudication, but within two years of the presentation of the petition of insolvency. The decision on this question in its turn depends on the question whether S. 53 is controlled by sub-S. 7, S. 28, and whether a person who is adjudged insolvent is to be deemed to be so adjudged for purposes of S. 53 on the date of the presentation of the petition. The authorities on the point appear to be divided. While the Calcutta and Madras High Courts and the Judicial Commissioner, Nagpur, have held that S. 53 is controlled by sub-S. 7, S. 28, the Bombay High Court and the Judicial Commissioners of Sind and Oudh have taken the contrary view. The latter view was also adopted by a Division Bench of this Court to which a case involving this very question was referred, in *Ghulam Mahomed* v. *Panna Ram* (2). The case dealt with in that appeal was one under the Provincial Insolvency Act of 1907, but there is no material difference between the relevant sections of the Provincial Insolvency Act of 1907, and the Provincial Insolvency Act of 1920, so far as the question of law now before us is concerned.

The earlier authorities were reviewed and fully discussed in that case. Since that case was decided there have been two decisions of the Madras High Court, *Rangiah* v. *Appaji Row* (3) and *Venkatanarasayya* v. *Official Receiver* (4), in which that Court has adhered to the view taken in an earlier decision by a Division Bench of that Court in *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (5).

(1) [1919] 46 Cal. 991=32 I. C. 747=24 C. W. N. 172.
(2) A. I. R. 1924 Lah. 374.
(3) A. I. R. 1927 Mad. 163=50 Mad. 800.
(4) A. I. R. 1927 Mad 826.
(5) [1918] 35 M. L. J. 296=9 M. L. W. 281=43 I. C. 283=(1918) M. W. N. 487.

The Bombay High Court and Judicial Commissioner of Sind, on the other hand, have adopted the contrary view in two recent decisions *Nagindas Dahyabhai* v. *Gordhan Das* (6) and *Official Receiver* v. *Tirath Das Mewa Ram* (7).

After carefully considering the argument advanced before us and the authorities cited I am inclined to agree with the view taken by the Bombay High Court, by the Judicial Commissioners of Sind and Oudh and by this Court in *Ghulam Mahomed* v. *Panna Ram* (2) referred to above. There can be no doubt that the plain wording of S. 53, as it stands, supports this view. According to that wording, the transferor must be "adjudged insolvent" within two years of the date of the transfer. It seems to my mind clear that a person cannot be said to be "adjudged insolvent" till the date on which the order of adjudication is passed. It is true that sub-S. 7, S. 28, lays down that an order of adjudication shall

> relate back to and take effect from the date of the presentation of the petition on which it was made,

but that sub-section seems to deal with the "effect of adjudication" as given in the section. If the intention of the legislature were that sub-S. 7 should govern the whole Act its provisions might have been expected to be embodied in a separate section rather than in a sub-section of S. 28. It is important to note in this connexion that while S. 28 deals with certain effects of an order of adjudication, the effect of such an order on antecedent transactions, have been separately dealt with in Ss. 51 to 55. These latter sections prescribe different points of time for determining the 'antecedent' character of the transactions referred to therein. S. 51, for example, refers to the "admission of the petition," S. 53 to the time when the transferor is "adjudged insolvent," S. 54 to the time when a "petition is presented," and lastly S. 55 to "the date of the order of adjudication." It may, therefore, be safely presumed that the legislature carefully chose the language according to the precise object in view in framing these sections. The wording of Ss. 53 and 54, which are analogous, deserve special attention. If the intention of the legislature had been that the provisions of sub-S. 7, S. 28, should govern the whole Act and the words "is adjudged insolvent" had been advisably used in S. 53 with reference to those provisions, it is difficult to understand why the legislature should have lost sight of those provisions in the very next section and adopted a different wording to convey the same intention. According to the ordinary rule of construction of statutes the legislature is presumed to use the same language and express the same intention, and variation of language suggests change of intention: (c.f. *Maxwell on Interpretation of Statutes*, 6*th Edn. p.* 560).

I am unable to find any clear indication in the language of the relevant sections or in the scheme of the Act that the provisions of sub-S. 7, S. 28, were intended to govern those of S. 53. To take these provisions to govern the effects of adjudication throughout the Act might lead to serious anamolies. It could scarcely have been intended, e. g., that the disqualifications from adjudication as given in S. 73 should take effect from the date of presentation of the petition so as to invalidate the acts of members of local bodies or of Magistrates, etc., between that date and the actual date of adjudication, in the event of such persons becoming insolvent. The rulings which adopt the contrary view appear to proceed mainly on analogies drawn from the English Bankruptcy Act or speculations as to the intention of the legislature or the inconvenience likely to result if a different view were adopted. The analogy of the English Act is, however, misleading as the language employed in the English Act is different to that used in the Indian Act as pointed out in *Ghulam Mahomed* v. *Panna Ram* (2) and *Nagindas Dahyabhai* v. *Gordhan Das* (6).

Although the law of Insolvency in India is based to a large extent on that in England, there can be no doubt that the legislature has made a departure therefrom in several particulars. It has been recently laid down by their Lordships of the Privy Council that when there is a positive enactment of the Indian legislature, the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any considerations derived from the English Law on which it may have been founded: (*A.I.R.* 1928. *P. C.* 2). It is equally well-

(6) A.I.R. 1925 Bom. 480=49 Bom. 730 (731).
(7) A. I. R. 1927 Sind 66.

settled that when the wording of a statute is plain it should be given effect to irrespective of any considerations as to possible inconvenience or as to the intention of the legislature as gathered from debates in the Legislative Council. It may, however, be remarked that the argument as regards inconvenience is possibly somewhat exaggerated; for the cases in which adjudication is delayed so as to bar the operation of S. 53, will be comparatively few and even in those few cases the receiver will not be left absolutely without a remedy as it will be still open to him to institute a regular suit to set aside a fraudulent transfer: see *Official Receiver of South Kanara* v. *Bastiao Sowza* (8). Lastly it must be remembered that S. 53 affects the rights of third parties and it seems scarcely equitable to import the doctrine of "relation back" into that section, unless this is clearly warranted by the language of the section.

However, as the question of law involved is important and there is a sharp conflict of authorities, and as the ruling of this Court has not been published in the authorized report and was recently expressly dissented from by the Madras High Court, the following question might if my learned brother agrees, be referred to a Full Bench.

Can a transfer of property of the description given in S. 53, Provincial Insolvency Act 1920, made by an insolvent more than 2 years before the date of the order of adjudication but within 2 years of the date of the presentation of the petition for insolvency be annulled by the Court under that section.

Tek Chand, J.—The question of law involved in this case is of great importance and there is a sharp conflict of judicial opinion on it. It is necessary to have an authoratative pronouncement on the subject, so that the law may be settled, at any rate, so far as this province is concerned. I accordingly agree that the question of law formulated by my learned brother be referred to a Full Bench. The papers will be laid before the Hon'ble Chief Justice for constituting the Bench.

Opinion

Shadi Lal, C. J.—The following question has been referred to a Full Bench for decision:

Can a transfer of property of the description given in S. 53, Provincial Insolvency Act, 1920 made by an insolvent more than two years before the date of the order of adjudication but within two years of the date of the presentation of the petition for insolvency be annulled by the Court under that section?

In other words, suppose, a person makes a transfer of his property and is subsequently adjudged an insolvent. The insolvency Court has to decide whether the transfer is voidable as against the receiver and should, therefore, be annulled. The decision depends upon the answer to the question whether the period of two years prescribed by S. 53, Provincial Insolvency Act, 5 of 1920, is to be counted back from the date of the order of adjudication or from the date of the presentation of the petition for insolvency. S. 53, so far as it is relevant to the present discussion, is in these terms:

> Any transfer of property . . . . shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court.

The language of the section, if interpreted literally, without any reference to any other provision of the statute, furnishes only one answer, namely, the terminus for counting the period of two years is the date of the order of adjudication; and, if the transfer was not made within two years prior to the date of that order, it would be immune from attack under that section. There is, however, another provision of the law which has an important bearing upon the matter under discussion. S. 28 deals with the effect of an order of adjudication, and sub-S. (7) of that section provides that an order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made. If S. 53 is controlled by the aforesaid sub-section, then the date from which the period of two years is to be counted is the date of the presentation of the petition for insolvency.

We have, therefore, to choose between the date of the presentation of the petition for bankruptcy and the date of the order of adjudication, and there can be no doubt that it is, by no means, easy to make a choice. Cogent arguments can be advanced in favour of either view, indeed, the cases cited at the Bar reveal a sharp conflict of judicial opinion on

(8) A. I. R. 1926 Mad. 826.

the subject. The High Courts at Calcutta, Madras and Allahabad have decided that S. 53 must be read in the light of S. 28, sub-S. (7); and that the determining date is the date of the presentation of the application for insolvency, vide, *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose* (1); *Rangiah etc.* v. *Y. V. Appaji Rao* (3): and *Sheonath Singh* v. *Mushi Ram* (9). On the other hand, the Bombay High Court has favoured the opposite view: *Nagindas Dahyabhai* v. *Gordhan Das Dahyabhai* (6); and that view has been affirmed by a Division Bench of this Court in an unreported judgment in *Ghulam Mohamad* v. *Panna Ram* (2).

I have bestowed upon the matter my careful consideration and reached the conclusion, though not without considerable hesitation, that the date of the order of adjudication, and not the date of the presentation of the application for insolvency should determine the fate of the transfer made by an insolvent. I do not propose to dwell upon an examination of the arguments which have been, or may be, urged on both sides; but I must say that, while the application for insolvency is, in many cases, influenced by the transfer of his property made by the prospective insolvent, there is no such connexion between the date of the order of adjudication and the transfer. It is a matter of common knowledge that a person, who is unable, or does not desire, to pay his debts, often transfers his property to his relatives or friends, and subsequently he himself or his creditors move the Court to adjudge him insolvent. He has no desire to expedite the proceedings. Indeed, he frequently retards their progress, with the result that an order of adjudication is not made until after the expiry of a long period. In some cases the order of adjudication might be delayed for a long time on account of the congested state of the judicial business pending before the Court, or by reason of the failure of the presiding officer to cope with the work or to understand the law on the subject. In the meanwhile, two years prescribed by S. 53 might expire, and if that period is to be counted back from the date of the order of adjudication, fraudulent transfers might be excluded from the operation of S. 53 by a mere lapse of time. Indeed, it would be within the power of a debtor to prevent the Court from exercising its jurisdiction under that section in respect of the annulment of a voluntary or fraudulent transfer made only a few days before the presentation of the application for insolvency, if he could succeed in delaying the order of adjudication for a sufficiently long time.

It is obviously absurd that the jurisdiction of the Court to annul a transfer should depend upon a mere accident, namely, whether the order of adjudication would be made promptly or would be delayed owing to causes which might be beyond the control of the Court. But when we compare the language of S. 53 with that of S. 54, we cannot say that the doctrine of relation back, which is embodied in sub-S. (7), S. 28, was intended to be a universal rule governing and controlling all the other provisions of the statute. It is significant that S. 54 lays down in express terms that the period of three months prescribed by it for deciding whether a certain transaction amounts to a fraudulent preference is to be calculated from the date of the presentation of the insolvency petition. Now, if the order of adjudication should, for all purposes, be deemed to have been made on the date on which the petition is presented, there is no reason why the Legislature should not have adopted the same phraseology in S. 54 as in S 53. If the framers of the statute intended that the terminus in both the cases should be the same, namely, the date of the presentation of the petition for insolvency, I do not understand why they should have referred in one case to the order of adjudication, and, in the other case, to the presentation of the petition for insolvency, for the purpose of counting the period. It is to be observed that S. 51, which deals with the effect of insolvency on the rights of a decree-holder executing his decree against the property of an insolvent-debtor, prescribes the date of the admission of the petition as the determining date. It is clear that the three sections lay down three different dates for deciding how antecedent transactions are affected by insolvency, and the difference in the phraseology cannot be attributed to a mere oversight on the part of the draftsman.

(9) [1920] 42 All. 433=55 I. C. 941=18 A.L.J. 449.

In view of the language employed by the Legislature in S 53 for prescribing the determining date and contrasting it with the corresponding phraseology of S. 54, I am not prepared to disent from the judgment of this Court in *Ghulam Muhammad's* case which lays down that the terminus for the purposes of the former section is the date on which the order of adjudication is made. It is true that the delay in making the order of adjudication might take some objectionable transactions out of the ambit of S. 53, but they would not acquire complete immunity from attack. It would be open to the receiver or the creditors to impeach their validity by bringing an action, though that remedy is neither cheap nor expeditious.

While I hold that S. 53 is not controlled by S. 28, sub-S. (7), and that the period of two years should be counted backwards from the date of the order of adjudication, I cannot help remarking that, in view of the great divergence of judicial opinion on a matter of such importance, it is the duty of the Legislature to step in and remove the uncertainty by amending the statute.

Broadway, J.—The question referred to the Full Bench is as follows :

> Can a transfer of property of the description given in S. 53, Provincial Insolvency Act, 1920, made by an insolvent more than two years before the date of the order of adjudication but within two years of the presentation of the petition for insolvency be annulled by the Court under that section ?

There is a conflict of opinion on the point involved, the Calcutta, Madras and Allahabad High Courts with the Judicial Commissioner of Nagpur giving an answer in the affirmative, while our own Court, the High Court of Bombay and the Judicial Commissioners of Oudh and Sind have answered it in the negative. The answer to the question depends on whether S. 53, Provincial Insolvency Act, is governed and controlled by S. 28 (7) and the cleavage of opinion between the Courts is due to their different interpretations of these sections.

The corresponding sections of Act, 1907, S. 36 and 16 (6), are in the same terms and, therefore, decisions relating to the old Act are in point. The first of these is *Bhagwant* v. *Munim Khan* (10), in which it was held that having regard to the provisions of S. 16 (6) and S. 36 of the Act of 1907 the Court had power to annul a transfer of property made by the insolvent within two years from the date of presentation of the petition. In arriving at this conclusion the learned Judicial Commissioner referred to "the discussion in the Legislative Council" which was not permissible and therefore his opinion loses some weight.

The next case is that of *Jokhan Singh* v. *Deputy Commissioner, Fyzabad* (11), when Piggott, J.C., Oudh, held unequivocally that the terminus a quo was the date of adjudication and not the date of presentation of the petition.

This view was, however, not accepted by the Madras High Court in *T. V. Sankaranarayana Aiyer* v. *Alagiri Aiyar* (5), where it was held that S. 36 was controlled by S. 16 (6) and that the terminus a quo was the date of presentation of the petition.

To this view the Madras High Court has consistently adhered in *Rangiah* v. *Y. V. Appaji Rao* (3), and *Venkatanarasayya* v. *Official Receiver Godavary* (4), reference being made to *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose* (1), which was followed, and *Nagindas Dahyabhai* v. *Gordhan Das Dahyabhai* (6), as well as to *Ghulam Muhammad* v. *Panna Ram* (2), which were dissented from.

In the Bombay and Lahore cases the question was discussed, and, as has already been said, the conclusion arrived at was that the two years must be taken to date back from the actual date of adjudication, S. 53 not being controlled in this connexion by S. 28 (7).

This also was the view taken by the Judicial Commissioner of Sind in the *Official Receiver* v. *Tirath Das Mewa Ram* (7), (Sind 1926) after an elaborate discussion.

In *Sheonath Singh* v. *Munshi Ram* (9) the point under discussion was not directly in issue but Piggott and Walsh, JJ. appear to have approved of *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (5), no reference, however, being made to Piggott, J's clear decision in *Jokhan Singh* v. *Deputy Commissioner Fyzabad* (11). The force of their approval is also

(10) [1910] 6 N. L. R. 146=8 I. C. 1115.

(11) [1914] 23 I. C. 924.

somewhat reduced by remarks to be found in *Hari Chand Rai* v. *Moti Ram* (12) though here again this point was not directly in issue.

This being the state of the case law on the point it is necessary to examine the Act itself which, it will be seen is divided into various parts.

Part 2 deals with "proceedings from Act of Insolvency to discharge" and is again divided into sub-heads, S. 28 appearing under the sub-head "order of adjudication" and after dealing with the vesting of the insolvent's property concludes with sub-S. 7 which runs :

(7) An order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made.

Section 53 is to be found in Part 3 "Administration of Property" under the sub-head "effect of insolvency on antecedent transactions" and runs :

Section 53—any transfer of property * * shall if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court.

It has been contended that this section is based on S. 42, English Bankruptcy Act, and should be construed accordingly. The English Act is, however, phrased somewhat differently and S. 42 runs

Any settlement of property * * shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy * *.

The language here is plain and clearly lays down that the terminus a quo is the *becoming bankrupt*. We have been asked to hold, however, that the intention of the Indian Legislature was to adopt the English rule and that the expression "*becoming bankrupt*" is adjudged insolvent should be treated as synonymous.

It seems to me that to do this would be to transgress against the ordinary canons of interpretation. Whatever the intention of the Indian Legislature may have been (and I am afraid that intention is not too apparent to me) we have to construe and interpret the actual words enacted and give them their ordinary meaning unless and until some other meaning can fairly and reasonably be deduced. As I have said this section appears under the sub-head dealing with the "effect of insolvency on antecedent transactions" which contains six sections viz., Ss. 51, 52, 53, 54 54A and 55, and a reference to these will show that the legislature has thought it expedient to fix the terminus a quo differently as occasion demanded. And some of these differentiations appear to be irreconcilable with the claim that S. 28 (7) was intended to control the rest of the Act. In Ss. 51 and 52 the terminus a quo is fixed as the date of the admission of the petition and, being a departure from the rule contended for, this is comprehensible.

In S. 54 a three months period of limitation is provided for the avoidance of the transfers referred to therein, the time to date back from the date of the petition on which the transferor is adjudged insolvent.

If it was argued, S. 28 (7) controlled the other sections of the Act and by the doctrine of "relation back" the effect of the adjudication was to make everything date back to the date of the petition what was the necessity to enact specifically that the three months limitation provided for here was to have for its terminus a quo the date of the petition. It seems to me that there is force in this contention.

Section 54-A is irrelevant to the matter under consideration, but in S. 55 again the legislature has enacted a proviso which lays down that for the avoidance of the transactions mentioned in this section a limitation is fixed, the starting point being the date of the adjudication.

In view of these various starting points can it be definitely stated that by using the words "adjudged insolvent" in S. 53 it was intended that the terminus a quo for that section should by the operation of the doctrine of "relation back" as enacted in S. 28(7) be the date of the petition.

Under the English Law a man becomes bankrupt when he commits an act of bankruptcy thus rendering himself liable to be adjudged or declared a bankrupt, and under the English Act the doctrine of fiction of "relation back" operates so as to make the act of bankruptcy (i. e., when a man becomes bankrupt) the point from which the prescribed period of limitation is to run.

(12) A. I. R. 1926 All. 470=48 All. 414.

In India the "relation back" as provided for by S. 28(7) refers only to the date of the presentation of the petition on which the order is made and not [except in cases covered by S. 6 (f)] to the acts of insolvency themselves as enumerated in the said section.

Here then at the outset is a notable departure from the scheme of the English Bankruptcy Law.

If it was the intention of the Indian Legislature to make S. 28(7) control the rest of the Act the variations referred to in Ss. 51, 52, and the proviso to S. 55 are reconcilable—being departures from the general scheme—but it does not appear possible to reconcile the language of S. 54.

This section provides that the starting point for limitation shall be the date of the presentation of the petition on which the person referred to is adjudged insolvent. This is merely a repetition of the provisions of S. 28(7) though worded a little differently, and there appears to be no reason why this section should have been so worded if S. 28(7) was to control the rest of the Act. If by the operation of S. 28(7) the adjudication order was to take effect as though it had been made on the date of the presentation of the petition on which it was made then there seems to be no reason why that fact should have been repeated here. And again if it was necessary to do so here then why was it not so in S. 53? Further I find it difficult to see how S. 28 (7) could apply to and control S. 73 of the Act.

I fully realize that this construction may, at times, enable an insolvent by prolonging the proceedings, to evade the consequences of S. 53, but I do not think it justifiable to put a different meaning on the words for that reason. In any event the creditor and the receiver are not left without a remedy. Though they cannot avoid the transaction by having it annulled under this section they are still free to take proceedings under the ordinary law, vide *Official Receiver South Kanara* v. *Bastiao Sowza* (8) and possibly S. 4 would afford them assistance. After a careful consideration of the authorities referred to and the arguments advanced at the Bar it seems to me that the view taken by the High Court of Bombay is more in consonance with the correct interpretation of the sections and I would, therefore, answer the question referred to us in the negative.

Tek Chand, J.—I have read the judgments prepared by the learned Chief Justice and my brother Broadway and have very little to add.

After carefully considering the provisions of the Act, the relevant decisions of the various High Courts and the arguments addressed to us at the Bar, I am of opinion that the point of time from which the period of two years prescribed in S. 53, Provincial Insolvency Act, is to be counted is the date on which the order of adjudication was passed and not the date on which the application to have the transferor declared insolvent was made. That section contains the substantive rule of bankruptcy law declaring certain kinds of transfers to be voidable as against the receiver, and also fixed the period within which the transfer must have been made in order to come within the ambit of the rule. It is the latter point alone with which we are concerned here, and it seems to me that the language used by the legislature to express its meanning is not open to any doubt. It is conceded that the words

> if the transferor is adjudged insolvent within two years after the date of the transfer

can only mean that the two years are to be calculated backwards from the date on which the order of adjudication was passed. But it is contended that S. 53 is to be read along with, and subject to, Cl. (7) of S. 28, in which it is provided that an order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it was made. It is urged that the combined effect of the two sections is to push back the terminus a quo to the date of the presentation of the application. I cannot, however, see how S. 28 can be at all brought in to modify the point of time specifically fixed by the legislature in S. 53 for counting the period. The former section is intended to invalidate the debtor's dealings with the property during the period for which the petition to have him declared insolvent remains pending, and provides that in the event of the proceedings materialising into an

order of adjudication, the title of the receiver shall "relate back" to the date of the petition. It cannot, in the absence of express words to the contrary, be taken to control all other provisions of the Act, and certainly not S. 53, which in clear and explicit language states that it will be operative only if the transferor is adjudged insolvent within two years after the date of the transfer. I have no doubt that in order to attract the provisions of that section the critical date is not the date from which the order of adjudication might, for certain other purposes, be deemed to take effect, but the date on which the order itself came into existence.

It should also be borne in mind that the part of S. 53, which we are construing fixes the period of limitation for the avoidance (subject to certain conditions) of voluntary transfers, and it is a well-settled canon of interpretation of statutes, that a provision of this kind must be construed according to the exact and specific language used in the enactment. Such a restrictive provision ought not to be given an extended construction, and it is not permissible to the Court to strain the wording with a view to bring in its purview transactions which are believed to be within the reason of the statute but which are not covered by the phraseology employed to express it.

The rulings which take the contrary view have (if I may say so with all respect) been unduly influenced by extraneous considerations and have paid greater regard to the principles of English Bankruptcy law, on which the Indian Acts are undoubtedly based. But it must not be forgotten that the Indian Legislature has departed from the English statutes in several important particulars, and its Acts—particularly the Provincial Act—are not mere servile copies of the former. In view of the fact that S. 53 of Act 5 of 1920, and S. 36 of Act 3 of 1907 which it replaced, are materially different from the corresponding provisions of the English statute (S. 42 of 4 & 5 Geo. V. c. 59), I am not prepared to accept as correct the ratio decidendi of the leading Madras judgment in *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (5), where Sadasiva Aiyar, J., observed that the

> Indian Legislature in its Act of 1907, enacted for the mofussil, did not intend to depart from the principles and the reasons for the provision made in the English Bankruptcy Act * * * * except in matters of detail.

As pointed out by Lord Sinha in delivering the judgment of their Lordships of the Privy Council in the recent case of *Mt. Ramanandi Kuer* v. *Mt. Kalawati Kuer* (*A I. R.* 1928 *P. C.* 2).

> where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded.

Nor am I pressed by the *argumentum ab incovenienti* which seems to have influenced the learned Judges of the Calcutta High Court in *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose* (1), that if the section is construed according to its plain wording, it is likely to defeat the general policy of the Act and to lend itself to abuse by dishonest and litigious debtors. The danger is no doubt real, but the remedy lies with the legislature which must, as observed by the learned Chief Justice, interevene to remove it.

A great deal has been said about the merits of the doctrine of "relation back." There is no gainsaying the fact that it is a salutary provision of the law, but it must be remembered that even in England, it is now administered in all its original severity as embodied in 13 Eliz. 7 and legislation has been repeatedly undertaken to limit its scope. Indeed an eminent English Judge, Lord Mansfield, has remarked that

> the doctrine of the relation of the act of bankruptcy is in all cases extremely hard, and in many, shocking, and it is not to be carried further than we are compelled to carry it (*Coles* v. *Wright*: 4 Taunt 198).

For the foregoing reasons I am of opinion that the reference to the Full Bench must be answered in the negative.

D.D. *Answered in the negative.*

A. I. R. 1928 Lahore 369

TEK CHAND AND BHIDE, JJ.

Oajal and *others* — Plaintiffs—Appellants.

v.

Mt. Sahib Khatun and *others*—Defendants—Respondents.

First Appeal No. 1183 of 1923, Decided on 4th January 1928, from decree of Senior Sub-Judge, Sargodha, D/- 1st March 1923.

Custom (Punjab)—Awan of Shapur district—Tamlik alienation — Donee gets full ownership.

The alienation described as a "tamlik" connotes that the property alienated has been settled in full ownership on the donee : 30 *All.* 84 and *A. I. R.* 1921 *Lah.* 11, *Rel. on.* [P 369 C 2]

L. Saunders and *Anant Ram Khosla* —for Appellants.

Hargopal for *M. L. Puri* and *S. L. Puri*—for Respondents.

Tek Chand, J. — On the 22nd January 1920, one Nur, an Awan of the Shahpur District, appeared before the village patwari and stated that he had made an oral settlement (tamlik-zabani) of his entire holding on his wife Mt. Sahib Khatun, defendant 1, and his predeceased son's son Ghulam Muhammad, in equal shares. The patwari entered the mutation which was put up before the Tahsildar for sanction on 22nd March 1920. On that date Nur appeared again and made a statement to the following effect :

My heirs after me are my wife Mt. Sahib Khatun and my grandson Ghulam Muhammad, minor. I settle my land by way of tamlik on both of them in equal shares.

No objection was raised by anyone against the above settlement and the mutation was accordingly effected in favour of the two donees in equal shares. Shortly afterwards Ghulam Muhammad preferred an appeal against the order of the Tahsildar sanctioning the mutation urging that the donor had no power to make the settlement on Mt., Sahib Khatun This appeal was rejected but the appellate Court expressed the opinion that the gift in favour of Mt. Sahib Khatun was in lieu of maintenance and directed that in column 9 of the mutation register the words 'hiba biae guzara' be added after Mt. Sahib Khatun. Some time after this, Ghulam Muhammad, the grandson of Nur, died childless.

On the 20th March 1922 Mt. Sahib Khatun describing herself as full owner of the half share which she had received by way of tamlik from Nur, executed a deed of gift in favour of Mt. Nur Bhari, defendant 2, who is the sister of Nur. The plaintiffs who are the collaterals of Nur in the sixth degree have instituted the present suit to contest this second gift. It is contended on their behalf that the tamlik by Nur in favour of Mt. Sahib Khatun dated 22nd January, 1920, did not confer an absolute estate upon her and that consequently she was incompetent to transfer the property to Mt. Nur Bhari. The lower Court has rejected this contention and has held that the tamlik conferred an absolute estate on Mt. Sahib Khatun. The suit has been accordingly dismissed and the plaintiffs appeal.

After hearing the appellants' counsel we are of opinion that there is no force in this appeal. The alienation by Nur is described as a tamlik which connotes that the property alienated has been settled in full ownership on the donee. Again the donor in his statement before the Tahsildar described both Ghulam Muhammad and Mt. Sahib Khatun as his warisan, and made no distinction as to the rights that were being conferred on them. In these circumstances it must be held that Mt. Sahib Khatun had become full owner of the property in suit and could validly gift it to Mt. Nur Bhari : see *Suraj Mani* v. *Rabi Nath* (1) and *Mohan Lal* v. *Niranjan Das* (2).

Mr. Saunders has laid stress on the opinion expressed by the Assistant Collector on appeal, that the gift to Mt. Sahib Khatun was merely in lieu of maintenance. But his opinion is not relevant and cannot be taken into consideration in ascertaining the real nature of the transaction.

The appeal fails and is dismissed with costs.

S.J. *Appeal dismissed.*

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(1) [1908] 30 All. 84=35 I. A. 17=5 A. L. J. 67 (P. C.).

(2) A. I. R. 1921 Lah. 11=2 Lah. 175.

* A. I. R. 1928 Lahore 370

TEK CHAND AND BHIDE, JJ.

Tej Ram and *another*—Plaintiffs—Appellants.

v.

Maqbul Shah and *others*—Defendants—Respondents.

First Appeal No. 1895 of 1923, Decided on 3rd January 1928, from decree of 1st Cl. Sub-Judge, Amritsar, D/- 31st July 1923.

* (a) *Stamp Act, Sch. 1, Art. 40 (c)—Separate deed of additional security is contemplated.*

Article 40 (c) deals with a case in which a separate instrument offering additional or substituted security is executed subsequent to the original mortgage transaction, which had been reduced to writing in previously completed instrument. It does not apply where the stipulation as to the original mortgage and the collateral security are made simultaneously and are embodied in one and the same deed.

[P 371 C 1]

* (b) *Stamp Act, S. 5—Different covenants relating to same transaction—S. 5 does not apply.*

Section 5 does not apply to a document, which embodies different covenants relating to the same transaction. The test is not whether the instrument embodies distinct contracts, but whether it comprises distinct matters.

[P 371 C 1, 2]

Where the transaction is one and one only, the subject matter of the agreement being the repayment of the amount advanced, the mere fact that there are two covenants in the deed, the first making certain properties chargeable in the first instance, and the second providing that in the event of the sale proceeds of the aforesaid properties being found insufficient, the mortgagees would be entitled to proceed against certain other properties, does not in any way affect the question : 15 *P. R.* 1910 (*F. B.*); 102 *P. R.* 1895 and 43 *Mad.* 365 (*F. B.*), *Rel. on.* [P 371 C 2]

Fakir Chand and *Chandra Gupta*—for Appellants.

Ghulam Rasul and *Ghulam Mohi-ud-Din*—for Respondents.

Tek Chand, J.—On 3rd March 1921, Khawaja Ghulam Hassan (predecessor-in-interest of defendants 1 to 7) Khuda Bakhsh (defendant 8) and Mt. Khadija Begum (defendant 9) executed a mortgage-deed (Exhibit P. 1) in favour of the plaintiffs whereby they mortgaged house No. 1587, and a vacant site for Rs. 6,000. The deed contained a clause that if the house and the vacant site aforesaid were found insufficient to pay off the mortgage charge, the mortgagees would be entitled to recover the deficiency from the one-half share of shops Nos. 369, 370 and 371 belonging to Ghulam Hasan and house No. 1846/1847 belonging to Mt. Khadija Begam. This deed was written on a non-judicial stamp for Rs. 60 and was duly registered.

Nothing having been paid by the defendants to discharge their liability, the plaintiffs sued in 1923 for recovery of Rs. 7,437-8-0 due to them on foot of the mortgage and prayed that house No. 1587 and the vacant site be sold in the first instance and the deficiency (if any) be made good by sale of one-half share of shops Nos. 369 to 371 and house Nos. 1846/1847

The defendants raised a number of pleas, of which the only one material for the purposes of this appeal is that the mortgage-deed was not properly stamped inasmuch as

an additional stamp of Rs. 5 was payable on the stipulation in the deed by which shops Nos. 369 to 371 and house No. 1846/1847 were offered as collateral security.

The learned Subordinate Judge upheld this contention and held that

an agreement to charge these last mentioned properties should have been executed on a properly stamped paper under Art. 40 (c), Sch. 1, Stamp Act and required registration under S. 17, Registration Act

and as this was not done it was unenforceable. He accordingly rejected the plaintiffs' claim to proceed against the shops Nos. 369 to 371 and house No. 1846/1847 as collateral security and passed a preliminary decree for the full sum claimed recoverable (a) by sale of house No. 1587 and the vacant site only and (b) if the sale-proceeds were insufficient to pay off the decree, from the other property of defendants 8 to 9.

The plaintiffs appeal and pray that the preliminary decree be modified so as to provide that if the amount recovered by sale of house No. 1587 and the site be found insufficient to discharge the decretal amount the properties excluded by the lower Court may also be sold and the deficiency made good therefrom.

At the hearing Mr. Ghulam Rasul for the respondents raised a preliminary objection that the memorandum of appeal was not properly stamped inasmuch as a Court-fee of Rs. 10 only had been paid. He contended that as the prayer in appeal is to make the properties excluded by the lower Court also liable for the mortgage money, an ad valoram Court-fee was payable. This question was, however, raised by the Deputy Registrar at

the time when the appeal was presented and was referred for decision to the taxing officer, who held on 19th September 1923 that the Court-fee paid was sufficient. This decision of the taxing officer is final under S. 5, Court fees Act, and whether it is right or wrong it is not open to this Bench to go behind it. The preliminary objection fails and is overruled.

On the merits the case is a very simple one. As already pointed out, the learned Subordinate Judge has refused to enforce the stipulation offering the shops and the house as additional security on the ground that the document was not properly stamped and that it required registration. We confess we are unable to appreciate the learned Judge's objection on the score of want of registration. The deed (Ex. P. 1) is a registered instrument and Mr. Ghulam Rasul for the respondents has frankly admitted that he is unable to support the judgment of the learned Subordinate Judge on this ground. He contends, however, that the deed in question is insufficiently stamped. He urges that in reality it embodies two distinct contracts; one by all the three executants mortgaging house No. 1587 and the site for Rs. 6,000, and the other by Ghulam Hassan and Mt. Khadija Begam only whereby they agreed to make one-half share in the shops Nos. 369 to 371 and house No. 1846/1847 liable as collateral security for the mortgage debt. In support of his argument the learned counsel relies on S. 5 and Art. 40 (c), Stamp Act. We are, however, of opinion that neither of these provisions is applicable to this case. Art 40 (c) deals with a case in which a separate instrument offering additional or substituted security is executed subsequent to the original mortgage transaction, which had been reduced to writing in previously completed instrument. This is admittedly not the case here, as the stipulation as to the original mortgage and the collateral security were made simultaneously and were both embodied in one and the same deed (Ex. P. 1).

Similarly S. 5 is inapplicable as it has not been shown that the deed in question embodies two separate and distinct matters. That section does not apply to a document, which embodies different covenants relating to the same transaction. The test is not whether the instrument embodies distinct contracts, but whether it comprises distinct matters. As pointed out in *Stamp Duty In re* (1) "distinct contracts are immaterial if they relate to the same transaction". To the same effect are *Mura* v. *Kahan* (2) and *Secretary to the Commr. of Salt, Abkari* and *Separate Revenue, Madras* (3). In the present case the transaction was one and one only, the subject-matter of the agreement being the repayment of the amount advanced. The mere fact that there were two covenants in the deed, the first making certain properties chargeable in the first instance, and the second providing that in the event of the sale proceeds of the aforesaid properties being found insufficient the mortgagees would be entitled to proceed against certain other properties, does not in any way affect the question. We hold, therefore, that the deed was properly stamped and stipulation entitling the plaintiffs to proceed against the shops and house in question is legally enforceable.

We accordingly accept the appeal, and direct that in the preliminary decree passed by the lower Court it be provided that in the event of the sale-proceeds of house No. 1587 and the site being found insufficient to discharge the decretal amount, the plaintiffs-appellants shall be entitled to bring to sale one-half share of shops Nos 369 to 371 (present No. 393) and house No. 1846/1847. The appellants shall get their costs in this Court.

D.D. *Appeal accepted.*

(1) [1910] 15 P. R. 1910=4 P. L. R. 1910=5 I. C. 812=16 P. W. R. 1910 (F. B.).
(2) [1895] 102 P. R. 1895.
(3) [1920] 43 Mad. 335=39 M. L. J. 506=56 I. C. 154=(1920) M. W. N. 247 (F. B.).

A. I. R. 1928 Lahore 371

ZAFAR ALI, J.

Umra and *others*—Defendants—Appellants.

v.

Barkat Ali and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1336 of 1927, Decided on 22nd December 1927, from decree of Addl. Dist. Judge, Jullundur, D/- 21st March 1927.

Civil P. C., O. 32, Rr. 12 and 13—The case of a defendant who becomes major during the pendency of the suit is not provided for—Notice of the case need not be given to him—In his ab-

sence Court has jurisdiction to try the case and the decree passed by the Court is not nullity.

Rules 12 and 13, O. 32, Civil P. C. lay down the course that a plaintiff may follow on attaining majority but there is no corresponding rule relating to a defendant who should become major during the pendency of a suit. The reason for this omission obviously is that while a plaintiff on becoming major can put an end to the litigation a defendant on attaining majority cannot do so and the case must proceed. He has notice of the case already and so no further notice of it need be given to him. It is absurd to say that the plaintiff or the Court should give notice to him that he had become major, a fact which he must know. If he should fail to take any action on attaining majority the presumption is that he chose to allow the case to be conducted by his quondam guardian or by the counsel that was engaged by that guardian. It cannot in these circumstances be said that the Court has no jurisdiction to proceed with the case or that the decree passed by it is a nullity. [P 373 C 1]

(*b*) *Civil P. C., S.* 11—*Decree in favour of one reversioner in a former suit operates as res judicata in a latter suit against same defendant brought by other reversioners, they having a right in common arising out of the same cause of action in the former suit.*

The decree in favour of a reversioner in a former suit operates as res judicata in the subsequent suit brought by other reversioners against the same defendants if they have a right in common arising out of the same cause of action and are, therefore, litigating under the same title in the later suit. [P 373 C 2]

(*c*) *Punjab Tenancy Act, S.* 59—*Right of reversioners under customary law is not taken away—Custom* (*Punjab*).

Section 59 does not create an absolute and indefeasible right of succession in the persons named therein. The right of the reversioners which they might otherwise have, to contest an alienation under customary law is not taken away: *A.I.R.* 1922 *Lah.* 278, *Foll.* [P 374 C 1]

Badri Das—for Appellants.

Sri Ram—for Respondents.

Judgment.*—The two connected appeals Nos. 1336 and 1337 of 1927 which arise out of two separate suits involve same questions of law. The subject-matter of litigation is an occupancy holding which was once in the joint possession of two brothers Shadi and Hadi who were Arain agriculturists. Shadi died leaving him surviving a married daughter named Mt. Jhando. On the death of Shadi his one—half share in the holding devolved upon Hadi. As Hadi was childless he gifted the entire holding to Nur Ilahi, the husband of Mt. Jhando. It so happened that Mt. Jhando as well as the two sons that she had borne to Nur Ilahi died and Nur Ilahi remarried. A son was born of this second marriage whose name is Barkat Ali. When Nur Ilahi died the holding was mutated in the name of Barkat Ali who was then a minor, but the reversioners of Shadi and Hadi contested Barkat Ali's right to succeed on the ground that the gift to Nur Ilahi was only for the benefit of Mt. Jhando and her children, and that as Jhando and her children had all died the property gifted must revert to the collaterals of the donor according to the general rule of custom applying to agricultural tribes. One of these reversioners, namely, Umra brought a suit for possession of his share in the holding. In that suit the rest of the reversioners were impleaded as co-defendants and the two sons of one of these co-defendants figured as co-plaintiffs with Umra. But these two co-plaintiffs had no right of succession as their father was alive, and so the suit was decreed with regard to the one-fourth share of Umra alone. As Barkat Ali was then a minor his mother was appointed his guardian ad litem and she engaged a member of the local bar to defend the action. It appears that Barkat Ali attained majority on 10th January 1924 and the evidence in that case was closed on 28th January 1924. The fact that Barkat Ali had become major was not brought to the notice of the Court and Umra's claim was decreed on 3rd March 1924. An appeal against that decree was lodged on behalf of Barkat Ali by one Ghaus representing him to be a minor. This appeal was dismissed and a further appeal by Barkat Ali himself to the High Court was also dismissed.

That litigation having thus finally ended, some of the remaining reversioners who were co-defendants of Barkat Ali in the former case brought the present suit for possession of their share in the holding. Barkat Ali on the other hand, instituted a counter-suit for a declaration that the decree against him in the former suit was a nullity because he had become major before it had been passed and he was not given notice to appear and defend the action, while his quondum guardian was then "functus officio." The trial Court dismissed Barkat Ali's suit and decreed that of the reversioners. On appeal by Barkat Ali, the learned

* [Letters Patent Appeal No. 48 of 1928 against this judgment was dismissed on 22nd March 1928.]

Additional District Judge of Jullundur has reveresed both these decrees.

Now, as regards Barkat Ali's suit the learned Additional District Judge's finding was that all the proceedings in the former suit against Barkat Ali that took place after the date of his majority were ultra vires, but he cited no law or authority in support of this conclusion. On the other hand, he observed that there is nothing in O. 32 (Civil P. C.,) to show that it was necessary to issue a notice to the appellant on his attainment of majority. On the contrary it would appear that it was his duty on attaining the age of majority to apply to the Court to remove his guardian *ad litem* and to allow him to conduct the case in person.

Rules 12 and 13, O. 32, Civil P. C., lay down the course that a plaintiff may follow on attaining majority, but there is no corresponding rule relating to a defendant who should become major during the pendency of a suit. The reason for this omission obviously is that while a plaintiff on becoming major can put an end to the litigation a defendant on attaining majority cannot do so and the case must proceed. He has notice of the case already and so no further notice of it need be given to him. It is absurd to say that the plaintiff or the Court should give notice to him that he had become major, a fact which he must know. If he should fail to take any action on attaining majority, the presumption is that he chose to allow the case to be conducted by his quondam guardian or by the counsel that was engaged by that guardian. It cannot in these circumstances be said that the Court had no jurisdiction to proceed with the case or that the decree passed by it was a nullity. Moreover that decree could be impugned and appealed against on that very ground. As it was not impugned on that ground it became final and binding on Barkat Ali.

It was further contended that the decree in the former suit was not binding on Barkat Ali because his guardian had been guilty of negligence in defending the action. But there is no indication of any negligence on her part on the record. On the other hand, it appears that she did all that she could possibly do, that is to say, she engaged counsel and left the case in his hands. The counsel appears to have done his best in supporting the defendant's pleas.

I, therefore, accept the reversioner's appeal in this case and setting aside the decree of the lower appellate Court restore that of the trial Court and order Barkat Ali to pay the appellant's costs throughout.

As regards the other appeal it is clear that the decree in favour of Umra reversioner in the former suit operates as res-judicata in the present. Umra and the other reversioners had a right in common arising out of the same cause of action and evidently the parties in the present case are litigating under the same title. Now Expln. 6 to S. 11, Civil P. C., runs thus:

> Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others all persons interested in such right shall for the purposes of this section be deemed to claim under the persons so litigating.

In view of the above explanation the rule of res judicata appears fully applicable to the present case.

The learned counsel for Barkat Ali contends that this rule does not apply because the decision in the former case was erroneous. The question for decision in the former suit as well as in the present was whether the estate left by Nur Ilahi was heritable by his sons or by the reversioners of the donor, Hadi, or in other words whether the gift to Nur Ilahi was an absolute gift to him or was really a gift to enure for the benefit of Mt. Jhando and her offspring. If it was to enure for the benefit of Mt. Jhando then according to the general rule of custom the estate must revert to the collaterals of the donor on the death of Nur Ilahi. Barkat Ali's counsel contends on the other hand that whatever might have been the object of the donor succession is governed by the rule laid down in S. 59, Punjab Tenancy Act, 1887 and the alleged custom does not apply and alter that rule and he relies upon 52 *P. R.* 1906 *Aisha Bibi* v. *Azizuddin* (1), and *Dewan Singh* v. *Kishen Singh* (2). But those rulings are distinguishable. The cases which contain a discussion on this point are *Hardit Singh* v. *Gopal Singh* (3) and

(1) [1910] 50 P. R. 1910=131 P. L. R. 1910=6 I. C. 946=74 P. W. R. 1910.
(2) [1913] 113 P.R. 1913=303 P. L. R. 1913=20 I.C. 771=198 P.W.R. 1913.
(3) [1911] 11 P. W. R. 1911=8 I. C. 869=97 P.L.R. 1911.

Baggu v. *Mt. Dani* (4). In the former case Chatterji, J., observed as follows :

The Punjab Tenancy Act is intended mainly to lay down the law governing the relations of the landlord and tenant in the Punjab. S. 59 of this Act does not embody the whole law applicable to the tenancy, viz., as regards the right of succession to it qua the landlords as well as persons mentioned in the section are concerned, and also as regards the right of alienation possessed by the holder of the tenancy qua the latter class. S. 59 gives the order of succession when such a question does arise. It does not and cannot mean also to say that the question of succession must arise. This section does not create an absolute and indefeasible right of succession in the persons named therein.

In *Baggu* v. *Mt. Dani* (4), it was held that the mere fact that the landlords have consented to an alienation of the land by an occupancy tenant does not take away from the reversioners any right which they might otherwise have had to contest it under Customary law.

In view of the principle laid down in the above rulings it cannot be said that the decision in the former case was erroneous. The result is that this appeal is also accepted. The order of the lower appellate Court is set aside and that of the trial Court restored. Barkat Ali will pay the costs of the appellants throughout.

N.K. *Appeal accepted.*

(4) A. I. R. 1922 Lah. 278=3 Lah. 69.

* A. I. R. 1928 Lahore 374

ADDISON, J.

Hasan Din and *another*—Insolvents—Appellants.

v.

Kirpa Ram and *others* — Creditors—Respondents.

Misc. First Appeal No. 1640 of 1927, Decided on 9th February 1928, from order of Dist. Judge, Sialkot, D/- 21st May 1927.

* *Provincial Insolvency Act* (1920), *S.* 10—*First application for adjudication dismissed for failure to produce evidence—Second application is not barred.*

The dismissal of first petition for being adjudicated an insolvent for failure to produce evidence does not bar the second petition on the general principles of res judicata as there is in the case of former application no trial on the merits : 10 *A. L.J.* 51, *Foll.* [P 375 C 1]

Bashir Ahmad for *Zafar Ullah Khan* —for Appellants.

Hazara Singh Uppal (for *Ram Rattan*) *Amar Nath* and *Dial Das* — for Respondents.

Judgment.—The appellants applied to be adjudicated insolvents but the petition was dismissed on 5th February 1927, on the ground that they were not entitled to a fresh opportunity of proving their inability to pay their debts as they had failed to take advantage of the opportunity already given them i. e., the application was dismissed for failure of the petitioners to produce evidence. Shortly afterwards the appellants put in another application to be adjudicated insolvents. This application has been dismissed by the learned District Judge on the ground that the general principle of res judicata applies and that a fresh application on the same facts did not lie. Against this decision this appeal has been preferred.

Had the first decision been on the merits, there is no doubt that the second application would not have lain on the general principle of res judicata. It was so held in the Full Bench ruling 75 *P. R.* 1905. In the present case the facts stated in the two petitions are the same ; the only distinction is that Gian Chand instead of being an ordinary creditor had become a judgment-creditor, while Mt. Sardar Bibi had instituted a suit for her debt at the time the second application for insolvency was put in. It makes no difference whether a person is an ordinary creditor or a judgment-creditor. It was argued, however, that the Full Bench ruling is not applicable as the first application was dismissed not on the merits but for failure to produce evidence. This was the view taken by the Allahabad High Court in *Salig Ram* v. *Ram Kishen Das* (1), where it was held that the matter was not res judicata as the question had never been tried. In *Abdul Aziz* v. *Habid Mistry* (2) and *Ram Prasad* v. *Mahadeb Lal* (3) the Calcutta and Patna High Courts held that if an insolvency petition was dismissed in default, a second application was not barred on the general principles of res judicata as the first petition had not been dismissed on the merits.

On the whole it seems to me that the petitioners are entitled to a disposal of their case on the merits under the insolvency Act. 75 *P. R.* 1905 is not in point as the first petition in that case

(1) [1912] 10 A. L. J. 51=15 I. C. 51.
(2) [1919] 49 I. C. 229.
(3) A. I. R. 1921 Pat. 472.

was decided on the merits. I do not think that S. 18, Insolvency Act helps the respondents. I hold, following the Allahabad decision, that the dismissal of the first petition for failure to produce evidence does not bar the second petition on the general principles of res judicata as there was no trial on the merits. I, therefore, accept this appeal, set aside the order of the District Judge and remand the proceedings to him to be decided on the merits. Parties will bear their own costs of this appeal.

D.D. *Case remanded.*

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* A. I. R. 1928 Lahore 375

HARRISON AND DALIP SINGH, JJ.

Thakardwara (Pheru Mal of Amritsar) —Plaintiff—Appellant.

v.

Ishar Das and *others*—Defendants—Respondents.

First Appeal No. 683 of 1927, Decided on 27th February 1928, from decree of Sub-Judge, 1st Class, Amritsar, D/- 10th December 1926.

(a) Hindu Law—Temple—Temple is not a juridical person.

An idol is a juridical person and similarly a Matt but to extend this doctrine to include the building in which the idol is deposited as in some way itself becoming a religious institution is a most unwarranted extension of this doctrine and would result in two juridical persons co-existing in the same institution. [P 375 C 2]

(b) Civil P. C. O. 1, R. 9—Applicability.

Order 1, R. 9, Civil P. C., presupposes that there are certain parties properly before the Court and certain other necessary parties are not before the Court. It has no application to a case where there is no party on the one side present in Court at all. [P 376 C 1]

(c) Civil P. C. O. 6 R. 17—Amendment changing plaintiff's name from temple to idol not applied for in trial Court—Amendment cannot be allowed.

Where in the trial Court there was no question of an application to amend the plaint by changing the name of the plaintiff from the name of the temple to the name of the idol but the question was for the first time raised at the stage of appeal,

Held: that to allow the amendment at the appellate stage might result in all kinds of complications and practically involve a retrial of the suit from the very beginning and so the application cannot be allowed. [P 376 C 1]

Mehr Chand Mahajan and *S. R. Laul* for *Gobind Ram Khanna*—for Appellant.

Badri Das and *Bhawani Singh Puri* for *Dev Raj Sawhney*—for Respondents.

Dalip Singh, J.—The plaintiff in this case was described as Mandar Thakardwara known as Pheru Mal and sued through Durga Das, the manager of the said temple. The facts are that defendant 1 in the present case, Ishar Das, obtained a money decree against Durga Das, Banarsi Das, Ram Lubhaya and Ram Parkash. In execution of that money decree he attached certain property which forms the subject-matter of the present suit, it being claimed that this land is the property of the Thakardwara, known as Pheru Mal, is Waqf for charitable purposes and that Durga Das is only Manager of the said property. It was objected by the defendants that the Thakardwara could not sue through Durga Das. The learned Subordinate Judge held that while an idol has a judicial status in the sense of being a juridical person, a temple which is merely a religious building or a building for the performance of religious ceremonies is not such a juridical person and therefore cannot be a plaintiff. He next held on the contention that there had only been a misdescription of the plaintiff and that the plaint could be amended, that no such application to amend had actually been made before him and, therefore, no question of amendment arose. On these findings he held that the suit as framed was not maintainable and dismissed the suit.

In appeal before us it has been contended that the Thakardwara is a juridical person and can sue. In support of this it has been urged that the Thakardwara must be taken as equivalent to a Matt and, therefore, is a juridical person as is also shown by the fact that the property dedicated was dedicated to the Thakardwara itself and not to the idol. In the alternative it was contended that the Thakardwara must be considered as equivalent to the idol and, therefore, a juridical person. The case that the Thakardwara is juridical person under either of these contentions has not, in our opinion, been at all made out. It seems to us that the rulings are clear that an idol is a juridical person by reason of the judicial recognition of Hindu religion and custom on this point. Similarly a Matt is a juridical person; but to extend this doctrine to include the building, in which the idol is deposited, as in some way itself becoming a religious institution is to our mind a most unwarranted extension of this doctrine and would result in two juridical persons

coexisting in the same institution. We, therefore, repel this contention.

It is contended next that in any event the suit should not be dismissed as this is only a misdescription of the plaintiff. O. 1, R. 9, has been cited in support of this contention, but it clearly does not apply as it presupposes that there are certain parties properly before the Court and certain other necessary parties are not before the Court. It has, therefore, no application to a case where there is no party on the one side present in Court at all.

Next, *Nanak Chand* v. *E. I. Ry. Co.* (1) *Raghunathji* v. *Lal Chand* (2) and *Mahomed Yusuf* v. *Himalayan Bank Ltd.* (3) have been cited in support of allowing amendment, and it is urged that the misdescription in all these cases was similar. The facts, however, of those rulings are quite different, but quite apart from the question of the rulings in this particular case the defendants raised an objection that the Thakardwara could not sue. The plaintiff, however, insisted that the Thakardwara could sue and an issue was framed and parties led evidence on all the issues framed in the case and then the Court decided that the suit as framed could not proceed. In the trial Court it seems that there was no question of an application to amend the plaint. We can only, therefore, hold that it was for the first time at the stage of appeal that an application was made to be allowed to amend the plaint.

In these circumstances we consider that to allow the amendment at this stage might result in all kinds of complications and practically involve a retrial of the suit from the very beginning. It has been admitted by counsel for the appellant that the idol can still sue to have its rights, if any, declared and is not barred by limitation. The matter, therefore, resolves, if this view is correct and we express no opinion on it now, into a question of Court-fee or of costs, and we see no reason why we should allow any indulgence to the plaintiff under the circumstances of this case. We, therefore, dismiss the appeal with costs.

S.J. *Appeal dismissed.*

(1) A. I. R. 1925 Lah. 441=6 Lah. 252.
(2) [1897] 19 All. 330=(1897) A. W. N. 75.
(3) [1896] 18 All. 198=(1896) A. W. N. 28.

* A. I. R. 1928 Lahore 376

TEK CHAND, J.

Kanshi Ram—Defendant—Appellant.

v.

Hindustan National Bank, Ltd.—Plaintiff—Respondent.

Misc. First Appeal No. 1580 of 1927, Decided on 7th November 1927, against order of Dist. Judge, Lahore, D/- 12th March 1927.

(a) Civil P. C., O. 38, R. 5—A liquidation Court acting under the provisions of the Companies Act can make an order of attachment.

Proceedings under the Companies Act are proceedings in a Court of civil jurisdiction. A liquidation Court has therefore in a proper case power to make an order of attachment before judgment in accordance with the provisions of O. 38, R 5. [P 377 C 2]

(b) Civil P. C., O. 38, R. 5—Jurisdiction.

A Court can attach before judgment property situate beyond its local limits. [P 378 C 1]

(c) Civil P. C., O. 38 R. 5—District Court acting under S. 164, Companies Act, has powers of a High Court—It can order attachment before judgment of property outside its jurisdiction.

Under S. 164, Companies Act, the District Judge is for the purpose of winding up a Company deemed to be the "Court" within the meaning of Act and has, for purposes of such winding up, all the jurisdiction and powers of the High Court and therefore he has power to order attachment before judgment of property situate beyond his jurisdiction. [P 378 C 1]

(d) Civil P. C., O. 38, R. 5—Jurisdiction to attach property before judgment should be sparingly used—Previous notice to the opposite party is necessary.

The jurisdiction of Courts in attaching property before judgment is of an extraordinary nature and must be very sparingly exercised. In such cases the Court proceeds to attach the property of the defendant before the respective rights of the parties are determined and it is absolutely necessary, that in exercising these powers, Court should strictly adhere to the procedure prescribed by the Code and it should issue notice to the opposite party calling upon him to furnish security for satisfying any decree that may eventually be passed against him or to show cause why he should not furnish security and it is only when he had appeared and failed to furnish the security or, show cause that the Court can under R. 6 pass an order attaching his property. The provision of R. 5 can only be invoked if the Court is satisfied that the respondent is about to dispose of the whole or any part of the property. [P 378 C 1]

Mool Chand—for Appellant.

Madan Gopal—for Respondent.

Judgment.—By an order of this Court the Hindustan National Bank, Limited, was ordered to be wound up and Mr. Madan Gopal, Advocate, was

appointed as the official liquidator. It was also directed that all subsequent proceedings in winding up be had in the Court of the District Judge, Lahore.

On the 6th January 1927, the official liquidator presented to the District Judge an application under S. 235, Companies Act, praying that an enquiry be made into the conduct of 16 persons who were named in the petition and who were alleged to have committed acts of malfeasance and misfeasance with respect to the property of the Company and that all or such of these persons, as may be found guilty of having committed such acts, may be directed to compensate the Company for the loss so caused. One of these 16 persons was Kanshi Ram, Assistant Engineer, Sukkur, (No. 8). In the application nothing was stated to indicate the position that he held in the Company, nor were any acts of misfeasance or malfeasance specified which he was supposed to have done. Mr. Madan Gopal points out that this was a mere slip of the pen and that really it was intended to proceed against him as one of the promoters of the Company, his son Kanwar Sain being the Managing Director of the Company. He also says that subsequently on the 21st May 1927 he applied for leave to amend the application to make this point clear and this amendment was allowed. It may, therefore, be assumed that the liquidator intended to proceed against Kanshi Ram as one of the promoters of the Company.

On the same day, i. e., the 6th January 1927, an application under O. 38, R. 5, Civil P. C. was presented by the liquidator supported by an affidavit praying for the attachment before judgment of a garden situate at Kunjah, district Gujrat, it being alleged that the liquidator had been informed and verily believed it to be true, that the aforesaid Kanshi Ram "was likely to dispose of the property with a view to defeat his creditors." The learned District Judge without issuing any notice to Kanshi Ram or following the procedure prescribed in R. 5, directed that the "attachment order as prayed may issue." On the 11th February 1927, Kanshi Ram appeared and raised various objections to the attachment of the garden. These objections were rejected by the District Judge on the 12th March 1927. Against this order a miscellaneous appeal under O. 43, R. 1 (q), Civil P. C. and S. 202, Companies Act, has been preferred to this Court by Kanshi Ram and I have heard Mr. Mool Chand on his behalf and Mr. Madan Gopal, Liquidator, who has appeared to support the order.

Mr. Mool Chand has argued that the order of the learned District Judge is wrong for the following fou reasons :

(1) that O. 38, R, 5, Civil P. C. is inapplicable to proceedings under S. 235, Companies Act ;

(2) that the District Judge of Lahore had no jurisdiction to attach immovable property situate in the Gujrat District ;

(3) that the proper procedure as laid down in O. 8, R 5, Civil P C., was not followed by the District Judge, and

(4) that on the affidavit of the liquidator and other materials on the record no case had been made out for attaching the property before judgment.

In addition to this Mr. Mool Chand also urged that his client was not one of the officers or promoters of the Company and, therefore, no proceedings under S. 235 could be legally taken against him As to this last point, however, no decision has yet been given by the lower Court and the matter is still under enquiry. I, therefore, did not allow Mr. Mool Chand to argue this point.

In my opinion there is no force in points Nos. 1 and 2 taken by Mr. Mool Chand. Under S. 141, Civil P. C., the procedure provided in the Civil P C., in regard to suits is to be followed as far as it can be made applicable, to all proceedings in all Courts of civil jurisdiction. Now it cannot be denied that proceedings under the Companies Act are proceedings in a Court of civil jurisdiction A liquidation Court has, therefore, in a proper case, power to make an order of attachment before judgment in accordance with the provisions of O. 38, R. 5, Civil P. C.

Nor do I see any force in the second objection, viz., that the learned District Judge had no jurisdiction to attach immovable property situate in the Gujrat District. Apart from the fact that under the Code as amended in 1908 the jurisdiction of Courts to act under O. 38, Rr. 5 and 6 has been very much extended and a Court can now attach before judgment property situate beyond its local limits, there is in the present case

the further circumstances, that under S. 164, Companies Act, the District Judge is for the purpose of winding up a Company deemed to be the "Court" within the meaning of the Act and has for purposes of such winding up all the jurisdiction and powers of the High Court. It cannot be denied that the High Court would have the power to attach immovable property in Gujrat. Therefore, the order of the District Judge attaching property at Gujrat is not without jurisdiction. Accordingly I overrule this objection also.

I am, however, of opinion that the appeal must succeed on objections Nos. 3 and 4. The jurisdiction of Courts in attaching property before judgment is of an extraordinary nature and must be very sparingly exercised. In such cases the Court proceeds to attach the property of the defendant before the respective rights of the parties are determined and it is absolutely necessary, that in exercising these powers, Courts should strictly adhere to the procedure prescribed by the Code, R. 5, O. 3, I. Civil P. C., lays down that if the

> Court is satisfied, by affidavit or otherwise that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property . . . . . the Court may direct the defendant, within a time to be fixed by it either to furnish security in such sum as may be specified in the order, to produce and place at the disposal of the Court when required the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree or to appear and show cause why he should not furnish security.

It is clear that before an order of attachment of property before judgment is passed, the Court should issue notice to the opposite party calling upon him to furnish security for satisfying any decree that may eventually be passed against him or to show cause why he should not furnish security and it is only when he had appeared and failed to furnish the security or, show cause that the Court can under R. 6 pass an order attaching his property. It is conceded that in this case this procedure was not followed. No doubt, in cases of emergency, the Code empowers the Court under Cl. 3, R. 5 to pass an interim order directing the conditional attachment of the property but in this case, the Court did not act under that section, nor did it subsequently say in its order of the 12th March that it intended to act under that clause. Further the provisions of R. 5 can only be invoked if the Court is satisfied that the respondent is about to dispose of the whole or any part of the property. The affidavit filed by the liquidator on which the Court acted in this case did not make any such allegation. All that was stated was that the appellant was likely to dispose of the garden. Now it is quite clear that a vague and indefinite allegation of this kind is wholly insufficient to justify proceedings being taken under rules 5 and 6. It is conceded that beyond this allegation in the affidavit there were no materials before the Court either on the 6th January 1927, when the attachment order was issued, or on the 12th March 1927, when the Court overruled the appellant's objections against this attachment, to justify a reasonable apprehension that the appellant was about to dispose of the whole or any part of his property with intent to obstruct or delay the execution of any order or decree that might be passed against him. I, therefore, hold that the learned Judge acted illegally in passing the order for attachment before judgment of the garden in question.

Accordingly I accept the appeal and set aside the orders of the lower Court dated 6th January, and 12th March 1927, and direct that the property be released from attachment. Having regard to all the circumstences of the case I direct that the costs of the appeal be borne by the parties.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 378

JAI LAL, J.

Gopal Mal—Judgment-debtor—Appellant.

v.

Gopal Singh Hira Singh—Decree-holder—Respondent.

Misc. Second Appeal No. 1417 of 1927, Decided on 10th November 1927, from order of Dist. Judge, Amritsar, D/- 11th April 1927.

Waiver—Default clause—Acceptance of overdue instalment amounts to waiver.

It is open to the decree-holder to expressly state when accepting the instalment that he does so without prejudice to his rights which

have already accrued owing to the default or to show by his conduct at the time of accepting the instalment that he does not waive his rights under the default clause. But in the absence of proof to the contrary tender by the debtor and acceptance by the creditor of an overdue instalment must be deemed to amount to a waiver and condonation of the default: 101 *P. R.* 1880; 188 *P. R.* 1883 (*F. B.*) and 27 *Bom.* 1 (*F. B.*), *Expl* and *Rel. on*. [P 380 C 1]

Anant Ram—for Appellant.

Faqir Chand—for Respondent.

Judgment*.—In a decree for the payment of money it was provided that the amount decreed shall be payble in instalments and that in default of payment of any one instalment the whole of the amount due under the decree, would become payable forthwith with the addition of Rs. 50. It seems that the first instalment was paid in Court two days late and the amount so paid was realised by the decree-holder. The second instalment was paid before the due date. The third instalment which was payable on 10th October 1925 was paid by the judgment-debtor to one Shiv Ram, who, it is alleged, was an agent of the decree-holder, on 20th October. It now transpires that Shiv Ram paid this amount on the same date to the decree-holder. There is, therefore, no dispute that the instalment due on 10th October was tendered to the decree-holder on 20th October and accepted by him. The decree-holder, on 26th October 1925, executed the decree for the whole of the balance due thereunder alleging that by paying the third instalment ten days late the judgment-debtor had made a default in the performance of the conditions of the decree. The executing Court declined to entertain the objection by the judgment-debtor to the contrary and hold that there had been a default by the judgment-debtor. On appeal the District Judge without deciding the dispute with regard to the third instalment held that the first instalment was admittedly paid two days late and, therefore, there had been a default and the whole amount due under the decree had consequently become payable.

From this order the judgment-debtor appealed to this Court and I remanded the case on 27th May 1926, holding that the acceptance by the decree-holder of the overdue instalment after the due date amounted, in this case, to a waiver of the default clause and that, therefore, the view of the District Judge was incorrect. It was represented to me at the hearing of that appeal that the third instalment was paid to Shiv Ram before the due date, and as it was not stated before me that Shiv Ram had paid the amount to the decree-holder on the same day I remanded the case to the District Judge with direction to decide whether Shiv Ram was an authorised agent of the decree-holder and whether the amount was paid to him before the due date.

The District Judge has now held that Shiv Ram was not an agent of the decree-holder and has dismissed the appeal. The judgment-debtor has presented this second appeal. It is admitted by both parties that the facts now stated by me are the correct facts. I must accept as conclusive the finding of the District Judge that Shiv Ram was not the agent of the decree-holder; it must, therefore, be held that in paying the amount of the instalment to the decree-holder he was acting as the agent of the judgment-debtor. It is, therefore, obvious that in view of my decision that ordinarily the acceptance by the decree-holder of an overdue instalment after the due date amounts to a waiver of the default clause it was not really necessary to remand the case.

The learned counsel for the respondent raised a preliminary objection that the findings of the learned Judge below were findings of fact and, therefore, a second appeal was not competent and in support of this contention he cited a judgment of the Judicial Commissioner of Sind reported as *Bahadur* v. *Gelomal* (1). There might have been some force in this contention were it not for the fact that the view of the learned District Judge is opposed to my judgment remanding the case to him. I am not examining the correctness or otherwise of the facts found by the District Judge but only the legal inference to be drawn from those facts.

Incidentally the ruling cited by the counsel is against his contention on the merits of the appeal because it was held in that case that the acceptance by a creditor of an overdue instalment after the due date does amount to a waiver of

*[Letters Patent Appeal No. 195 of 1927 against this judgment was dismissed on 12th March 1928]

(1) [1920] 14 S. L. R. 128.

the default. The same view was taken in *Ram Nath* v. *Gio* (2) which case related to a default clause contained in a mortgage bond. But in my opinion there is no difference, so far as the point at issue is concerned, between a bond and a decree making the amount due payable by instalments with the default clause. In *Khairuddin* v. *Atu Mal* (3), which is a Full Bench judgment of the Chief Court of the Punjab, the following remark appears at p. 553.

It has been held that if the plaintiff accepted payment of one or more sums as an instalment or instalments due under the bond such acceptance amounts to a waiver and puts an end to the cause of action which had accrued.

I have not been shown any subsequent ruling either of the Chief Court of the Punjab or of this Court taking a different view to that taken in these two cases. The learned counsel for the respondent relied upon a Full Bench judgment of the Bombay High Court in *Kashi Ram* v. *Pandu* (4), in which a different view was alleged to have been taken but I have been unable to discover where the difference lies. In that case Jenkins, C. J., held that acceptance of an overdue instalment may have the effect of estopping the creditor from enforcing the default clause but that there may be circumstances which may negative the operation of an estoppel, and Astone, J., expressed himself strongly in favour of the proposition that under the circumstances mentioned the creditor must be deemed to have waived his rights under the default clause. *Badri Narayan* v. *Kunj Behari* (5) and *Jivan Bakhsh* v. *Mubinal Hag* (6), also support this view. It is of course open to the decree-holder to expressly state when accepting the instalment that he does so without prejudice to his rights which have already accrued owing to the default or to show by his conduct at the time of accepting the instalment that he does not waive his rights under the default clause. In the absence of proof to the contrary tender by the debtor and acceptance by the creditor of an overdue instalment must be deemed to amount to a waiver and condonation of the default.

On the facts that have now transpired and in view of my opinion on the legal point involved in this case I hold that the default by the judgment-debtor in the payment of the third instalment on the due date has also been waived by the decree-holder.

The result is that I accept the appeal and setting aside the orders of the Courts below dismiss the application for execution of the decree. The appellant will have his costs throughout.

R.K. *Appeal accepted.*

(2) [1880] 101 P. R. 1880.
(3) [1883] 188 P. R. 1883 (F. B.).
(4) (1903) 27 Bom. 1=4 Bom. L.R, 638 (F.B.).
(5) [1913] 33 All. 178=18 I. C. 731=11 A. L. J. 224.
(6) A. I. R. 1923 Lah. 678.

A. I. R. 1928 Lahore 380

FFORDE AND JAI LAL, JJ.

Hayat and *others*—Accused — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 981 of 1927, Decided on 3rd January 1928, from order of Sessions Judge, Mianwali, D/- 30th August 1927.

(a) Criminal trial—Cross cases—Use of evidence in one case, in the other is illegal.

Evidence led in another case and not recorded in the presence of the accused cannot be used : *A. I. R. 1924 Lah. 101, Foll.* [P 381 C 1]

(b) Criminal P. C., S. 162—Statement made by persons before Police officer can be used only for contradicting their testimony in Court.

Statements made before the Investigating Police officers cannot be used in any way except for the limited purpose of contradicting the testimony of the prosecution witnesses produced at the trial. [P 381 C 1]

Ram Chand Manchanda — for Appellants.

Des Raj Sawhney—for the Crown.

Jai Lal, J. — On the 15th February 1927, at the village Silwan in the District of Mianwali there was a serious fight between two parties in which injuries were received by Hussain, Mt. Bhagan, Akbar, Azam Sher and Dalil on one side, and Muhammad, son of Tana, and Sikandar on the other Hussain died as a result of the injuries received by him and consequently members of both the parties were sent up for trial to the Court of the Sessions Judge, Mianwali. They were tried with the result that 8 men of one party, which may for the sake of brevity be called the party of Darhal, were convicted for having taken part in the fight. Out of these Zaman was convicted under S. 302,

I. P. C., and sentenced to death, while the other convicts were sentenced to various terms of imprisonment. Of the other party, i. e., the party of the Silus, two men named Akbar, son of Azam, and Sher, son of Muhammad, were convicted under S. 324, I. P. C., and sentenced to two years' rigorous imprisonment each. The convicts on both sides have appealed to this Court and the case of Zaman is also before us on the question of confirmation of the sentence of death.

At the outset the learned counsel, who appeared for the convicts belonging to the Darhal party, raised an objection that the trial in this case was conducted by the learned Sessions Judge in a manner which is not warranted by law and that in consequence his clients have been seriously prejudiced. What appears to have happened is this. Ostensibly two separate trials were held in respect of the accused of each party. The trial of the accused of the Darhal party was held first. After the entire evidence against them had been recorded by the learned Sessions Judge the assessors apparently desired that they would like to hear the evidence in the cross-case before giving their opinion in the case in which the evidence had been recorded. The Sessions Judge considered this request to be reasonable and directed that the case be put up with the cross-case and that the opinion of the assessors be recorded after the evidence in that case had been heard. He thereupon proceeded to record the evidence in the cross-case and then heard the arguments in both the cases, and thereafter recorded the opinion of the assessors and then proceeded to judgment. He wrote one judgment in both the cases and an examination thereof shows that he did not keep the evidence recorded in each case separate but made use of the evidence recorded in the cross-case in arriving at his conclusions about the matters in controversy between the parties in the first case. (The judgment then described the irregularities by quoting from Session Judge's judgment and proceeded.) It will thus be observed that the learned Sessions Judge has committed several irregularities. In deciding one case he has not only used the evidence led in the other case and which was not recorded in the presence of the accused, but has contravened the express provisions of 28. 16, Criminal P. C., which prohibit the use of the statements made before the Investigating Police Officers except in the limited purpose of contradicting the testimony of the prosecution witnesses produced at the trial: He has used the statements made during the investigation and proved in the cross case as substantive evidence in the first case. There is absolutely no sanction in law for such a procedure. The opinion of the assessors was influenced by material which could not be legally considered at all and the conclusions of the learned Sessions Judge are based on irrelevant and inadmissible evidence. The contention of the learned counsel, therefore, has force that his clients have been seriously prejudiced by the manner in which the learned Sessions Judge has dealt with the case.

In the present case there are graver irregularities than existed in *Allu* v. *Emperor* (1) where the trials of the accused in two cross-cases were held to be illegal and the cases remanded for fresh trial. What happened in these cases was that, after the prosecution evidence in one case had been finished, the accused and their counsel stated that they wanted the prosecution witnesses in the cross cases treated as defence witnesses in their case. Then the cross-case was taken up and after the prosecution evidence had been recorded the accused in that case were asked whether they wanted to call witnesses for defence, they said, no, but added that they wanted the evidence of three prosecution witnesses in the other case to be treated as defence evidence in their case. The arguments were then heard and after the opinions of the assessors had been recorded judgment was pronounced. Fforde, J., expressed himself as follows as to the manner in which those trials were conducted :

> In my opinion the procedure adopted in the cases before us is wholly unauthorized by law in several particulars. In the first place, though the two sets of accused were intended to have been tried separately—as in law they were bound to be—the mode in which they were actually tried was in substance a joint trial. Only prosecution evidence appears on each record ; speeches of counsel were reserved till the close of both cases, the assessors were not asked to give their findings until both cases had been closed, and only one set of findings was recorded in respect of both and, finally, one composite judgment was delivered.

(1) A. I. R. 1924 Lah. 104=4 Lah. 376.

In all penal matters the utmost strictness in procedure must be observed. Where the mode in which a criminal trial is to be conducted is, as it is in India, regulated by Statute, a departure from the authorized procedure can itself only be sanctioned by a statutory provision. There is no such sanction for any of the illegalities which have taken place in the course of the trial of these two cases.

Finally the learned Judge held that the trials being prohibited in the mode in which they were conducted were, therefore, illegal. These observations apply with greater force to the circumstances of the present case because a procedure somewhat similar to that in the reported case was adopted therein with this difference that in the present case there is not even the consent of the accused and the counsel to the unauthorized procedure and use has been made as substantive evidence of statements made before the Investigating Police Officers.

Reference may also be made to *Madat Khan* v. *Emperor* (2) in which their Lordships of the Privy Council advised His Majesty that special leave to appeal should be granted because of the apprehension that it might turn out that evidence which was given in one trial had been improperly imported into a quite separate trial. In that case there were two separate trials in two cross cases but they were dealt with in one judgment by the appellate Court. When the case was finally discussed before the Judicial Committee on its merits it turned out that the apprehension mentioned above was not well-founded because in spite of there being one judgment in two cases the appellate Court had kept the evidence in both separate and it did not appear that the evidence recorded in one case was used as evidence in the other. The appeal was finally dismissed by their Lordships but the reasons given for granting special leave to appeal show that if the apprehension alluded to above had turned out to be well-founded the convictions would probably have been set aside.

In my opinion, therefore, the manner in which the learned Sessions Judge has dealt with the two cases is not warranted by any sanction of law and the trials in these cases were illegal. I would, therefore, accept these appeals, set aside the convictions of the appellants in both cases and order a re-trial of the appellants in the manner provided by law.

I wish to make it clear that this order does not authorize the re-trial of those of the accused, who have been acquitted by the Sessions Judge.

Fforde, J.—I agree.

S.J. *Convictions set aside.*

(2) A. I. R. 1927 P. C. 26=8 Lah. 193 (P. C.).

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* A. I. R. 1928 Lahore 382

TEK CHAND, J.

M. L. Pritchard—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 133 of 1928, Decided on 13th April 1928, from order of First Class Magistrate, Lahore, D/- 6th January 1928.

(a) *Criminal P. C., S. 342—Examination of accused after examination of some only of the prosecution witnesses is not illegal.*

Where the Magistrate examined the accused at length after only some of the witnesses for the prosecution were examined, but it was not proved that any prejudice was caused to the accused.

Held : that the procedure though irregular was not illegal. [P 385 C 2]

* (b) *Criminal P. C., S. 342—Non-compliance with second part of S. 342 (1) is serious illegality vitiating the trial.*

Noncompliance with the mandatory provisions of the second part of Cl. (1), S. 342, requiring that the Magistrate shall question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called upon for his defence, is a serious illegality sufficient to vitiate the trial, at any rate from the stage at which the accused should have been so examined. [P 386 C 1]

* (c) *Evidence Act, Ss. 14 and 15 — Evidence of collateral facts—Principles explained —Charge under S. 409, Penal Code for embezzling specific sums—Evidence of embezzling other sums is not admissible.*

It is settled law that under neither of Ss. 14 and 15 can the evidence on facts similar to but not part of the same transaction as the main fact be received for the purpose of proving the occurrence of the main fact, which must be established by evidence directly bearing on it. But when the existence of that fact has been so established and a question arises as to the state of mind of the person who did it, or whether the act in question was done accidentially or with a particular knowledge or intention, evidence of similar acts may, under certain conditions, be admitted. S. 14 is wholly inapplicable to a case where the state of mind or feeling of the accused is not a fact in issue or a relevant fact, and the guilt or innocence depends on proof of actual facts : 6 *Cal.* 655 : 42 *Cal.* 957 ; 47 *Cal.* 671 (*F. B.*) ; 12 *P. R.* 1913 *Cr.* and *Reg.* v. *Richardson*, 8 *Cox* 448, *Rel. on.* [P 387 C 1]

Where the accused was charged under S. 409, Penal Code, for embezzling three specific sums,

Held : that evidence of collateral offences in respect of other sums was not admissible. [P 387 C 1]

(*d*) *Criminal P. C., S. 423—Charge of criminal breach of trust—Altering the conviction on appeal to abetment of the offence is unfair.*

If in the case of a breach of trust where proof of abetment differs from proof of substantive offence in material particulars, of the attention of the accused is not directed at the time of framing the charges or during the trial to the fact that he might have to meet a charge of abetment, it would be highly unfair for the High Court on appeal to alter the conviction to one of abetment. [P 390 C 1]

* (*e*) *Penal Code, S. 409 — Offence completed — Subsequent help to real offender to conceal: embezzlement is not abetment of the offence under S. 409.*

Where the offence of embezzlement was ex-hypothesi complete long before, anything done subsequently to help the real offender to conceal the embezzlement might be punishable under some other section but does not amount to abetment of the offence under S. 409 : *A. I. R.* 1921 *Pat.* 286, *Ref.* [P 390 C 2]

(*f*) *Penal Code, S. 409—Criminal misappropriation—Prosecution must prove that money was paid in trust and that it was not so applied.*

In cases of criminal misappropriation the onus lies on the prosecution to prove not only that money was paid to the accused in trust but also that he did not apply it for the purpose for which it was given : *Ratan Lal, U. R. Cr. C.* 872 and 860, *Rel. on.* [P 392 C 1]

(*g*) *Evidence — Inculpatory facts must be shown to be incompatible with the innocence of the accussd in order to convict him on circumstantial evidence.*

In order to infer guilt from the circumstantial evidence it must be shown that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. [P 392 C 2]

Moti Sagar, *Raghunath Sahe* and *Edmunds*—for Appellant.

Dev Raj Sawhney and *Raj Krishna*—for the Crown.

Judgment.—M. L. Pritchard, Deputy Assistant Engineer, who was the officer-in-charge of the Telegraph Stores Depot Mughalpura (Lahore) in 1924-26, Abdul Aziz, Store-Keeper, and Tirath Ram, Clerk in the same Depot, were tried at one joint trial by Mr. Phailbus, Magistrate, First Class (with enhanced powers) Lahore, under S. 409, I. P. C., for having committed criminal breach of trust in respect of the following three sums which, it was alleged, they had received for credit to Government Funds but which instead of depositing in the Imperial Bank of India in the account of the Depot, they had misappropriated :

(a) Rs. 162 received from Messrs. Pokhar Das & Sons, Lahore, on 18th October 1924 ;

(b) Rs. 1,745-9-0 received from Messrs. K. L. Wadi. Lahore, on 9th December 1924, and

(c) Rs. 846 received from Messrs. K. L. Wadhi, Lahore, on 12th August 1925.

The learned Magistrate has found all the charges proved against the three appellants and has sentenced each of them to undergo rigorous imprisonment for two years and pay a fine of Rs. 1,000 under each charge, the sentences of imprisonment to run consecutively. As every one of the convicts had been, in the aggregate, sentenced to imprisonment for six years and a fine of Rs. 3,000 he had a right of appeal direct to this Court. The three convicts have accordingly preferred separate appeals (Criminal Appeals Nos. 73,83 and 133 of 1928) but as they arise from the same judgment, I have heard them together and shall dispose of them in one judgment.

Before dealing with the merits of the case in respect of the three specific items for embezzling which the appellants have been found guilty, I propose to set out a few preliminary facts, and to discuss and decide certain legal points on which there has been much argument before me.

During the period with which we are concerned (October 1924 to April 1926) the staff of the Telegraph Stores Depot at Mughalpura consisted of Pritchard (appellant in Cr. A. No. 133 of 1928) as the officer-in-charge, Abdul Aziz (appellant in Cr. A. No. 83 of 1928) as Store keeper and three permanent Clerks, Tirath Ram (appellant in Cr. A. No. 73 of 1928), Mohammad Umar (P. W. 3) and Muhammad Qazim (P. W. 6) a Chaprasi Ghulam Dastgir and a few labourers. In addition to these persons Mohammad Munir (D. W. 7) also appears to have worked as a temporary clerk for some time. In the Depot there used to be kept a large quantity of Telegraph stores, as it was the distributing centre for the Punjab. Out of these stores serviceable articles could be bought by private individuals with the sanction of the higher authorities at Calcutta, payments for which were to be made to the officer in charge, who was also authorized to sell unserviceable stores by public auction under certain prescribed conditions. Elaborate rules had been framed and directions sent from the Head Office at Calcutta for maintaining the cash book and other registers and for submission of returns and it was provided that all moneys

received were to be deposited in the Imperial Bank of India.

On 16th December 1926, the police challaned under S. 409, I. P. C., five persons namely, the three appellants, P. W. 2 Harsaran Das, son of Bhagwan Das, of Kucha Missar Beliram, and one Rahmat Ullah, son of Din Mohammad, of Mohalla Kundigaran, Lahore, on the allegation that the three appellants had received on behalf of Government Rs. 12,300-1-9 as the price of Government stores sold to private individuals directly or through public auctioneers but had misappropriated the same, and that Ramsaran Das and Rahmat Ullah aforesaid had abetted this unlawful act of the appellants. A list of 53 witnesses, whom the prosecution intended to produce at the trial, was attached to the challan. The five persons aforesaid were in due course produced before the Additional District Magistrate but he transferred the case for trial to the Court of Mr. Phailbus, Magistrate First Class. On 7th February 1927, the Public Prosecutor stated that he intended to proceed in this case against three persons only viz: Pritchard, Abdul Aziz and Tirath Ram appellants in respect of the sum of Rs. 11,309-13-6 alleged to have been misappropriated between 13th October 1924 and 5th April 1926, and that separate challans regarding the embezzlement of the remaining sum of Rs. 990-4-3 would be sent up against Ramsaran Das and Rahmat Ullah and certain other persons. Accordingly the Magistrate discharged Ramsaran Das and Rahmat Ullah and proceeded to try the case against Pritchard, Abdul Aziz and Tirath Ram. The sum of Rs. 11,309-13-6 which the Public Prosecutor proposed to prove in this trial as having been embezzled by the appellants, comprised thirteen items, alleged to have been received on different occasions as follows:

No.	Date.	Amount. Rs. a. p.	Person who paid the money.
1	13th October 1924	162 0 0	Puran Chand of Pokhar Das and sons.
2	10th December 1924	1,745 9 0	Wadhi.
3	12th August 1925	846 0 0	Wadhi.
4	12th November 1925	752 13 6	Wadhi.
5	17th December 1925	1,000 0 0	Pokhar Das.
6	25th May 1925	2,000 0 0	Wadhi.
7	1st June 1925	123 12 0	Wadhi.
8	28th July 1925	1,800 0 0	Wadhi.
9	21st December 1925	363 3 0	Wadhi.
10	5th April 1926	900 0 0	Wadhi.
11	19th January 1926	561 5 0	Ramsaran Das.
12	23rd January 1926	500 0 0	Ramsaran Das.
13	22nd February 1926	553 3 0	Kirpa Ram, Secretary M. C. Hoshiarpur.

After the evidence of only six witnesses for the prosecution had been recorded, the Magistrate on 7th March 1927, proceeded to examine the accused Pritchard and continued his examination for three days which covers 16 pages of closely typed matter. He then examined Abdul Aziz accused on the 10th, and Tirath Ram accused on the four succeeding days. Tirath' Ram's statement also extends over 14 typed pages of the record. At the next hearing the Public Prosecutor resumed the examination of the remaining witnesses for the prosecution and by the 22nd July the evidence of nine more witnesses (P. Ws. 7-15) was recorded. On that date the Magistrate noted that Asaf Ali Sub-Inspector whom the Public Prosecutor wanted to produce was absent. He accordingly put further questions to the accused in respect of the evidence which had been led till that time and after recording their answers adjourned the case to 15th August 1927. On that date also Asaf Ali did not appear again and the Public Prosecutor produced D. S. P. Morris (P. W. 16) at the conclusion of whose evidence the three accused were again questioned generally as to the evidence produced against them and they replied that they had nothing further to add to their former statements. Thereupon the Magistrate on 29th August 1927, framed three charges under S. 409, I. P. C., against the three appellants jointly for having received and misappropriated the sums of Rs. 162, 1,745-9-0 and 846 being the first three of the 13 items comprising Rs. 11,309-13-6 which were alleged by the prosecution at the commencement of the trial to have been embezzled.

The accused, having pleaded not guilty, recalled most of the prosecution witnesses for re-cross-examination, which

continued till the 18th November 1927. On that date also Asaf Ali Sub-Inspector, was absent and the case was adjourned to 21st November 1927. Asaf Ali at last appeared on 21st and was examined and cross-examined on that and the following day and at the conclusion of his evidence the Magistrate recorded that the prosecution was closed and that

the accused have nothing to add to their previous statements. They however, wish to produce defence.

After several witnesses for the defence had been examined and arguments heard, judgment was announced on 6th January 1928, the concluding portion of which runs as follows:

There is no evidence as to how the money was divided between themselves but the prosecution has proved that all three accused did embezzle not only the amounts of which they stand charged but ten other items also. I have no hesitation in finding them all guilty, and convict them of offences punishable under S. 409, I. P. C., as regards all three heads, and taking into consideration that about Rs. 12,000 have been embezzled I order that Pritchard, Abdul Aziz and Tirath Ram undergo rigorous imprisonment for a period of two years each under each head The sentences to run consecutively. They shall also pay a fine of Rs. 1,000 each under each head making a total of Rs. 3,000 and in default shall undergo rigorous imprisonment for a period of six months each under each head.

To the procedure followed at the trial exception has been taken by Mr. Moti Sagar, counsel for the appellant Pritchard on two grounds. Firstly it has been contended that the learned Magistrate ought not to have examined the accused at such great length after only six witnesses for the prosecution had been examined and a large part of the evidence still remained to be recorded. The learned counsel suggested that the lengthy examination of the accused Pritchard and Tirath Ram at that stage was in the nature of cross-examination and was intended to ascertain beforehand their defence so as to enable the prosecu- to mould the rest of their evidence in the light of the admissions made; and he argued that this procedure was wholly illegal being contrary to the letter and spirit of S. 342, Criminal P. C., and has materially prejudiced the accused. Sir Abdul Qadir and Mr. Ram Lal Anand, who appeared respectively for the other appellants Abdul Aziz and Tirath Ram, while agreeing that the Magistrate ought not to have examined the accused at the stage at and in the manner in which they were examined took up the position that this was an immaterial irregularity which cannot and does not vitiate the trial. Mr. Raj Krishna for the Crown strenuously urged, on the other hand, that the provisions of S. 342 had not been contravened in any way and that the procedure adopted by the Magistrate was neither illegal nor irregular. After fully considering the arguments addressed to me by the learned counsel and carefully scrutinizing the relevant portions of the record I am of opinion that though the Magistrate would have been well-advised in not examining the accused at this stage, his procedure was not illegal and Mr. Moti Sagar's contention that the entire proceedings be quashed and a retrial ordered must be overruled. Of the first six witnesses, who had been examined for the prosecution before the examination of the accused on 7th March, Mohammad Umar (P. W. 4) had given evidence to prove a large number of entries in the cash book at the Depot showing receipt of the 13 items mentioned in the challan and had also deposed as to a large number of books and documents in the handwriting of one or the other of the accused and Tola Ram (P. W. 6) treasury clerk had stated that these sums were not entered as having been received in the books of the Treasury. In addition to this, other witnesses had given further evidence bearing on items alleged to have been embezzled.

In these circumstances the Magistrate was entitled under S. 342 to put such questions to the accused as he considered necessary for the purpose of enabling them to explain the circumstances which appeared against them in the evidence which had been led up to that time. It is no doubt true that the examination of the accused extended over several days and occupied a large number of closely typed pages of the record, but it appears that most, if not all, of the questions put by the Magistrate to each accused related to the documents with reference to which Mohammad Umar had given evidence and it was in answer to these questions that the accused Pritchard and Tirath Ram instead of admitting or denying their handwriting, gave lengthy answers and volunteered detailed explanations with regard to the subject-matter of each entry. The examination of the record

indicates that it was not the nature of the questions but the length and prolixity of the answers given by these two accused which were responsible for the long duration of the examination. It is also significant that though the accused were represented by experienced counsel at the trial, no objection to this procedure was taken at the time and further this point was not raised in any of the memoranda of appeal filed in this Court. Indeed, Mr. Moti Sagar himself did not take up this point till the very close of his opening address and even at that time he argued it in a faint-hearted manner. It was only in his final reply that the learned counsel laid much stress on the point, and at that stage too, counsel for the other two appellants did not join with him in pressing it. As however, the objection if substantiated, would have vitiated the whole trial, I allowed it to be fully argued. It has not been indicated that the prosecution were able to take improper advantage of the statements made by the accused or that prejudice was actually caused to any of the appellants. In these circumstances I am of opinion that the objection is devoid of all force and I overrule it.

The second contention raised by Mr. Moti Sagar (in which again Sir Abdul Qadir and Mr. Ram Lal Anand did not join him) is that the mandatory provisions of the second part of Cl. (1), S. 342, requiring that the Magistrate shall question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called upon for his defence, were not complied with. This objection, if established, would disclose a serious illegality sufficient to vitiate the trial, at any rate from the stage at which the accused should have been so examined. The facts bearing on this point have been set out in detail above, from which it will appear that in addition to the statements which the accused made in answer to the questions put by the Court on 7th March 1927, they were examined on 22nd July 1927, and after the evidence of (P. W. 16) Morris, had been recorded on 15th August the Magistrate questioned them generally as to the evidence produced against them and they stated that they had nothing further to add to their former statements. Charges were then framed against them and after the prosecution witnesses had been re-cross-examined and the last witness Asaf Ali (P. W. 17) Sub-Inspector examined, the accused are recorded to have stated evidently in answer to questions put by the Magistrate, that they had nothing more to add to their previous statements, but wanted to produce evidence in defence. It is no doubt true that this answer is recorded in the indirect form of narration, but in my opinion this does not affect the question. I have no manner of doubt that after the prosecution witnesses had been cross-examined and the evidence of Asaf Ali concluded the Magistrate did ask the accused generally about the case and they replied that they had nothing more to add to the very lengthy and detailed statements which they had already made on three different occasions. The learned counsel for both parties have drawn my attention to a number of rulings, which disclose a serious conflict of judicial opinion on the question whether "examination" in this part of S. 342 means examination-in-chief, or it also includes the further cross-examination and re-examination of the witnesses. I do not, however, think it necessary to decide which of these rival views is sound, as I am of opinion, that even if the latter view is correct the provisions of this section were substantially complied within this case. The objection fails and must be overruled.

Mr. Moti Sagar's third point, which has been strongly pressed by counsel for the other appellants as well is, however, much more substantial. As already stated the appellants were charged with having embezzled three specific items of Rs. 162, Rs. 1,745-9-0 and 846 only but at the trial the prosecution led evidence relating to alleged embezzlements of 10 other items (No. 4-13 of the list given above). The learned Magistrate in his judgment has discussed this evidence and recorded definite findings that the appellants had committed criminal breach of trust in respect of these 10 items also and as will have been seen from the concluding portion of this judgment cited above, he has taken this fact into consideration in basing the conviction and in passing heavy sentences on them. Appellants' counsel have contended that this evidence was inadmissible and irrelevant and ought not to have been allowed to go on the record, and in any case it

ought not to have been used against them in the manner in which it has been done by the Magistrate. Mr. Raj Krishna for the Crown, in the very able argument which he addressed to me on the point, has very fairly and properly conceded that he cannot defend the action of the learned Magistrate in definitely finding the appellants guilty in respect of the items which were not included in the indictment, or in taking these findings into consideration in passing the sentences. But he has argued that the evidence was admissible under Ss. 14 and 15, Evidence Act. It is however, settled law that under neither of these sections can the evidence of facts similar to but not part of the same transaction as the main fact be received for the purpose of proving the occurrence of the main fact, which must be established by evidence directly bearing on it. But when the existence of that fact has been so established and a question arises as to the state of mind of the person who did it, or whether the act in question was done accidentally or with a particular knowledge or intention that evidence of similar acts may, under certain conditions, be admitted. S. 14 provides that :

facts showing the existence of any state of mind * * * * are relevant, when the existence of any such state of mind * * * * * * is in issue or relevant.

As pointed out by Garth, C. J., in the leading case *Empress* v. *Vyapuri Moodaliar* (1) ;

Section 14 seems to me to apply to that class of cases where a particular act is more or less criminal according to the state of mind or feeling of the person who does it ; as for instance in actions for slander or false imprisonment or malicious prosecution, where malice is one of the main igredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff. But I think we must be very careful not to extend the operation of the section to other cases where the question of the guilt or innocence depends on actual facts and not upon the state of a man's mind or feeling. We have no right to prove that a man committed theft or any other crime on one occasion by showing that he committed similar crimes on other occasions.

Applying this test, it must be held that S. 14 is wholly inapplicable to the present case, as here the state of mind or feeling of, any of the appellants is admittedly not a fact in issue or a relevant fact, and the guilt or innocence depends on proof of actual facts.

Let us now refer to S. 15 which runs as follows :

When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned is relevant.

It will be seen that under this section, the prosecution cannot use the evidence as to the commission of other acts of a similar nature in proof of the existence of the specific acts which form the subject matter of the charge. But when the existence of these acts has been established by evidence aliunde and the only question which remains to be decided is whether they were done accidentally or intentionally or with a particular knowledge or intention, then and then only could the evidence of other similar acts be let in, provided :

(a) it was shown that such acts were of the same specific kind, and

(b) they formed part of a series of occurrences in each of which the person committing the act was concerned. S. 15 embodies a well-established rule of the English law of evidence which has been thus enunciated by Lord Herschell, Lord Chancellor, in the well-known case of *Makin* v. *Attorney General for New South Wales* (2).

In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

The question has been considered at length by Mookerji, J. in *Amrit Lal Hazra* v. *Emperor* (3), and by a Full Bench of the same Court in *Emperor* v.

(1) [1891] 6 Cal. 655 (659)=8 C. L. R. 197.

(2) [1894] A. C. 57 (65)=63 L. J. P. C. 41=69 L. T. 778=58 J. P. 148=17 Cox. C. C. 704.

(3) [1915] 42 Cal. 957=21 C. L. J. 331=29 I. C. 513=19 C. W. N. 676.

Panchu Das (4), in the former of which the rule is formulated in the following terms :

Facts similar to but not part of the same transaction as the main fact, are not, in general admissible to prove either the occurrence of the main fact or the identity of its author. But evidence of similar facts although in general inadmissible to prove the main fact or the connexion of the parties therewith, is receivable after evidence aliunde on these points has been given to show the state of mind of the parties with regard to such fact ; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto. In general, whenever it is necessary to rebut even by anticipation, the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question or not of a different character, and the acts tendered must also have been proximate in point of time to that in question.

An illustration of the kind of cases in which such evidence can be admitted is *Girdhari Lal* v. *Crown* (5), where the accused had been charged under S. 420, I. P. C., for having received from the two complainants certain sums of money on false pretences that he had been authorised to recruit unskilled labour for service in Africa and that on payment of certain fees he would be able to engage them for service in that country. The prosecution alleged that the accused had not been given any such authority to recruit and that the whole of his recruiting business was bogus and fraudulent. The accused admitted having received this sum of money but alleged that he had done so honestly and not with any fraudulent intention. To rebut this defence the prosecution was allowed to show that in the course of this sham business the accused had defrauded other persons from whom he had received sums of money on false pretences of a similar kind. It should be noted that this evidence was not admitted to prove the receipt of the money from the complainant which fact had indeed been admitted by the accused but to determine the sole question which required decision there whether he had received the money with an honest or a fraudulent intention. Another case of the same kind is *Reg* v. *Richardson* (6), in which the indictment charged the person with having embezzled three sums of £ 2 each, the money of his employer. After evidence had been given relating to these sums it was proposed to lead evidence of other items which were also alleged to have been embezzled, to show that if it should be contended that the sum charged in the indictment were the subject of a mistake in keeping of the account, there being many other sums unaccounted for, admission of evidence relating to these sums would assist the jury as to what value to attach to that suggestion. It is obvious that the facts of both these cases were wholly dissimilar from those of the present but it is important to note that in each of them it was held that the evidence of the alleged collateral offences could not be treated as substantive evidence of the offences charged in the indictment. In both of them the factum of the receipt of the money had been admitted by the accused ; and the sole question for determination in the former was whether the money had been received with a fraudulent or an innocent intention and in the latter whether money admittedly received and still in the possession of the accused had not been accounted for by mistake or oversight, and it was for this limited purpose that the evidence of collateral facts which formed part of a series of acts of the same specific kind was received.

It is conceded that in the present case the controversy centres round matters of fact as to receipt or retention of three specific sums, and no question of the kind mentioned in Ss. 14 and 15 arises or has been argued before me. I must, therefore, hold that the evidence of the alleged collateral offences, was erroneously admitted and ought to be left out of consideration.

Excluding the evidence which I have held to be inadmissible, let us now see if the prosecution have succeeded in establishing the guilt of one or more of the appellants in respect of the three sums in question. In determining this question it must again be borne in mind that the appellants were not indicted for conspiracy to commit criminal breach of trust nor for abetment of the acts of each other but each one of them was

(4) [1920] 47 Cal. 671=31 C. L. J. 402=58 I. C. 929=24 C. W. N. 501 (F.B.).

(5) [1913] 12 P. R. 1913 Cr.=269 P. L. R. 1914=6 I. C. 934=26 P. W. R. 1910, Cr.

(6) [1858] 8 Cox. 448.

charged for and has been found guilty of having himself committed three substantive offences. Accordingly the prosecution must establish against each of them the essential ingredients of the offence, namely :

(i) that he was entrusted with each of the specific sums in question ;

(ii) that he misappropriated it or converted it to his own use ;

(iii) that such misappropriation or conversion was in violation of (a) any direction of law prescribing the mode in which such trust was to be discharged, or (b) any legal contract, express or implied which he had made touching the discharge of such trust,

or that he wilfully suffered some other person to do as above.

After a careful scrutiny of the evidence I have no hesitation in saying that the prosecution have failed to establish the first of these essential points against both Abdul Aziz and Tirath Ram. It is admitted that under the rules as well as according to the "duty list" (Ex. P. 9) submitted by the officer in charge of the Depot to the Controller of Telegraph Stores, Alipore, on 15th May 1924, it was not the duty of either of these appellants to deal with cash. On the other hand, the amount received in cash, the cash book and the cheque book were to be kept by the officer in charge in an iron safe fixed in the wall of his room. All cash was to be received and payments made by him personally and he was responsible for depositing the amounts received in the Imperial Bank of India to the Credit of the Stores Depot. Abdul Aziz was store keeper and Tirath Ram dealt with the "general" and "account" correspondence and assisted the officer in charge in such work as was assigned to him. It was not, therefore, a part of the duties officially assigned to Abdul Aziz and Tirath Ram to receive cash or deposit it in Bank. So far as the three items in question are concerned, it was admitted by the learned counsel for the Crown before me that they are proved to have been received by Pritchard. The evidence on the point is conclusive and is to the effect that

(a) Rupees 162 was delivered to Pritchard on 13th October 1924, by a chaprasi sent by Puran Chand, Accountant of Messrs. Pokhar Das and Sons, who had purchased 18¾ poles from the Store at Mughalpura with the permission of the Calcutta authorities.

(b) Rupees 1745-9-0 had been brought on 9th December 1924, in cash by Tirath Ram from Messrs. Wadhi and Co. who had auctioned certain unserviceable stores on 20th October 1924, and that this sum was actually paid by Tirath Ram to Pritchard.

(c) Rupees 846 was actually paid by Wadhi to Pritchard in the office on 12th August 1925, as part-payment of the sale proceeds of unserviceable articles auctioned by him on 20th July 1925.

Pritchard's defence is that after receiving each of these sums he made it over to Tirath Ram to be deposited in the Bank and that he does not know what happened to the money thereafter.

Taking the case of Abdul Aziz first, it will be seen that there is no allegation much less proof that any of the sums in question was ever entrusted to him or he had any dominion over it. The learned Magistrate has mentioned four points as indicating his guilt.

(a) His failure to keep a certain register (Ex. P. L.) relating to sales of serviceable stores which he was directed to keep as far back as September 1923 It is conceded that this register had nothing to do with the receipt or disposal of cash and even if it had been properly maintained, it would not have thrown any light on the misappropriation of the sale price of the articles actually sold. Abdul Aziz's conduct might be punishable departmentally but this circumstance has no probative value as proving his guilt.

(b) Delay on his part in sending to Calcutta the "Store Voucher" (Ex. P. E. E.) relating to the first sale which he sent on 8th October 1924, instead of 4th. I fail to see how his omission to send the voucher till 8th October could prove his having misappropriated the money, which was actually received in the office by Pritchard five days later.

His writing the letter (Ex. P. A. 1) which was signed by Pritchard, to Pokhar Das and Sons, that the cheque for Rs. 162 formerly sent by them had been lost and that a new cheque be sent. In my opinion this latter indicates his innocence rather than guilty knowledge.

(d) His not preparing the sale accounts relating to 2nd and 3rd items. But it is admitted by D. W. 16 H. P. Catterji, Head Clerk, Telegraph Stores,

Calcutta, and is proved by other evidence also that it was not Abdul Aziz's duty to do this.

Mr. Raj Krishna admitted his inability to support his conviction on the second and third charges. I find the evidence on the record insufficient to connect this appellant with the alleged embezzlement and I hold that he has been wrongly convicted and acquit him.

Coming now to the case against Tirath Ram the first question is whether he was entrusted with any one or more of of the sums in question (After considering evidence His Lordship proceeded). The result is that there is no reliable, direct or circumstantial evidence on the record from which it may be inferred that the appellant Tirath Ram was entrusted with any of the sums in question or that any portion thereof ever passed into his possession. The first element necessary to establish the charge against him is thus lacking and consequently it must be held that he had been erroneously convicted under S. 409.

Mr. Raj Krishna while practically conceding that Tirath Ram could not be held guilty of the substantive offence of criminal breach of trust has, however, argued that there are sufficient materials on the record to establish a charge of abetment against him and this Court must on appeal alter the conviction accordingly. I have fully considered this argument but find myself unable to accept it. In the first place it must be borne in mind that in a case like this, proof of abetment of the offence of criminal breach of trust must necessarily differ in several material particulars from proof of the substantive offence; and the attention of the appellant not having been directed at the time of framing the charges or during the trial to the fact that he might have to meet a charge of abetment it will be highly unfair for this Court on appeal to alter the conviction, as suggested. Secondly. I do not think that the circumstances on which counsel for the Crown relies are legally sufficient to bring the acts of the appellant within the definitlon of "abetment" as given in S. 107, I. P. C. There is no proof that he instigated Pritchard or any person to commit criminal breach of trust or that he engaged with any one in any conspiracy for doing so, or intentionally aided by any act or illegal omission the commission of such offence.

As regards the first item of Rs. 162, the mere fact that he is the scribe of the receipt for the amount, which was signed by Pritchard, or that he made an entry in the cash book, is no proof of his having abetted the offence, and Mr. Raj Krishna has frankly admitted that the suggestion of Prichard's counsel that it was Tirath Ram and not Pritchard who sent the telephonic message received by Puran Chand of Messrs. Pokhar Das and Sons to send the money in cash instead of by cheque, cannot be supported on the evidence It was, however, strenuously urged that several weeks after the receipt of the money by Pritchard this appellant prepared the Primary Abstract of sales (Ex. P. R. / 2) for submission to Calcutta from which the item of Rs. 162- was omitted, while it was included in the office copy (Ex. P. R. 2 / A.) These documents are in the handwriting of Tirath Ram but are signed and certified to be correct by Pritchard. At the trial Tirath Ram stated that he worte them at the dictation of Pritchard and declared that he was not responsible for the omission. On the other hand Pritchard stated that the documents had been written by Tirath Ram and he signed them without verifying their contents. It is not necessary for me to decide as to which of these versions is correct, for even if Tirath Ram's explanation be incorrect, there can be no doubt that the wrong entry made several weeks after the alleged embezzlement would not make Tirath Ram guilty of abetment of the offence of embezzlement. At worst, he would be an "accessory after the fact", and as such, not punishable under the Indian law. The offence of embezzlement was ex-hypothesi complete long before and anything done subsequently to help the real offender to conceal the embezzlement might be punishable under some other sections but does not amount to abetment of the effence under S. 409. Reference may in this connexion be made to a Division Bench decision of the Patna High Court in *Hazari Lal* v. *Emperor* (7) where the question is discussed in detail.

The same considerations apply mutatis mutandis to the second item of Rs.

(7) A. I. R. 1921 Patna 286.

1745-9-0 as the fact that Tirath Ram brought the sum of Rs. 1745-9-0 in cash from Wadhi and paid it to Pritchard does not in any way incriminate him. Nor does his subsequent conduct in not making correct entries in the sale-account (Ex. P. C. C.) dated 21st January 1925, and in the Primary Abstract dated 3rd January 1925, several weeks after the alleged embezzlement amount to abetment for reasons already given.

So also with regard to the third item of Rs. 846- which was received by Pritchard on 12th August 1925, no inference against Tirath Ram can be drawn from the fact that he is the scribe of the receipt which was duly signed by Pritchard as the officer in charge. In regard to the Primary Abstract (Ex. P. W.) and the office copy (P. W. 1) my attention was drawn to certain entries in them, which had been written over or scored out in such a manner that the figures subsequently entered appeared to be short of those originally written by Rs. 846- It was urged that these corrections were, made by Tirath Ram and are initialled by him. Of these documents, however, Tirath Ram only admitted one (Ex. P.W. 1) to be in his handwriting, but denied that the corrections were made by him or bear his initials. He did not admit Ex. P. W. to be in his handwriting. Both these documents seem to have been sent during the police investigation to the Government of India Expert for Questioned Documents and he was one of the persons included in the original list of 53 witnesses, whom it was intended to produce at the trial, but for some reasons which have not been explained, neither he nor any other expert was produced to prove that the entries denied by Tirath Ram were in his handwriting. The evidence of Mohammad Ummar (P. W. 3) on which the learned counsel for the Crown sought to rely is highly unsatisfactory. He did not claim to be an expert but gave evidence because of his alleged familiarity with the handwriting of Tirath Ram. This witness, however, appears to have been throughout biased against him, and in one case at least it has been proved that he wrongly stated that a document (Ex P. 01) was in Tirath Ram's handwriting whereas later on he himself admitted that it was not so but had really been written by Pritchard. I must, therefore hold that the circumstances relied upon by Mr. Raj Krishna are wholly insufficient to hold Tirath Ram guilty of abetment.

Coming now to the case against Pritchard, I may say at once that the evidence on the record fully establishes that he received the three sums in question for credit to Government Funds and that under the rules it was his duty to remit them to the Imperial Bank for credit to Government Funds. It has, therefore, been satisfactorily established that he was entrusted with the moneys. The evidence relating to this point has already been dircussed in detail above and it is not necessary to repeat it. The question, however, is whether the prosecution has succeeded in establishing the second point necessary to support a conviction for criminal breach of trust against him viz : that he misappropriated the moneys or converted them to his own use. In this connexion the first thing that was necessary to prove was that these items had not been paid into the Imperial Bank, as they should have been under the rules. But it is significant that though the list of witnesses attached to the challan included three persons from the Imperial Bank, namely, Mr. Isles, the Agent. Bhagat Ram, Clerk and the Cashier of the Bank, none of them was produced at the trial. The only Bank clerk produced was P. W. 15, Banwari Lal Saksena but he stated nothing as to the non-receipt of the sums in question by the Bank. His evidence related to the fact that the seals on four receipts, Exs. P. W. W. W., P. Z. Z, Z., P. 4 and P. 7 were not genuine. None of these receipts has anything to do with the items which were the subject-matter of the charge. The facts that the sums in question were not received in the Imperial Bank could have been easily proved by the examination of the books of the Bank, but no effort was made to send for them. Further Mr. Isles the Agent was examined as a defence witness (D. W. 15) on behalf of Pritchard when he deposed as to certain incidents which took place before him on 21st April 1926, in the presence of Pritchard and Tirath Ram, but as they relate to a matter which is said to be subject matter of another criminal prosecution against some of the appellants and do not seem

to have any direct bearing on the present case I do not think it proper to discuss his evidence. It is sufficient to say that though an opportunity was thus afforded by the defence to enable the prosecution even at that late stage to prove the non-receipt of the moneys by the Bank by cross-examining Mr Isles on the point, the prosecution failed to avail themselves of it and did not put a single question to him in cross-examination. Thus a serious lacuna in the case for the prosecution has been left and Mr. Raj Krishna for the Crown was constrained to admit that he was unable to find any explanation for this omission. He has, however, contended that this defect is supplied by the evidence of P.W. 6, Tola Ram, Treasury Clerk, Lahore District, who deposed that the items in question were not entered as having been received in the books of the Treasury. The entries in these books are admittedly not made in the Bank but in the Treasury Office on receipt of the challans sent there, after the amount had been deposited in the Bank. They cannot, therefore, be considered as primary evidence of the transaction, which take place in the Bank and the fact that a particular item is not entered in these books does not necessarily indicate that it had not been received by the Bank It must be remembered that in cases of criminal misappropriation the onus lies on the prosecution to prove not only that money was paid to the accused in trust, but also that he did not apply it for the purpose for which it was given. As held by the Bombay High Court in *Queen-Empress* v. *Hari Dagdu* (8):

> In a trial for an offence under S. 403 where the accused admitted having received the money alleged to have been misappropriated by him but defended himself by saying that he made it over to the proper person the onus did not lie on him to prove payment, but on the prosecution to prove nonpayment, for it is only when the latter is proved that the presumption will arise of misappropriation or breach of trust.

See also the case of *Queen-Empress* v. *Ramchandra Ganesh* (9) As already stated the best evidence to prove non-payment was the books of the Bank, but for reasons best known to the prosecution, it was kept back.

This, however, does not settle the matter, for the circumstantial evidence on the record might be sufficient to establish misappropriation by Pritchard. But in inferring his guilt from this kind of evidence it must be shown that the inculpatory facts are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of his guilt. As pointed out by Mr. Justice Wills in his great Work on circumstantial evidence:

> This is the fundamental rule, the experimentum crucis by which the relevancy and effect of circumstantial evidence must be estimated . . . . . It is not enough that a particular hypothesis will explain all the phenomena; nothing must be inferred merely because, if true, it would account for the facts, and if the circumstances are equally capable of solution upon any other reasonable hypothesis it is manifest that their true moral cause is not exclusively ascertained, but remains in uncertainty, and they must, therefore, be discarded as exclusive presumption of guilt. Every other reasonable supposition by which the facts may be explained consistently with the hypothesis of innocence must be rigorously examined and successively eliminated and only when no other supposition will account for all conditions of the case, can the conclusion of guilt be legitimately adopted.

The evidence relied upon in this connexion consists mainly of the omission of the items concerned from the returns sent to Calcutta, over this appellant's signatures, and the keeping of two receipt books, one of which is denounced as "bogus" by the prosecution. Reference to some of these documents has already been made while dealing with the case against Tirath Ram and I do not think it necessary to discuss them in detail again. It is sufficient to say that I have carefully examined the evidence bearing on the point and while I am not prepared to accept the explanation given by Pritchard that he blindly signed these documents, I cannot at the same time find, that, having regard to the principles enunciated above, the prosecution have succeeded in proving that it was Pritchard who misappropriated these sums. The utmost that can be said is that the evidence raises a strong suspicion against him. But in a case of this kind a conviction cannot be based on suspicions only, howsoever strong they might be. I am, therefore, constrained to give him the benefit of the doubt, and must hold that the case against this appellant also is not established.

The result is that I accept all the three appeals, set aside the conviction

(8) Rat. Un. Cr. C. 872.
(9) Rat. Un. Cr. C. 860.

and sentences passed against each appellant, and direct that he be set at liberty forthwith. The fines if paid will be refunded.

It is unfortunate that the defalcations which were the subject-matter of enquiry at this trial should have remained unpunished, but there is no doubt that this is due mainly, if not entirely to the insufficient and careless manner in which the case for the Crown appears to have been conducted in the Court below. The whole course of the trial discloses a great disregard for the elementary rules of evidence and criminal procedure and a lamentable lack of discrimination between the essentials and the nonessentials. It is much to be regretted that the record of the case should have been allowed to be encumbered with such a large mass of inadmissible and irrelevant matter, with the inevitable result that the points, on proof of which depended the guilt or innocence of the appellants, were lost sight of and material evidence which was or could, without much difficulty, have been available was not placed on the record, and several documents which were in the possession of the prosecuting agency remained unproved. In their anxiety to lead evidence of collateral offences the prosecution omitted to prove the facts necessary to establish the substantive offences charged in the indictment, and the learned Magistrate, overpowered by the magnitude of the task, which he had unnecessarily set up for himself, of finding the appellants guilty of embezzling items not covered by the charges framed against them, lost himself in a hopeless maze of inadmissible and irrelevant evidence, mixed up conjecture with proof, and confused documents which had been duly proved with those which were not. The result was not only much avoidable waste of his own time and the time of this Court, but also an unsatisfactory and obscure finding in a judgment, which the counsel who appeared for the Crown before me felt great difficulty in supporting in spite of all the labour and ingenuity which he brought to bear on his task.

R.D. *Convictions set aside.*

A. I. R. 1928 Lahore 393

JAI LAL, J.

Kidar Nath—Plaintiff—Appellant.

v.

Municipal Committee, Delhi—Defendant—Respondent.

Second Appeal No. 513 of 1928, Decided on 11th April 1928, from decree of Dist. Judge, Delhi, D/- 16th December 1927.

Punjab Municipal Act (3 of 1911), Ss. 190 and 193—"Building" means that part of the house in respect of which an application is made to the Committee—A bye-law of a Municipality prohibiting erection of any portion of any building abutting on street or lane within four feet of the centre of such street or lane cannot be invoked to put back an old outer wall which abutted a street.

The term "building" as used in Ss. 189, 190 and 193 means that part of the house in respect of which an application is made to the Commitee and it does not mean the whole of the house, a portion whereof is proposed to be erected or re-erected and, therefore, the conditions imposed by the Committee under S. 193 must be confined to that part of the house in respect of which an application to erect or re-erect is made to it. It also follows that the Committee is not entitled to invoke the aid of a bye-law which prohibits erection of any portion of any building abutting on a street or lane within four feet of the centre of such street or land, for putting back an old outer wall of the applicant's house which abutted a street, if the building proposed to be erected does not abut a street. [P 395 C 2]

Moti Sagar—for Appellant.

Mehr Chand Mahajan—for Respondent.

Judgment.—The Municipal Committee of Delhi has framed a bye-law which runs as follows:

No portion of any building abutting on any street or lane, to which from time to time the Committee may, by resolution, declare this rule to apply, shall be built within 7½ ft. of what was the centre of such street or lane at the time of the passing of these bye-laws, and no portion of any building abutting on any other street or lane shall be built within four feet of what was the centre of such street or lane at the time of the passing of these bye-laws, provided that when the Municipal Commitee has laid down a building line to regulate the frontage of buildings in any street or lane, the Municipal Committee may permit a building to be constructed up to that line irrespective of the distance of any portion of it from the centre of the existing street or lane.

On 26th May 1924 the appellant Kidar Nath applied to the Committee for sanction to build a portion of his house situate in a locality within the Municipal limits of Delhi to which the part of the bye-law prohibiting the erection of any

portion of any building abutting on a street or lane within four feet of the centre of such street or lane applies. On 30th September 1924 the Municipal Committee sanctioned the building on condition that the outer wall of the appellant's house which abutted the street should be put back so as to be re-erected at a distance of four feet from the centre of the street in front thereof. The appellant erected his building in accordance with the plan submitted by him but did not put back the wall of his house as directed in the condition imposed by the Committee. Consequently a notice dated 16th September 1925 under S. 195, Punjab Municipal Act, was served upon him by the Committee to alter or to demolish the building erected in contravention of the sanction granted. The suit out of which this second appeal has arisen was then instituted by Kidar Nath for issue of perpetual injunction to the Municipal Committee of Delhi restraining the latter from demolishing the building erected by him or the wall abutting the lane. The suit was dismissed by the trial Court and the decree has been affirmed by the District Judge on appeal. The plaintiff has presented this second appeal.

It appears that a large portion of this house was burnt down by fire many years ago and some portions of it were re-erected immediately afterwards by the plaintiff with the permission of the Municipal Committee. The wall abutting the street, however, was not destroyed or damaged by the fire and has remained intact up to this time. The application of 26th May 1924 made by the plaintiff related to the re-erection of the remaining portion of the house but the outer wall abutting the street and the wall at right angle therewith was not proposed to be re-erected. It seems that in all probability the plaintiff fearing an order by the Committee to put back his building designedly applied for sanction to erect the inner portions of the house leaving the outer walls intact.

The only point discussed by counsel on both sides before me is whether the condition imposed by the Committee to set back the outer wall of the plaintiff's house abutting the street in the manner already described was or was not ultra vires.

Section 189, Punjab Municipal Act, provides that no person shall erect or re-erect or commence to erect or re-erect any building without the sanction of the Committee and that every person who intends to erect or re-erect any building shall give notice in writing to the committee of such intention. Power is also given by that section to the Committee by means of a bye-law to provide for the submission of the necessary plans of the building to accompany such notice describing inter alia free passage or way in front of the building and space to be left about the building to secure free circulation of air and facilitate scavenging and for the prevention of fire. Then S. 190, confers power on the Municipal Committee to regulate by bye-laws in respect of the erection or re-erection of any building inter alia of the following matters:

> The ventilation and the space to be left about the building to secure the free circulation of the air and for the prevention of fire.

Section 193 provides that within two months after the receipt of the notice mentioned in S. 189, the Committee may inter alia sanction the building either absolutely or subject to such conditions as it may deem fit in respect of all or any of the matters specified in S. 189.

It is on the correct interpretation of these sections that the decision of this case rests. The term "building" is defined in S. 3 (2), Municipal Act, as follows:

> Building means the whole or any part of any house, hut, outhouse, shed and stable whether used for the purpose of human habitation or otherwise and whether of masonry, bricks, wood, mud, thatch, metal or any other material whatever and includes a wall and a well.

The question, therefore, is whether on an application being made for sanction to erect or re-erect one portion of a house the Committee is competent by virtue of S. 193 of the Act to impose conditions in respect of another portion of that house which the applicant for sanction does not propose to demolish and re-erect. The case for the appellant is that the Committee can impose conditions under S. 193 only in respect of that portion of the house which it is proposed to erect or re-erect and that, therefore, any condition imposed relating to another portion which it is not proposed to touch in connexion with the scheme of erection or re-erection is outside the competence of the Committee and ultra vires. The contention of the learned counsel for the Municipal Committee on the other hand

is that the expression 'building' as used in S. 193, includes the whole of the house a portion whereof is proposed to be re-erected.

Now having regard to the definition of the word 'building' in S. 3 (2) I have no doubt that the expression as used in Ss. 189, 190 and 193 does not include the whole of the house but only such part thereof as the applicant proposed to erect or re-erect. It must be deemed to have been used in all these sections in the same sense and as relating to the same subject-matter. It cannot be, as appeared to be the contention of the respondent's counsel, that building in S. 189 means part of a house which is proposed to be erected or re-erected, while the same terms as used in Ss. 190 and 193 means the whole house of which it is a part. It consequently follows that under S. 193 when sanctioning the application the Committee can impose conditions only with regard to such portion of the house which is proposed to be erected or re-erected In my opinion any other interpretation of the section would make the working of the Municipal Act unfair to the owners of the houses and may lead to absurd results.

As I put it to the learned counsel for the Committee, supposing a huge building covering an area of, say, an acre exists on a site within the municipal limits and the owner thereof applies for sanction to re-erect a room at one corner thereof, is the Municipal Committee entitled to impose conditions with regard to a room at the opposite corner of such a building? The learned counsel replied to this question in the affirmative but I am not prepared to hold that the Legislature ever intended to place such arbitrary powers in the hands of the Municipal Committee. I have, as I have already stated, merely to decide whether the action taken by the Committee in this case under Ss. 193 and 195 was within its competence. No other provision of law under which this action could be taken was relied upon before me, and it is not necessary for me to examine the question what was the proper procedure for the Committee to adopt to attain its object. It is, however, satisfactory to feel that the Committee was not without remedy and had ample power under the other provisions of the Municipal Act to carry out its object. It has, however, not chosen to take action thereunder and I have merely to decide the present case with regard to the provisions of law under which the Committee preferred to act.

I hold that the term 'building' as used in Ss. 189, 190 and 193 means that part of the house in respect of which an application is made to the Committee and that it does not mean as was contended by counsel for the Municipal Committee the whole of the house a portion whereof is proposed to be erected or re-erected and therefore the conditions imposed by the Committee under S. 193 must be confined to that part of the house in respect of which an application to erect or re-erect is made to it It also follows that the Committee was not entitled to invoke the aid of the bye-law quoted at the commencement of the judgment, because the building proposed to be erected did not abut a street.

Accepting this appeal I set aside the decrees of the Courts below and decree the plaintiff's suit with costs throughout.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 395

TEK CHAND AND BHIDE, JJ.

Gurmukh Singh and *others*—Appellants.

v.

Shiromani Gurudwara Prabandhak Committee, Amritsar—Respondents.

First Appeal No. 1534 of 1927, Decided on 29th February 1928, from order of Sikh Gurudwara Tribunal, D/- 7th May 1927.

Sikh Gurudwaras Act (Punjab Act 8 of 1925), S. 6—Only past or present hereditary office-holder or his presumptive successor can apply.

An application for compensation under S. 6 can only be made on behalf of a "past or present hereditary office-holder" or the "presumptive successor" of such office-holder. [P 396 C 2]

Badri Das and *Din Dial*—for Appellants.

Man Singh—for Respondents.

Judgment.—On 5th July 1926, four persons Pritam Singh, Bhag Singh, Sant Singh and Bali Singh presented a petition for compensation under S. 6, Sikh Gurdwaras Act, to the Local Government through the Secretary, Transferred Departments. In the petition, it was stated that Gurdwara at Khadar Sahib known as Sri Darbar Sahib belonged to the

descendants of Guru Angad Dev Ji, that it was occupied and managed by the said descendants whose interest in the place as well as the income thereof was determined by the right of inheritance under their personal law, that the income of the Gurdwara was divided amongst them according to ancestral shares, that these descendants used to appoint, from amonst themselves representatives to act on their behalf for the management of all that belonged to them jointly and for the realization and distribution of the joint income and that the present representatives were the four applicants who had been recognized as such by the district authorities. They were accordingly "entitled" to present the petition on behalf of themselves and their principals, the descendants of Sri Guru Angad Dev, and they prayed that the

> whole income of the Gurdwara or such part of it as might be deemed proper, be awarded to the descendants of Sri Guru Angad Dev at Khadar Sahib through the petitioners and that the jagir income might be adjudicated to belong entirely to the petitioners and their principals.

In this petition the names of the "principals" were not disclosed nor was it stated how many they were and where they were living. The petition was duly forwarded to the Tribunal and on 7th April 1927, Mr. Din Dayal, Advocate, appeared for the four applicants. He admitted that his clients, the four petitioners (whom alone he described as office-holder), did not hold any power of attorney for the other descendants of Guru Sahib on whose behalf they professed to act nor did he himself hold any vakalatnama from them. He expressed his inability to state their number even approximately and remarked that they might be one thousand. At the foot of his statement, there is a note recorded by the president that

> Mr. Din Dayal asked repeatedly whether these one thousand people were office-holders of the Gurdwara, refused to give a direct answer repeating merely that they were owners of the Gurdwara.

On this the Tribunal passed an order, dated 7th April 1927, holding that the petitions as presented must be confined to the claim of the four persons mentioned in it, and that it was incompetent on behalf of the other descendants of the second Guru, whose number or names or other description had not been disclosed either in the petition or before the Tribunal. They accordingly framed issues relating to the claim of the four applicants only.

A few days later, on 19th April 1927, the appellants, who are 53 in number. presented an application to the Tribunal under O. 14, R. 5, Civil P. C., stating that they along with 70 other persons had filed a petition under S. 6 through their four representatives aforesaid, but that the Tribunal had decided on 7th April that the petition on their behalf was incompetent. They alleged that they were owners and office-holders of the Gurdwara and as such competent to apply. They accordingly claimed that the said order be discharged and they be given an opportunity to sign the original petition or the Tribunal might exercise its powers under S. 15 of the Act and join them as parties to the application. This application was rejected by the Tribunal on 7th May 1927.

The present appeal has been filed on behalf of these 53 persons attacking the orders passed on 7th April and 7th May 1927, respectively. Mr. Badri Das, who appeared on behalf of the appellants, addressed us on several points, but in our opinion the appeal must fail on the short ground that neither in the petition of 5th July 1926, nor in the statement made by counsel on 7th April 1927, was it claimed that the 53 appellants were "past or present hereditary office-holders" as defined in S. 2 (4), which lays down that unless there is anything repugnant in the subject or context, "office" means any office by virtue of which the holder thereof participates in the management or performance of public worship in a Gurdwara or in the management or performance of any rituals or ceremonies observed therein : and "office-holder" means any person who holds an office. An application for compensation under S. 6 can only be made on behalf of a "past or present hereditary office-holder" or the "presumptive successor" of such office-holder. The appellants could, therefore, succeed only if this status was claimed for them, but that application apart from the fact that it was not signed by the appellants or their duly authorized agents was entirely silent on that point. It nowhere stated that the appellants participated in the management or performance of public worship in the Gurdwara at Khadar

Sahib or of any rituals or ceremonies observed therein.

It has been argued that this application ought not to be strictly construed, in view of the fact that the Sikh Gurdwaras Act was a novel piece of legislation and that there were no precedents to guide the claimants or their advisers. But we feel ourselve unable to accede to this contention in view of the fact that for nine months after the presentation of the petition the appellants took no steps whatsoever either to disclose their identity or to state that they held an "office" or were the "presumptive successor" of an "office holder" in the Gurdwara. Indeed on 7th April 1927, the learned counsel for the alleged agents of the appellants expressed his inability to define the status which the descendants of Guru Angad Dev, including the appellants, were supposed to have in the Gurdwara at Khadar Sahib, and he refused to give a direct answer to the question repeatedly put to him by the Tribunal whether these persons were "office-holders."

In these circumstances we must hold that the Tribunal came to a correct conclusion in confining the application of 5th July 1926, to the four applicants named therein, and in rejecting the application subsequently made on behalf of the appellants. This being our view, it is not necessary to decide the other points that arise in the case.

The appeal fails and is dismissed with costs.

D.D. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 397

ADDISON AND COLDSTREAM, JJ.

L. Kanshi Ram and *another* — Defendants—Appellants.

v.

R. S. L. Shankar Das etc. and *another* —Plaintiffs and Defendant—Respondents.

First Appeal No. 1041 of 1924, Decided on 12th January 1928 from preliminary decree of Senior Sub-Judge, Lahore, D/- 21st January 1924.

(a) *Hindu Law — Joint family — Nucleus very small—Presumption of joint family property does not arise.*

Where the nucleus proved is very small no presumption of jointness of subsequently acquired property arises. In order to raise any presumption based on family nucleus it must be shown that it was possible to have incurred the cost of the property claimed as joint, from that family source : *A. I. R.* 1926 *Lah.* 333 ; 29 *All.* 244 ; *A. I. R.* 1923 *All.* 574 and *A. I. R.* 1926 *Nag.* 389, *Foll.* [P 405 C 1]

(b) *Hindu Law—Joint family—Self acquisitions.*

There is no presumption that the members of a joint Hindu family possess their self acquisitions as joint coparcenary property.

(c) *Hindu Law—Joint family—Self acquisitions—Gains of science—Person asserting it to be not partible must prove that eduction was acquired without detriment to family property.*

All acquisitions by members of a joint Hindu family are prima facie partible and the burden of proof lies on those who assert to the contrary. The gains of science are exempted from this rule only when the education which made such gains possible is affirmatively shown to have been acquired without detriment to the family estate : *A. I. R.* 1917 *P. C.* 105 and *A. I. R.* 1921 *P. C.* 35, *Foll.* [P 407 C 1]

(d) *Evidence Act, S.* 114—*Account books not produced--Adverse inference should be drawn.*

Failure by a party to produce account books raises a strong presumption that their evidence would confirm in a conclusive manner the other documentary evidence against him. [P 410 C 2]

* (e) *Registration Act, S.* 17 — *Document referring to immovable property if not intended to be operative requires no registration.*

A document not intended to be operative, though referring to rights and interests in immovable property does not require registration. [P 411 C 1]

(f) *Benami — Hindu Law — Purchase by father in son's name should be presumed to be benami—Source for the acquisition is the criterion.*

When a purchase of real estate is made by a Hindu in the name of one of his sons the presumption is in favour of its being a benami purchase and the burden of proof lies on the party in whose name it was purchased to prove that he was solely entitled to the legal and beneficial interest in the permanent estate. The source from which the acquisition is made, is the main criterion for deciding whether the person in whose name a benami purchase is made is or is not the real owner : 6 *M. I. A.* 53 (*P. C.*) and 12 *A. L. J.* 79 (*P. C.*), *Foll.* [P 409 C 1, 2]

Muhammad Shafi—for Appellants.

Jagan Nath, Mukand Lal Puri and *Lala Fakir Chand, Moti Sagar* and *Mehr Chand Mahajan*—for Respondents.

Coldstream, J.—This judgment will dispose of five appeals Nos. 1041, 1042, 1211, 1287 and 1376 of 1924. The printed records are in four books : (1) one of 316 pages including the oral evidence produced at the trial, (2) one of 311 pages of documentary evidence, (3) one of 56 pages and (4) one of eight pages of miscellaneous records. These may conveniently be referred to as books A, B, C. and

D respectively. The circumstances from which the appeals arise are as follows :

R. B. Buta Mal, who had retired from Government service in 1902, died in June 1914, leaving four sons of whom the two elder, R. S. Mul Chand and R. S. Shankar Das, were officers in the Punjab Civil Service. The third L. Kanshi Ram, was a pleader practising in Ferozepore, and the fourth, L. Behari Lal was managing a factory and a cotton press at Kot Rai Buta Mal an estate close to Kot Radha Kishan R. S. These sons all had male descendants living ; a pedigree of the family will be found at the beginning of the judgment under appeal. For some time before Buta Mal died there had been friction between the head of the family and his sons. After his death dissensions became acute. L. Kanshi Ram was in possession of extensive immovable property in Ferozepore where he had built up a remunerative legal practice and Behari Lal claimed as his own separate property, a valuable area of land occupied by the factory and the press and their appurtenance at Kot Rai Buta Mal. It was round the claims of these two sons that the conflict centred. There was a conference in April 1915, resulting in a statement of her views on the matter by Buta Mal's widow but this failed to avoid the litigation threatening, and in June 1916, Shankar Das, his four sons and five grandsons instituted a suit for partition in Lahore against all the other male descendants of Buta Mal and one Har Charan Das, to whom Kanshi Ram had mortgaged land at Ferozepore. Subsequently Harcharan Das was struck off the list of defendants and Buta Mal's widow was added to the list with the approval of all the parties.

In their plaint as finally amended, after stating that the parties were members of a joint undivided Hindu family, descendants of the common ancestor Buta Mal, and describing in detail the property of which Buta Mal had died possessed, and all that property in possession of his descendants at the time of his death which was claimed to be joint of the family and partible between the parties as survivors of Buta Mal the plaintiffs prayed that the property described and any other property in possession of any other party discovered to be joint be partitioned so far as the Court could decree partition. As regards property partible only by a revenue Court they prayed for a declaration of title. Besides property about which there is no dispute, the plaintiffs list included a house and a stable occupied by Kanshi Ram in Ferozepore city, an area of 151-1/20 Kanals in Kot Rai Buta Mal including the factory and cotton press, 740-7/20 Kanals of land in Ferozepore in possession of Kanshi Ram, moveable property in possession of Behari Lal at Kot Rai Buta Mal worth Rs. 7,950, income amounting to Rs. 80,000 stated to have been withheld by Behari Lal, being rent and profit derived from the land, houses and the cotton press and Mill at Kot Rai Buta Mal and from land in Lyallpur District and houses at Amritsar, the income of Kanshi Ram derived from his practice as a preader and from land in his possession in Ferozepore, the professional income of Kanshi Ram's engineer son, Bashi Ram who, it was alleged, had been educated in England at the expense of the coparcenary and the nuptial gifts received from the family by Bashi Ram.

The defendants all admitted that they and the plaintiffs were a joint Hindu family. Mul Chand, the eldest son, who also pleaded for his minor son Mehr Chand, admitted further that all the immovable property listed was joint and partible and that he and Kanshi Ram had formerly been in the habit of handing over their surplus income to their father as head of the family ; it was objected that Shankar Das, the plaintiff, had withheld his own salary and part of the income from the lands at Lyallpur and should be held accountable to the coparceners for his savings and the income in Lyallpur ; provided that a sum of Rs. 10,000 was set aside for his son Radha Kishan in accordance with an alleged previous agreement between the parties to enable him to start a business of his own. Mul Chand agreed to a partition of the property in possession of the parties including the professional income of Lala Kanshi Ram and his son Bashi Ram, the land at Ferozepore which he declared had been purchased by Buta Mal " for the family," and the income from the property at Kot Rai Buta Mal and elsewhere withheld by Bihari Lal.

Kanshi Ram and Bashi Ram denied that the property possessed by Buta Mal's sons was all coparcenary property. To

the property of Buta Mal, which had been acquired by him and had been his exclusively, his sons were entitled to succeed not as survivors but only as heirs. Kanshi Ram and his sons possessed no immovable property which was joint of the family and the house and lands in Ferozepore belonged to Kanshi Ram exclusively. Kanshi Ram's and Bashi Ram's income did not form part of the coparcenary family property because the expenses of their education had not been met from joint funds. Nor had Bashi Ram's marriage been paid for by the family as it ought to have been. As regards the factory and press at Kot Rai Buta Mal Kanshi Ram and Bashi Ram admitted it to be partible as property acquired by Buta Mal. After providing for the maintenance of a daughter of Buta Mal the property which the parties had inherited jointly should be partitioned, Mrs. Buta Mal being entitled to a fifth share. It was pointed out that the plaintiffs had not proposed to put their own income and salary and the joint property in their possession into the hotchpot.

Joint pleas (printed at page 23 of Book A and page 4 of Book D) were put in on behalf of Bihari Lal and his minor son Amrit Lal, Radha Kishen (Mul Chand's son) and Radha Kishan's two minor sons, denying the existence of any joint property of the family in the lifetime of Buta Mal, the whole of whose property had been self-acquired, but admitting that all property listed in the plaint was partible between the parties as Buta Mal's heirs and his widow with three exceptions, namely, (1) the factory and press at Kot Rai Buta Mal which, along with a garden and a bungalow and other buildings appurtenant thereto these defendants claimed to be their own separate property for the income of which they were not accountable to the family, (2) the savings of Kanshi Ram and Bashi Ram from their professional savings, and (3) the nuptial gifts received by Bashi Ram, the partibility of which last two items was neither contested nor denied. If, however, the property in dispute at Kot Rai Buta Mal was held by the Court to have been joint of the family, Behari Lal and Radha Kishen were entitled to remuneration for its management and improvement (further pleas put in by Bihari Lal and Radha Kishen on the 16th February 1918). As regards the Ferozepore property, Bihari Lal and Radha Kishen denied Kanshi Ram and Bashi Ram's claim, and admitted it to be partible. Bihari Lal submitted further pleas in June 1918 alleging that the plaintiffs were barred from suing for partition in view of the results of the conference of 1915 which had been recorded in a document purporting to be the " orders of the Lady mother". The arrangements recorded were by way of a family settlement and could not be impugned now by the plaintiffs.

Mrs. Buta Mal in pleas presented on the 15th January 1918, admitted that the property listed in the plaint with the exception of the property claimed by Bihari Lal, which she declared was his exclusively, was joint coparcenary estate partible between the parties as survivors of her husband along with herself. She claimed a 5th share as well as a sum of Rs. 8,000 which she alleged had been deposited by her at interest with her husband as her stridhana. She also pleaded for the reservation of a sum of Rs. 10,000 as provision for the maintenance of Mt. Ram Rakhi, Buta Mal's widowed daughter, who, it was alleged, was also entitled to a right of residence in the bungalow at Lahore.

An attempt made by the other sons of Buta Mal in December 1919 to settle the dispute by compromise so far as it did not affect the property in possession of Kanshi Ram and his son, was frustrated by Shankar Das and litigation proceeded. In April 1921, Amrit Lal, defendant 4, minor son of Bihari Lal, applied through his maternal grandfather to be allowed to submit fresh pleadings on the ground that his father, when acting as guardian ad litem had negligently failed to put forward the plea that Bihari Lal and his son were the sole survivors of the joint family to which Buta Mal belonged because Buta Mal's other sons had separated from family during his lifetime. The Court refused to re-open Amrit Lal's case on this plea.

The following issues were struck for trial by the Senior Subordinate Judge of Gurdaspur to whose Court the case had been transferred.

1. Whether the land and buldings in Ferozepore are the exclusive property of Lala Kanshi Ram ?

2. If so, is he estopped from asserting his

rights of exclusive ownership over that property ?

3. Whether the plaintiffs cannot sue for a declaration as to the land in Ferozepore ?

4. Whether the stable at Ferozepore was gifted by R. B. Buta Mal to Lala Kanshi Ram ?

(5) If so, is the gift invalid ?

(6) Whether the factory and buildings connected therewith at Kot Rai Buta Mal are the exclusive property of Lala Bihari Lal and Radha Kishen ?

7. If not, are the plaintiffs and defendants 1 and 2 (Mul Chand and Kanshi Ram) estopped from disputing their ownership ?

8. Whether L. Bihari Lal and L. Radha Kishen are not liable to render complete accounts of all the income from rents and profits of factory, trade and produce of land, and if they are not liable to account for the income of any property what is that property ?

9. Whether L. Bihari Lal and Lala Radha Kishen are entitled to claim any remuneration for any services rendered by them, and if so to what amount ?

10. Whether the incomes of Shankar Das, Mul Chand, Kanshi Ram and Bashi Ram cannot be considered joint family property ?

11. Whether the nuptial gifts received by defendant 5 Lala Bashi Ram on his marriage can be considered joint family property available for partition ?

12. If so, are the nuptal gifts of any of the other parties not similarly liable to partition ?

13. Whether the widow of the late R. B. Buta Mal is not entitled to a share of the joint family property but only to suitable maintenance and what is the amount of the share or maintenance ?

14. What provision, if any, should be made for the maintenance and residence of Bibi Ram Rakhi widowed daughter of Rai Bahadur Buta Mal ?

15. Whether the widow of Rai Bahadur Buta Mal deposited the sum of Rs. 8,000 with her husband on interest, and, if so, when and at what rate of interest and can she claim that amount ?

16. Whether the plaintiffs have omitted any joint family property, and if so, what, and should their suit be dismissed ?

The learned Subordinate Judge of Gurdaspur decided the last issue (No. 16) on the 31st October 1919. He held that as Shankar Das had received only an ordinary education suitable to his position as a member of the family his earnings, as a Government servant must be considered to be his separate property and that in any case, as the plaint had been amended so as to allow the Court to partition any property not included in the plaint but found to be joint, the suit could proceed.

After this the case was re-transferred to Lahore where the lamentably protracted trial was concluded by the Senior Subordinate Judge on the 21st January 1924. His decision, wholly in favour of the plaintiffs, was that Rai Bahadur Buta Mal and his sons had formed a joint Hindu family possessed of a joint estate, that Kanshi Ram had irrevocably admitted the joint character of the property at Ferozepore, in respect of which the plaintiffs could sue for a declaration as Kanshi Ram's possession was merely that of a cosharer, that no gift of the stable at Ferozepore by Buta Mal in favour of Kanshi Ram was proved, that Bihari Lal and Radha Kishan had no exclusive rights in the press and factory and other property in Kot Rai Buta Mal, that the plaintiffs and the defendants Mul Chand and Kanshi Ram were not estopped from claiming a share in the factory and its appurtenances by the alleged family arrangement effected by their mother in April 1915, as this alleged settlement had not been seriously conceived and accepted but was merely a "family joke", that Bihari Lal and Radha Kishen were liable to be called upon to render accounts of their stewardship in respect of the press and mill, which were not their separate property, but had been managed by them for the family under Buta Mal's control and without establishing any right to remuneration for their services, that Mul Chand's income was joint of the family, as was that of Kanshi Ram and Banshi Ram, whose profits were gains of science resulting from special education at the family expense, that Banshi Ram's nuptial gifts received from the family as well as those of other members of the family (with the exception of those received by Shankar Das's third son Piare Lal whose marriage expenses were not defrayed from the common fund) must go into the hotchpot, that Mt. Ram Rakhi's right of residence and maintanance must be recognized, a sum of Rs. 10,000 being due to her in respect of maintenance, and that Mrs. Buta Mal was entitled to a fifth share in the partition but not to the sum of Rs. 8,000 claimed as her stridhana.

The learned Subordinate Judge accordingly passed a preliminary decree for partition and gave the plaintiffs the declaration for which they sued appointing the late Sir Ganga Ram to take accounts, carry out the partition and make the necessary adjusting payments. Bihari Lal and Radha Kishan were required to furnish accounts of the press and

ginning business from the date of Buta Mal's death up to October 1915 when the family was disrupted. After this date they would only be liable to pay compensation for their use of the factory and press up to 1st January 1919 when Bihari Lal took a lease of these properties under an order of the Court. Similarly, Kanshi Ram was to account for the income of the immovable property at Ferozepore from October 1915 onwards and Shankar Das for the income of the Lyallpur lands from the same date until he handed over the property to a receiver under an order of the Court passed in January 1919. The plaintiffs were to get their costs in the suit from Kanshi Ram and Bihari Lal.

Against this judgment we have the following appeals :

(1) The plaintiffs in appeal No. 1042 have appealed in respect of the relief granted to Mt. Ram Rakhi who was at no time a party to the suit and to Mrs. Buta Mal who was eighty years old and was, it is alleged in collusion with Behari Lal, unable to manage the property herself, and entitled merely to maintenance by the family. It is also objected by the plaintiffs that Behari Lal should have been ordered to render accounts not only up to October 1915, but up to the date when he handed over the property in his possession to the receiver.

(2) Kanshi Ram and his son (Appeal 1041 of 1924) challenge the propriety of the order in favour of Mrs. Buta Mal and the finding that the property in their possession including the lands at Ferozepore is partible. It is urged that the Court took into consideration evidence that was inadmissible and documents that had not been properly proved, wrongly rejected evidence offered by the appellants and had been inconsistent in exempting Shankar Das' income and savings from partition.

(3) Appeal No. 1287 is preferred by Lala Bihari Lal who objected to the inclusion in the hotch-pot of the factory and cotton press, their appurtenances and the bungalow and the garden at Kot Rai Buta Mal which he claimed to have been made over to him by his father for his advancement. There was, he contends, no joint coparcenary property belonging to Buta Mal and his sons, and the settlement of 4th April 1915 was not a jest but a serious arrangement which was acted upon by Buta Mal's sons on whom it was binding. In any case the plaintiffs must bring their moneys into the common fund for partition. It is also protested that much evidence has been wrongly admitted, that evidence not even admitted to the record has been relied upon and that the appellants were wrongly refused opportunity to produce evidence. To this appeal Shankar Das has filed cross-objections.

(4) The fourth Appeal No. 1211 is by Amrit Lal who urges grounds similar to those preferred by his father in appeal No. 1287 and also protests that the decree is void against him for want of the proper appointment of a guardian ad litem, his father having colluded, while he was guardian, with his uncles to the appellants' detriment.

(5) In Appeal No. 1376 Mrs. Buta Mal claims her stridhana of Rs. 8,000 with interest. Mul Chand died after these appeals were filed and his representatives have been substituted in his place on the record.

I dispose of first this last mentioned appeal by Mrs. Buta Mal. The question is simply one of fact and was dealt with by the learned Sub-Judge summarily with the remark that no serious attempt had been made to prove that Mrs. Buta Mal had deposited Rs. 8,000 with her husband at interest. In support of his clients' appeal Mr. Kishen Dial relies on Cl. (9), of the "Orders of the mother" of 4th April 1915 which is :

> Bihari Lal knows about the money in cash of Bhabo Ji and Bibi Ji. At first that will be given.

Bhabo Ji was admittedly Mrs. Buta Mal. Mr. Kishen Dial contends that this evidence corroborated by that of a document printed at pp. 275-278 of paper book B, which Mr. Kishen Dial alleges to be the transliteration of an account, kept by Buta Mal between 1st March 1892 and 31st March 1912, recording sums credited to Mrs. Buta Mal during that period and interest accruing on them.

Neither the document nor the correctness of its contents had been proved. Mul Chand and Kanshi Ram admitted that the signature at the end of the original document and some initials thereon were those of their father but questioned the genuineness of the entries which were in a script not understood by

them. Mrs. Buta Mal was not questioned about her claim when she went into the witness-box on 9th March 1917. It is obvious that Mrs. Buta Mal's claim is not established by this evidence, which is all that is put forward by Mr. Kishen Dial, and her appeal must, therefore, be dismissed.

Mr. Kishen Dial who appears for the appellant Amrit Lal does not press appeal No. 1211. There is no basis in the record for the supposition that Bihari Lal who contested the suit streneuously throughout did not act in the interests of his son to the best of his ability and Mr. Kishen Dial has acted wisely and properly in withdrawing this appeal which is accordingly also dismissed.

Before proceeding to deal with the remaining appeals it will be useful to note the following dates which are of importance in this case. Of Buta Mal's grandfather we know nothing certainly, except that his name was Karam Chand. His father Atma Ram is alleged by the plaintiffs to have belonged to Kasur in Lahore District and to have migrated to Amritsar where he carried on business and where Buta Mal, his only son, was born in 1844 or 1845. Buta Mal entered Government service and became a school master and subsequently a Naib-Tahsildar in Ferozepore in 1862 where he was joined by his father.

In 1866 a small area of 290 square yards (approximately 12 marlas) of land in Ferozepore was bought for Rs. 38, (with Buta Mal's money according to Kanshi Ram), and in 1868 and 1869 mortgage rights in two houses were secured, the deeds showing Atma Ram as purchaser and mortgagee. Atma Ram died in Ferozepore in 1872. In 1873 Buta Mal brought the two mortgaged houses. In 1884 Mul Chand entered Government service as a clerk being then 23 years old. In 1896 Buta Mal began to buy land near Kot Radha Kishen railway station, so laying the foundation of the estate containing the factory and cotton press. By 1893 the factory had been completed and in 1895 Bihari Lal then nineteen years old was sent there to work. Meanwhile in 1891 or 1992 Shankar Das, then about 29 years old had entered Government service and Kanshi Ram who was six years younger had started practising as a pleader in Ferozepore. In 1892 Buta Mal gave Kanshi Ram the houses in Ferozepore of which he had bought the equity of redemption in 1873. On this site Kanshi Ram built his house and stable. In 1895 Buta Mal made over the land, brought in Ferozepore in 1866 for Rs. 38, to Kanshi Ram who having been thus enabled to defeat pre-emptors purchased more land. In 1904 a cotton press was added to the factory. Shortly after Rai Buta Mal died in 1914, Kanshi Ram had the agricultural lands in Ferozepore recorded in the revenue records by mutation as the property of all four sons of Buta Mal in equal shares. On 4th April 1915 there took place the family concert resulting in the alleged settlement by Mrs. Buta Mal. These "orders" alloted the factory, press and their appurtenances to Bihari Lal who was, however, to admit Radha Kishen to a fourth share, but made no mention of the property at Ferozepore. The document was signed by all the four sons of Buta Mal.

I come now to deal with the appeal of Kanshi Ram (No. 1041). (The judgment then referred to the pleadings of the parties and proceeded.) From these pleadings it appears to be clear that the case set up by the plaintiffs, backed by the defendant Mul Chand, was that the property acquired by Buta Mal and his sons was joint family property of a coparcenary of which they were members because its acquisition was made possible by the existence of nucleus of ancestral property in the hands of Buta Mal; and that the mutation proceedings in respect of the Ferozepore lands were evidence, as proving an admission by Kanshi Ram, of the fact that those lands were not his separate property but had always been joint of the family.

In support of this case the plaintiffs attempted to prove that the sons of Buta Mal contributed part of their savings to a common fund and that they constituted a joint family holding all the property in the hands of its members as joint coparcenary estate. But, in coming to his finding that the plaintiff's case was established, the learned Subordinate Judge has made certain remarks which, it is now argued, indicate an opinion that whether there was or was never a nucleus of ancestral property in Buta Mal's possession, which was the germ of the alleged coparcenary estate, a joint co-

parcenary came into existence by the blending of the incomes first of Atma Ram and Buta Mal and then of Buta Mal and his sons. He has for instance remarked :

> The important facts to remember are that R. B. Buta Mal blended his income with the income derived from the property left by Lala Atma Ram and thus created a joint family estate (p. 279 of Book A).
>
> If it is assumed that the nucleus of ancestral property in the hands of Rai Bahadur Buta Mal was negligible and that he was sole master of his own earnings, then it cannot be said that Lala Kanshi Ram received his education at the expense of any joint family funds. But it is clear beyond doubt that R. B. Buta Mal created a coparcenary body making all his sons bring all their savings into a common chest (p. 290) ;

and again

> it has been held that there was considerable nucleus of ancestral property which R. B. Buta Mal blended with his own income and thereby created a joint family estate (p. 289).

It is on these remarks that Sir Muhammad Shafi, counsel for Kanshi Ram, bases his first attack upon the plaintiffs' case as it now stands, urging strenuously that, as there was no allegation in the plaintiffs' pleadings, substantive or alternative, that Buta Mal and his sons created the alleged coparcenary by contributing their incomes or blending their property, an allegation which would have been inconsistent with the plaintiff's pleadings that Atma Ram and his sons were already a joint Hindu family possessed only of joint property, that Buta Mal succeeded to ancestral joint property by survival, that Buta Mal's acquisitions were subsequently made with the help of the nucleus and that the expenses of his son's education and the money for Kanshi Ram's acquisitions came out of joint family funds, therefore, plaintiff's suit must fail, so far as Kanshi Ram is concerned, if the case described above as set up by the pleaders is not established, even if some proof be found of the creation of a joint coparcenary estate including the disputed property either by blending of property or income or the contribution of saving into a joint family fund.

Sir Muhammad Shafi has cited in this connexion an array of important rulings laying down the principles that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case made thereby. *Eshen Chunder Singh* v. *Shamacharan Bhatto* (1) cited in *Mylapore Iyasawmy Vyapoory Moodaliar* v. *Yeo Kay* (2) and by the Punjab Chief Court in *Ali Gauhar Khan* v. *Muhammad Hussain* (3) that a new case is not to be substituted for the one set up in the pleadings, *Durga Bakhsh Singh* v. *Muhammad Ali Beg* (4), and that a party is not entitled to rely on evidence supporting a case not consistent with the pleading, *Ram Rakha Mal* v. *Devidas* (5), although his pleadings may be amended, *Pool* v. *Secretary of State* (6). In reply Mr. Jagan Nath for the plaintiffs contends first that the plaintiffs' claim from the beginning until now has been that there was a joint family in Buta Mal's time whose members owned a joint coparcenary, that there was no necessity for them to give in detail the processes by which this coparcenary was created, that its creation by conduct of the sons was suggested in para. 2 (i) of the replication (at p. 31 of the Book A) where it was stated that Shankar Das did as a matter of fact give his savings after deduction of expenses to his father, and in the statement of 6th May 1918 before issues were struck, where Shankar Das stated that Buta Mal acquired the Ferozepore property "from joint family money" and that he, Shankar Das, used to make over his savings to his father as a member of the joint Hindu family (p. 56 of Book A). In the second place Mr Jagan Nath contends that there is ample authority for not enforcing the principles relied on by Sir Muhammad Shafi in cases like the present one where the defendants were certainly not taken by surprise or hampered, and evidence was fully taken. He has referred us to a number of rulings in which variation between pleadings and proof have not been regarded as fatal.

In *Karson Das Dharamsay* v. *Gangabai* (7) the Bombay Court overruled a somewhat similar objection in a case resembling this one (though the pleas raised originally appear to have been much

(1) [1866] 11 M. I. A. 7=6 W. R. P. C. 57.
(2) [1887] 14 Cal. 801=14 I. A. 168=5 Sar. 50 (P. C.).
(3) [1888] 159 P. R. 1888.
(4) [1905] 27 All. 1=7 C. C. 287=31 I. A. 235 =8 Sar. 725 (P. C.).
(5) [1905] 89 P. R. 1905.
(6) [1886] 68 P. R. 1886.
(7) [1908] 32 Bom. 479=10 Bom. L. R. 184.

more definite than those in the present case). In *Ram Nand Chatterjee* v. *Kusum Kamini Debi* (8) a suit for partition of ancestral joint property, the plaintiff had alleged that certain properties were acquired by his grandfather, who was also the grandfather of the defendants but the case as developed in the evidence was that the properties were acquired by the plaintiffs' father as karta with joint family funds. This variation was held not to justify a dismissal of the claim in respect of those properties. This ruling was followed in *Kumudini Dassya* v. *Mukta Sundar Dassya* (9). An interesting review of the case law on the point will be found in *Ananda Chandra* v. *Braja Lal Singh* (10).

The truth in this case appears to me to be that the plaintiffs came into Court with a very vague notion of the distinct facts on which they proposed to rely, and when pressed for elucidation they did not clearly put forward the case that the alleged coparcenary holding all its property jointly came into existence by an intentional blending of their property by the members of the family or the creation of a joint fund to which they contributed their savings. The questions whether the family formed a coparcenary, the members of which held their property in common and how it came into existence were not put expressly in issue, and there is no doubt that the plaintiffs did allege, in support of their claim to share in the properties in dispute, the fact that the members of the family did contribute some of their property—their savings—to a fund controlled by their father, and evidence relating to this allegation was produced by the parties. Such evidence was certainly relevant to prove the existence of the joint property of which partition was claimed. Having regard to these circumstances, the form in which issues were struck for trial and the principles laid down by the authorities cited by Mr. Jagan Nath, I have examined the whole of the evidence to decide whether the lower Court was correct in its conclusions that Buta Mal and his sons held the property in dispute as joint of the family. As I have found for reasons given in this judgment that no such blending or contribution took place as would make this property joint, the point taken by Sir Muhammad Shafi need not be considered further.

As it will now be necessary continuously to examine in detail the oral evidence in the case, a general observation as to its nature will not be out of place here. It consists for the most part of the depositions of the defendants from whose admissions the plaintiffs attempted to prove their case. It is, therefore, mostly tainted by self-interest. It is prevaricating, often unconvincing and to be accepted with caution except when corroborated by documentary, circumstantial or disinterested parol evidence. In considering it two important features have, however, to be borne in mind : one is that Shankar Das who conducted the suit never himself went into the witness-box and the other is that the evidence of Mul Chand, in consultation with whom the suit was launched, who was siding with the plaintiffs, supplied them with documents and appears to have been used as their mouthpiece in Court, carries, in view of these facts, considerable weight when it does not directly support the plaintiffs' case.

According to the case set up by the plaintiffs in their evidence the nucleus of ancestral property inherited by Buta Mal consisted of : (1) money earned by Atma Ram and Buta Mal in joint business in Amritsar and Ferozepore ; (2) two shops in Kasur and (3) a small plot of land and mortgagee rights in two houses in Ferozepore. (The judgment then discussed evidence and concluding that the only ancestral property proved to have been inherited by Buta Mal was a share in a small house in Amritsar and one shop or possibly two shops in Kasur, property incapable of yielding an income sufficient to maintain Atma Ram, proceeded.)

It may now be considered as settled law that it is necessary to establish the existence of a nucleous of joint family property before the property in the possession of any one member can be presumed to be joint property (Mayne's Hindu Law, 9th edition para. 290.)

But the proposition on which Mr. Jagan Nath here takes his stand is that if there is joint Hindu family with an ancestral nuclous of joint property, however small, the onus of proving that any particular item of property, alleged to be joint is separate, lies upon the person asserting that it is so, and this onus

(8) [1906] 4 C. L. J. 56.
(9) A. I. R. 1925 Cal. 257.
(10) A. I. R. 1923 Cal. 142=50 Cal. 292.

has not, he urges, been discharged. Reliance is placed on *Mahadeo Kasaudham* v. *Gaya Din Kasandhan* (11), *Moti Lal* v. *Harji Mal* (*A. I. R.* 1926 *Nagpur* 146) and *Sukhnandan* v. *Brijnandan* (*A. I. R.* 1923 *All.* 574.) The first of these judgments cited certainly laid down broadly the principle asserted by Mr. Jagan Nath and held that in that case the onus had not been discharged. The second dealt with a case upon grounds not to be found in the one before us now. In the third case the Allahabad Court, while remarking that property which was incapable of yielding any income might not be treated as a nucleus for the purpose of affecting the presumption as to subsequent acquisitions, held that there was in the case before it a nucleus consisting not only of an ancestral house but of an ancestral business and that the onus lay on the party who claimed as his own property acquired mainly by his exertions to prove his case.

It is urged by Sir Muhammad Shafi (and here Mr. Moti Sagar for Bihari Lal is with him) that the mere proof of the existence of some nucleus, however small, would raise no such presumption as that contended for by Mr. Jagan Nath and that until the plaintiffs could prove that the nucleus in this case was substantial, and such as could be used, and was used, for the acquisition of the property in dispute, the onus of proving that this property is partible was still upon them, that this onus has not been discharged and that in any case if the onus lay upon Kanshi Ram to show that the property he claims as his own is separate, he has discharged it.

The point of presumption was decided by this Court in *Iqbal Singh* v. *Jang Bahadur Singh* (12) in which case, after reference to *Lal Bahadur* v. *Kanhaya Lal* (13) and *Sukhnandan* v. *Brij Narain* (*A. I. R.* 1923 *All.* 574) it was held that as the nucleus proved was very small no presumption of jointness of subsequently acquired property arose. The onus of proof in such cases must depend upon the circumstances of that particular case : *Trailakyanath Char* v. *Chintamony Dutt* (14). The question of onus was considered at length by the Nagpur Judicial Commissioners in *Birdi Chand Lal* v. *Popat Lal* (15) which cited many of the rulings placed before us. The lower Court had in that case held that in order to raise any presumption based on family nucleus it must be shown that it was possible to have incurred the cost of the property claimed as joint from that family source. This view was confirmed by the Judicial Commissioner who remarked that where some nucleus has been established

> the matter does not and could not rest there, and the lower Courts were legally entitled to take the smallness and the apparent insufficiency of the nucleus into consideration in deciding whether the presumption (in favour of jointness) was amply rebutted in view of the evidence read as a whole, and to come to the conclusion whether the cost could have come out of it and whether as a matter of fact the family nucleus was taken in making the new acquisition.

Adopting this view of the law my opinion is that the extent and value of the nucleus proved to have existed in this case were not such as to raise the presumption relied on by Mr. Jagan Nath, but on the contrary were such as to make it impossible that Buta Mal's acquisitions were made with its help. The ancestral property being incapable of being considered as the germ from which the estate possessed by Buta Mal expanded that estate must be deemed to have been acquired by Buta Mal by himself and for himself as full owner.

I come now to the question whether there was any such blending of property or income as created a common fund of property, monetary or other, of which the acquisitions of Buta Mal and his sons must be considered to have become a part. As regards blending of his property and business by Buta Ram and his father, proof that a common business was carried on with such blended funds has been found by the lower Court only in the account book which has now been excluded from the evidence. This part of the case, therefore, calls for no further consideration. It has been made sufficiently clear in this judgment that the plaintiffs never alleged clearly in their pleadings the creation of a joint coparcenary by blending of any kind between the members of the family. Nor has it at any time been alleged that any pro-

(11) Second Appeal No. 1020 of 1923 decided on 20th April 1926.
(12) A. I. R. 1926 Lah. 333.
(13) [1907] 29 All. 244=34 I. A. 65=4 A. L. J. 227 (P. C.).
(14) A. I. R. 1926 Cal. 813.
(15) A. I. R. 1926 Nag. 389.

perty was acquired jointly with the intention of making it joint of the members who acquired it or of all of the coparceners. This is not a case of an ancestral family firm or business or of a large immovable ancestral estate to which the presumption of the Hindu law of property would be clearly applicable. The family on the contrary was of the typical Punjab Hindu family, not joint in food or worship, described in the last paragraph on p. 356 in *Rup Chand* v. *Basanta Mal* (16) to which the presumptions of Hindu law are indeed applicable but with a force less general and rigid than in the other provinces : See also the remarks in *Muharrim Ali Chishti* v. *Bansi Lal* (17).

The learned Subordinate Judge's emphatic finding that Buta Mal and his sons constituted a joint Hindu family whose members held these properties in common is, so far as I understand his intention, based on the evidence, first, of the existence of the alleged germ in the form of a nucleus of ancestral property and, secondly, of the conduct of Buta Mal and his sons which in his opinion proved that this coparcenary existed throughout Buta Mal's life. "It is clear beyond doubt" he says,

> that Rai Bahadur But Mal and his sons formed a joint estate and every one fully recognized the position and did what he could to enrich and agument the family estate (p 280).

Mr. Jagan Nath has not pointed to any evidence suggesting a deliberate creation at any particular time of a coparcenary holding all its property jointly. "The question," he says, "is not of blending but whether the parties kept their property separate".

There is no evidence of any mutual agreement by the members of the family to end a pre-existing state of affairs and to throw their separate acquisitions into a family hotchpot or create a new family fund by contributing the earnings. The lower Court has rightly found that as a matter of fact the plaintiff Shankar Das did not contribute his earnings to a common fund. There is no presumption that the members of a joint Hindu family possess their acquisitions as joint coparcenary property and in view of the finding I have come to on the matter of nucleus the question whether the parties were joint owners of the disputed property might, I think, be properly determined against the plaintiffs forthwith. But the case which Mr. Jagan Nath has adopted in support of the judgment before us appears, if I understand him rightly, to be that the evidence proves that, nucleus or no nucleus, the parties as a matter of fact did form a joint family with joint coparcenary property, however created, that they recognized and admitted the existence of this coparcenary and its joint property and did enrich it from time to time by contributions from their savings and additions to it of their separately acquired property. It is, therefore, necessary in view of the decision upon Sir Mohammad Shafi's preliminary objection on the pleadings to examine the whole evidence and decide whether it establishes the facts upon which Mr. Jagan Nath takes his stand. (The judgment then discussed the evidence and proceeded.) There are only four ways in which a joint Hindu family holding as joint coparcenary all the property possessed by its members can be proved to have come into being: (1) by showing that ancestral joint property existed in the hands of the karta and was used by him for further acquisitions for the family, (2) by showing that a joint family as such jointly acquired property, (3) by proving that the property acquired by a member was intentionally acquired for the family and (4) by the blending of their property by the members for the creation of a joint fund or a family hotchpot of property.

There is nothing in any of the authorities cited before us by Mr. Jagan Nath to warrant the supposition that a joint family holding all the property in the hands of its members as joint of the family can be created in any other way.

I have, I think, surveyedwith sufficient detail the evidence on which the lower Court appears to have decided that Buta Mal and his sons were a joint family holding all their acquisitions and earnings as joint family property. The plaintiffs on whom the onus lay of showing that a substantial nucleus of ancestral property or a joint fund or property joint of the family existed have not themselves faced the Court to rebut the direct evidence of Kanshi Ram and Bihari Lal. That evidence, cannot, as already remarked, be regarded as of the most reliable kind, but, after making all allowances for the taint of personal interest

(16) [1889] 102 P. R. 1889.
(17) [1919] 34 P. R. 1919=51 I. C. 121.

and bearing in mind the shifting attitude of the parties towards each other both before and after the suit was instituted, my conclusions are that the parties and their father neither inherited a germinal nucleus of ancestral property to which their acquisitions could be traced nor made any acquisitions for the joint benefit of the family nor intentionally at any time blended their property or earnings in order to create a joint family whose members held their acquisitions in common, and that Buta Mal was a self-made man who jealously and properly regarded the property acquired by him as his own.

Assuming, however, that the parties and their father did constitute a joint family posessing a joint fund, or some joint property traceable to an ancestral nucleus, or otherwise brought into being, it is clear, I think, that Kanshi Ram's acquisitions must be held to be his own separate property. These acquisitions were paid for out of Kanshi Ram's professional earnings with the help of money borrowed from outside the family.

The ordinary gains resulting from education at the expense of joint funds of a Hindu family are no doubt partible. The principles followed in the more recent cases decided by the Privy Council on the subject *Metharam Ramrakhiaomal* v. *Rewa Chand Ramrakihiomal* (18) and *Amar Nath Gopal Chand* v. *Hukam Chand Nathu Mal* (19) are discussed in paras. 283 and 284 of Mayne's Hindu Law, 9th Edition. In the latter case their Lordships after reviewing the whole case-law laid it down that all acquisitions by members of a joint family are prima facie partible and the burden of proof lies on those who assert to the contrary, and that the gains of science are exempted from this rule only when the education which made such gains possible is affirmatively shown to have been acquired without detriment to the family estate.

I have already referred to the statement made by Buta Mal in a civil Court in 1896 regarding Kanshi Ram's exclusive title in the lands at Ferozepore.

Kanshi Ram's own testimony (p. 100 of Book A) is that his school-fees were never more than Rs. 2-8-0 per mensem. When he passed his "Middle School Examination" he won a scholarship of Rs. 5/- per mensem which his father took from him. After passing the University Matriculation Examination he took a scholarship of Rs. 10/- p. m. As soon as he passed the Mukhtar's examination he began practising in the Lahore Court attending lectures at the same time and renting lodgings at Rs. 2-9-0 per month. He passed the Pleader's examination 11 months later and then started practice in February 1891 and maintained himself entirely having full control over his earnings. I do not find in this evidence justification for the learned Sub-Judge's finding that Kanshi Ram received a "special professional education, and that at the expenses of the family estate" but rather that his school education was ordinary and his professional education was not paid for either by his father or out of any family fund. The circumstances are obviously entirely different from those in *Amar Nath Gokal Chand* v. *Hukam Chand Nathu Mal* (19) where there was a joint ancestral business and the son who claimed the earnings to be his separate property failed to depose at the trial that his specialized education in England was obtained by his own self-taught efforts.

Bashi Ram's earnings must also be held to be impartible for it is proved that his education, though of a special kind, was paid for by his father and not out of any joint fund.

On all these findings, that there was no substantial nucleus of ancestral property by the aid of which Buta Mal's acquisitions were made, that, therefore, these were his own, that he and his family did not form a joint Hindu family holding all its property jointly as copercenary property, that Kanshi Ram's earnings and acquisitions were his own, that he never threw them into a family hotchpot but kept them separate, Kanshi Ram's and Bashi Ram's appeal must succeed and the property claimed by them as their separate property excluded from partition. Mr. Jagan Nath for the plaintiffs had stated that his clients do not ask for partition of the nuptial gifts received by Bashi Ram or any other member of the family and counsel for the appellants have agreed

(18) A. I. R. 1917 P. C. 105=45 Cal. 666=45 I. A. 41 (P. C.).
(19) A. I. R. 1921 P. C. 35=2 Lah. 40=48 I. A. 162 (P. C.).

to the exclusion from partition of all such gifts.

I come now to the appeal by Bihari Lal, No. 1287, praying for the exclusion from partition of the factory and press, their appurtenances, and a bungalow and garden in Kot Rai Buta Mal revenue estate at Kot Radha Kishan Station.

Embarrassed as he was by the fractural manœuvering that preceded the litigation the choice of a defence to the plaintiffs' claim to a partition of this property appears to have perplexed Bihari Lal no less than the difficulty of stating their case troubled the plaintiffs.

His first claim set forth in his written pleas of 19th May 1917 (printed in Book D) was limited to the factory and press, the machinery, buildings and houses appurtenant thereto, a bungalow and a garden which were declared to belong to himself, his minor son Amrit Lal, Mul Chand's son Radha Kishen and Radha Kishen's two minor sons. In an affidavit put in on 17th November 1913 he affirmed that the factory and press were the exclusive property of himself and Radha Kishan. In her pleas of 16th February 1918 Mrs. Buta Mal who obviously favoured her youngest son declared Behari Lal to be the sole-owner of this property and the same declaration was made by Bihari Lal in a petition presented to the Court on 4th March 1918. It was not until he was examined with a view to the striking of issues on 6th May 1918 that Bihari Lal defined his share in the property as two-thirds, the remaining one-third being allotted to Radha Kishan. It was then he put forward the plea that the property had been made over to him in 1894 or 1895 by Buta Mal by way of advancement as a provision for his maintenance and that Radha Kishan "came in" later on. On 8th November 1922, after the plaintiffs had amended their plaint to correct an error of description, Bihari Lal took the opportunity to amend his pleas in order to claim a very much more extensive area of urban property than he did at first, and to claim it "in sole ownership" as his self-acquired property. When giving evidence on 4th May 1923 he claimed "all the urban property at Kot Radha Kishan" (much more, that is to say, than the factory press and their appurtenances).

The issue struck for trial was :

whether the factory and buildings connected therewith at Kot Radha Kishan are the exclusive property of Lala Bihari Lal and Lala Radha Kishan ?

In his appeal Bihari Lal has claimed as his own separate property the whole "urban area" at Kot Radha Kishan but Mr. Moti Sagar states that his clients' appeal relates only to the factory, the press and their appurtenances—the area claimed is marked by a surrounding red line in the plan Exhibit p. 11 covering an area of 7 ghamaons approximately—together with the garden and the bungalow, the bungalow being the residence of his client who was the manager, and the garden its compound.

Radha Kishan has not appealed. The obscurity surrounding the basis of his claim, one of the results of the uncertainty of Bihari Lal's position, Mr. Moti Sagar has not been able to dispel. He states, however, that Bihari Lal claims to be joint undivided owner of two-thirds and admits Radha Kishan's title to a share of one-third. He asks for a decree to that effect which it is in our power to grant under the provisions of O. 41, 33, Civil P. C. In this respect he is joined by Mr. Fakir Chand who appears for Radha Kishan as a respondent to all the appeals.

The case now put forward by Mr. Moti Sagar is that the evidence proves that Buta Mal bought the factory for his son as an advancement to provide him with an independent livelihood. If, however, this case is not found to be established Mr. Moti Sagar's contention is that in any case it is proved that there was a family settlement, or such conduct of the family as amounted virtually to a settlement, by which the property in dispute was made over to Bihari Lal—an arrangement which was acted upon and is irrevocable. This settlement he says, is evidenced by the recorded "orders of the lady mother" of 1915 and the parties' conduct at and about that time.

The site of the factory was acquired by Buta Mal in 1886. The superstructure was built in 1891-92 by a partnership, ostensibly between Bihari Lal and a Parsee, Bapuji, who mortgaged the factory to Mr. Awar Bai, on 15th July 1892, by registered-deed for Rs. 8,000. Bihari Lal was then 16 years old and his father still a District Judge in Government service. The factory was leased in 1893 to Asmat Ullah, Bihari Lal being

disclosed as lessor. The partnership "fell through" and the factory was leased again ostensibly by Bihari Lal to Jahangir Jee Sorabjee. The mortgage was redeemed on 30th March 1895, with a cheque for Rs. 2,000/- drawn by Buta Mal, a hundi for the same amount and a bond for Rs. 4,000/-. Bihari Dal declares that he himself paid off the hundis (we do not know more about the bond). In 1895 Bihari Lal was removed from College being then in his second year, and sent to work in the factory. In the following year a partnership deed was drawn up between Bihari Lal and a number of "experienced business-men" (so styled by Kanshi Ram) Joti Mal and others, including, a Kanshi Ram, who was not the appellant. The factory was rebuilt. This partnership was dissolved, the other partners being bought out, according to Bihari Lal, by himself with help from his father who contributed Rs. 10,000 or Rs. 15,000 but, according to Kanshi Ram, by Buta Mal. This was in 1897. The factory continued to be run at a loss and was closed for two years. About this time Radha Kishan, who had failed to obtain a University degree was sent to join Bihari Lal at the factory. In 1904 the cotton press was added. Bihari Lal says he paid the cost of it, borrowing Rs. 20,000 from the Punjab Banking Company jointly with his father. Thenceforward Bihari Lal and Radha Kishan managed the factory, for themselves according to them, or for the joint family, according to plaintiffs, and for Buta Mal according to Kanshi Ram.

The principle of Hindu law laid down in 1854 in *Gopeekist Gosain* v. *Gunga Pershad Gosain* (20) and repeated by their Lordships of the Privy Council in *Parbat Devi* v. *Baikuntha Nath Das* (21) that when a purchase of real estate is made by a Hindu in the name of one of his sons the presumption is in favour of its being a benami purchase and the burden of proof lies on the party in whose name it was purchased to prove that he was solely entitled to the legal and beneficial interest in the permananent estate, has never been definitely dissented from. It was applied in the Punjab by the Chief Court in *Ghulam Dastgir* v. *Teja Singh* (22). These and other important rulings approve the source from which acquisition was made as the main criterion for deciding whether the person in whose name a benami purchase is made is or is not the real owner. Mr. Moti Sagar, while conceding that the source of the purchase money which admittedly was in this case supplied by Buta Mal, is one of the criteria, urges that it is not the sole one (and this has frequently been expressed by the Courts) but that the surrounding circumstances in the present case afford evidence amply sufficient to rebut the presumption.

He cites *Raj Kunwari* v. *Maharaj Kunwar* (23), where in referring to the general rule as to the criterion laid in *Gopeekrist Gosain* v. *Ganga Parsaud Gosain* (20), the Oudh Judicial Commissioner's Court found an "important qualification" of the rule as quoted by the Privy Council in *Bilas Kunwar* v. *Des Raj Ranit Singh* (24), namely that the rule applied only in the absence of all other relevant circumstances. The Oudh judgment goes on to quote from *Mahbub Ali Khan* v. *Bharat Indu* (25).

> *Benami* transactions are very familiar in Indian practice, and as Lord Hobhouse said in *Uman Parshad* v. *Gandharp Singh*, even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose . . . . Such a (*benami*) transfer cannot be considered as nothing, the person who impugns its apparent character must show something or other to establish that it is a *benami* or sham transaction.

Mr. Moti Sagar has also referred us to *Panton* v. *Administrator General, Bombay* (26), but that was not decided according to Hindu Law, and *Harihar Prasad Singh* v. *Kesheo Prasad Singh* (27) where, however, the general rule of presumption in favour of the person who supplied the purchase price was accepted "But" as remarked by Miller, C. J., in that judgment,

> apart from the fact that the presumption is rebutted its strength or weakness can only be guaged by reference to all the surrounding circumstances.

(20) [1854] 6 M. I. A. 53=4 W. R. P. C. 46=2 Suther 13=1 Sar. 493 (P. C.).
(21) [1914] 12 A. L. J. 79=22 I.C. 51=16 Bom. L. R. 101 (P. C.).
(22) [1918] 73 P. R. 1918=47 I. C. 367=159 P. W. R. 1918.
(23) A. I. R. 1925 Oudh 243.
(24) A. I. R. 1915 P. C. 96=37 All. 557=42 I. A. 202 (P. C.).
(25) [1919] 23 C.W. N. 321=53 I. C. 54=(1919) M. W. N. 507.
(26) Civil Appeal No. 15 of 1925 decided on 10th September 1925.
(27) A. I. R. 1925 Patna 68.

The question of initial presumption is not, however, of great importance in the present case. Both sides have produced evidence and we have to consider it in order to decide not merely how far the presumption is supported by the circumstances of the time but also whether the evidence as a whole proves that the factory, its appurtenances and business were made over to Bihari Lal, or as a fact remained Buta Mal's property until his death.

The circumstances to which Mr. Moti Sagar points as proving conclusively Buta Mal's intention to make over the property in dispute to the appellant were these.

Mul Chand had been safely launched upon an official career. In 1899 he was drawing Rs. 80 per mensem as a clerk in the Financial Commissioner's Office. Kanshi Ram had started practice as a pleader in 1891 and in 1892 Shankar Das obtained his first official appointment as overseer of Crown Land (Darogha Nazul) at Lahore. Bihari Lal alone remained unprovided with a career. Buta Mal was well off and passing middle age. It would have been natural enough and in accordance with custom for him to start his youngest son upon an independent business career and for this purpose make him a separate allotment of property. Bihari Lal was still at his studies. These were cut short to his own detriment so far as professional prospects were concerned, and he was sent to take charge of the property allotted to him before he was twenty years old. Where the evidence limited to that of these circumstances it might perhaps be held to have discharged the onus upon Behari Lal. But the mass of evidence through which we have been taken in detail by Mr. Moti Sagar and counsel for the plaintiffs appears to me to disprove the case of advancement and to show that while the other sons broke away from their father on their independent careers, although remaining members of the joint Hindu family, Bihari Lal, unfortunately as it turned out for himself, stayed along with his father and was employed by him to manage under his control the factory and press which belonged to and were financed by Buta Mal until the latter died.

These are in fact the conclusions at which the learned Subordinate Judge has, after reviewing the evidence at length, himself arrived. In his opinion it was proved beyond doubt that the factory was started by R. B. Buta Mal, was worked under his control and supervision by L. Bihari Lal and latterly by Bihari Lal and Radha Kishan, was financed by R. B. Buta Mal, as long as he lived

and the evidence

indicated clearly that R. B. Buta Mal was the master of the factory and not L. Bihari Lal.

(The judgment then discussed the evidence and proceeded). Now the best evidence that Behari Lal could have produced to prove that the factory and press were his own concern and property, as he claimed them to be, would have been forthcoming in the accounts of the business carried on there. In his pleadings he relied upon these account books, though he was, from the beginning, apparently, doubtful of the wisdom of producing them, for in the list of documehts put in on 21st June 1917, we find the words "except those which were burnt". These words were, however, deleted deliberately by his counsel whose signature is on the erasure in the original document. He was ordered by the Court to specify the books and on the application of the plaintiffs a notice for production of the factory accounts was passed under O. 11, R. (14), Civil P. C. He protested on the grounds that their production would be inconvenient for the business and that the application was vexatious and frivolous Subsequently, however, when questioned before the issues were struck, his pleader stated that he would rely on books relating to the factory and press. It is certain, therefore, that he possessed books and contemplated their production so late as 6th May 1918. Nevertheless he had not produced them in spite of the Court's orders, by 24th August 1918, when his refusal was adversely commented on in the Sub-Judge's order appointing a receiver to take over the property. On 10th March 1923 he declared on solemn affirmation that "all his books had been burnt in 1907-08 or 1909." This declaration has every appearance of falsehood in face of his previous reliance on his accounts. But even if it was true, Behari Lal must still have had in his possession the accounts for the years after 1907 or 1908 or 1909.

Bihari Lal's failure to produce these books raises a strong presumption that

their evidence would confirm in a conclusive manner the documentary evidence referred to above.

It remains to deal with the second line of Mr. Moti Sagar's attack—the contention that the property in dispute was made over to Bihari Lal by a family settlement recorded as the "orders of the Lady mother" on 4th April 1915. Objection is taken to this document on plaintiff's behalf on the ground that it must fail of effect because it was not registered as required by S. 17 (1) (b), Registration Act. Much argument has centred round this objection. Several of the "orders" certainly refer to rights and interests in valuable immovable property and if the orders did by themselves create these rights or interests, were agreed to by the sons and were intended to operate as a final deed, their admission in evidence is precluded by that statute.

According to the plaintiffs this document did not and was not intended to be operative, and if this is true, it obviously did not require registration. Mr. Moti Sagar, avoiding the difficulty has not argued that by itself it created any title but relies upon it as merely a recital of a previously arranged family settlement in which recital his clients' claim was recognized and therefore a weighty piece of evidence in favour of his clients' claim. Such a document would not require registration: *Bakhtawar* v. *Sundar Lal* (28).

Admittedly no question of estoppel arises. The circumstances are in no way analogous to those in *Mohomed Musa* v. *Aghore Kumar Ganguli* (29) in which the Privy Council held effective, as having given rise to equities which had to be administered, a compromise which though defective for want of registration had been acted upon by the parties for more than thirty years. Nor in the present case was there any mutal settlement so carried into effect that nothing remained to be done as was there in *Kunti* v. *Gajraj Tiwari* (30) where the parties had for nine years been in undisputed enjoyment of property of which they had taken possession under their agreement.

Whatever the intentions of the parties were at the time it is certain that they did not wholly accept and give effect to the settlement of which the vague and inconsistent "orders" of their mother are alleged by the appellant to have been a recital. She herself was to get the rent of the Amritsar property and "as much as she wished to take of" the income of property in Lyallpur District. We do not know if she has received anything from these sources. It appears that Radha Kishen has not got the Rs. 10,000 proposed to be given by Cl. 4 for this is the sum his father is now asking for him, nor have the mother and her daughter, so far as we know, been given the money mentioned in Cl. 9. On the very day that the orders were recorded, Mul Chand and Kanshi Ram wrote to the Alliance Bank of Simla asking for their father's account to be entered in the names of all the four brothers as members of a joint Hindu family who had succeeded to their father's estate. Two days later all four brothers wrote to the Punjab National Bank asking the bank to continue to deal with their account in the same form as it was treated before the orders with Behari Lal operating on their account. Two months afterwards Kanshi Ram informed Behari Lal that he would retain his share in the press at Kot Radha Kishen and Mul Chand wrote a document giving up his rights "in the factory" as desired by his younger brother Behari Lal, but he reserved the rights of his sons, especially, Radha Kishen to take such action as they thought proper. Neither of these two letters express unreserved compliance with the orders but were obviously only negotiations with a view to compromise the disputes still pending in spite of them.

It is incredible that Kanshi Ram, Shankar Das and Mul Chand all men with practical legal experience could have ever regarded the document, worded as it was, to be an effective deed of contract or would have allowed it to remain as the only formal record of an enforceable mutual agreement seriously intended. Certainly it could not have been seriously contemplated that Shankar Das was to lose the whole of his inheritance if he failed to pay "the money" as he was enjoined to do by Cl. 10. A father can in certain circumstances bind his minor children by a bona fide compromise, but

(28) A. I. R. 1926 All 173=48 All. 213.
(29) A. I. R. 1914 P. C. 27=42 Cal. 801=42 I. A. 1 (P. C.).
(30) A. I. R. 1924 All. 826=46 All. 847.

there is no ground for supposing that Mul Chand had authority to settle for Radha Kishen who at one time claimed the whole factory and press jointly with Behari Lal and still claims a third share but was allowed only a fourth share in its income by Cl. 4, and this only if his uncle approved his work. The Ferozepore property was in dispute at the time but the "orders" made no reference to it.

Having regard to all the evidence I think that the Subordinate Judge's view of the proceedings of the brothers connected with their mother's orders is correct. The document simply recorded Mrs. Buta Mal's own wishes and proposals and her sons' signatures attested not their assent to but their knowledge of them.

It follows that the orders of the mother have no such value as Mr. Moti Sagar would attach to them. They are not put forward as proof of any advancement and they do not, in my opinion, prove the fact of any valid settlement warranting Behari Lal's and Radha Kishen's claim that the factory and press with their appurtenances and the bungalow and garden at Kot Rai Buta Mal were their separate property and impartible.

Mr. Moti Sagar has not shown us any good grounds for differing from the lower Court's decision that Behari Lal is not entitled to remuneration for managing the factory before the institution of the suit.

Behari Lal flatly denied the other parties' rights in the property and refused to disclose the accounts of the business. He was operating on the Banking account when his father who supported him was alive and there is no evidence to show that he suffered financially in any way by being deprived of the manager's share of profits.

The lower Court's orders regarding the taking of accounts have been attacked in appeal by both Behari Lal and the plaintiffs. Behari Lal is not accountable to the other parties for the profits of the joint property in his possession (it became joint of Buta Mal's heirs on his death) before October 1915, the date of the family disruption, there being no allegation of fraud or other improper conduct on his part. The law on the subject is set forth clearly in p. 196 of Mulla's Principles of Hindu Law, 5th Edition, where the case law is fully cited. The parties are not bound to accept Behari Lal's statement as to what the property consisted of, and the actually existing state of the property is to be seen : *Pormeshwar Dube* v. *Gobind Dube* (31).

Mr. Jagan Nath has stated that he does not press the points raised in the first four paragraphs of the plaintiff's appeal (No. 1047 of 1924) and counsel for all parties have expressed their consent with the orders referred to in them. He asks, however, for a modification in his client's favour of the orders relating to rendition of the accounts by Bihari Lal. The lower Court has ordered accounts to be taken from Behari Lal and Radha Kishen relating to the factory, the press and other business upto October 1915 only, remarking that after that date the brothers are merely entitled to compensation for the user of the factory by Behari Lal and Radha Kishen upto January 1919 when Behari Lal took a lease of the factory and press under the order of the Court.

I think it proper that the whole question of what the parties are entitled to should be settled here and the decree I propose to pass will provide for this.

The additional ground of appeal submitted by the plaintiffs dated 29th June 1926 (the petition submitting them will be found at p. 56 of the Book C) has not been argued. Nor has Mr. Jagan Nath pressed the cross-objections. See the printed paper book E, the two matters raised in which are disposed of by the order I propose to pass.

I have now dealt with all the five appeals before me. The case is a most unsatisfactory one from almost every point of view. By obstructive and dilatory tactics the parties dragged out over seven years a trial which might have been concluded in a 12 month. Their intrigues and the consequently unreliable and perplexing character of their evidence have already been noticed. The resulting difficulty in dealing with these appeals has been greatly augmented by the manner in which the parties threw their documents upon the record without regard to legal formalities. Important documents were produced or discovered upon the record years after the hearing had begun. The confusion was aggravated by the lax procedure of the Court itself,

(31) [1916] 43 Cal. 459=33 I. C. 190=20 C. W. N. 25.

which allowed a mass of documents to be placed from time to time upon the record without strict proof, admission of parties or its own signed authority. Some of these were and are still relied upon by all parties. Others to which exception has been taken before us were apparently used at the trial without objection.

I have endeavoured to admit to consideration only those documents the genuineness of which was satisfactorily proved or obviously admitted or which ought, for the reasons I have given in my judgment, to have been allowed to come upon the record. The statements of the grounds in the appeals of Kanshi Ram (No. 1041) and Behari Lal are extremely prolix and the appeals were argued in great detail. I have, however, dealt with all the points raised before us by counsel in each appeal. My conclusions are embodied in the following order:

The appeals of Mrs. Buta Mal (No. 1376) and Amrit Lal (No. 1211) are dismissed.

The appeal of Kanshi Ram and Banshi Ram (No. 1041) is accepted.

The appeal of Behari Lal (No. 1287) is dismissed.

The appeal of the plaintiffs is accepted as regards the taking of accounts to the extent shown below.

The savings from their income and the property acquired out of such savings in possession of the parties and the immovable property in Ferozepore are declared impartible, as are also the nuptial gifts received by the parties. All the other property listed in the plaint is partible, the shares of R. S. Mul Chand, R. S. Shankar Das, Lala Kanshi Ram, Lala Behari Lal and Mrs. Buta Mal being one-fifth each, after deduction of a sum of Rs. 10,000 to be paid to Bibi Ram Rakhi who will also be entitled to maintenance, the amount to be fixed by the final decree and a right of residence. The property assessed to land revenue will be partitioned by the revenue authorities. The Commissioner will partition the other partible property. For this purpose he will examine the accounts as they stood on 31st October 1915, relating to the factory, press and business and the other property at Kot Radha Kishen and Rai Buta Mal and the accounts showing the income from the Lyallpur lands administered by R. S. Shankar Das and all other accounts showing the income accrued from partible property elsewhere in the possession of parties, so as to determine the shares of the parties in all these properties on 31st October 1915. The Commissioner will also in order to determine the share of each of the five shares take account from Lala Behari Lal, Lala Radha Kishen and R. S. Shankar Das of the accumulations and accretions of these properties from 1st November 1915 up to the times when they were taken in possession by a receiver or leased under the orders of the Court.

The directions of the lower Court regarding the propriety of keeping the factory and press and the other large integral bundles of property intact, of giving Lala Behari Lal the first choice of acquiring the factory and press, of making the parties bid for the properties which ought to be kept in tact and of equalizing shares by pecuniary adjustments should be followed by the Commissioner.

Having regard to the conduct of the parties before and during the litigation and the result of the case as a whole I think that Kanshi Ram should receive his costs in the lower Court and the costs of his appeal from Shankar Das who will be entitled to be paid by Behari Lal half of his costs in the suit and the whole of his costs in Behari Lal's appeal.

With these exceptions the parties will bear their own costs here and below.

Addison, J—I agree.

R.K. *Order accordingly.*

A. I. R. 1928 Lahore 413

ZAFAR ALI, J.

Kirpa Ram—Defendant—Judgment-debtor—Appellant.

v.

Nand Lal and *others*—Plaintiff—Decree-holder and Auction-Purchasers—Respondents.

Misc. First Appeal No. 2956 of 1926, decided on 25th November 1927, from order of Sr. Sub-J., Gujranwala, D/- 25th November 1926.

Civil P. C., O. 21, R. 92, Cl. (2)—Order setting aside sale should not be passed without notice to purchaser—There is no time limit for notice.

The requirements of O. 21, R. 92, Cl. (2) are fulfilled if no final order affecting the auction-purchaser is passed unless notice of the appli-

cation to set aside the sale is given to him. This proviso does not fix any period for giving that notice to the auction-purchaser, and there is no provision in the Limitation Act for such notice : *A. I. R.* 1924 *Pat.* 37 ; 37 *Bom.* 387 ; *A. I. R.* 1923 *Cal.* 394 ; *A. I. R.* 1922 *Oudh* 129 ; 17 *O. C.* 306; *A. I. R.* 1926 *Pat.* 266, *Foll.*; 50 *I. C.* 5 and *A. I. R.* 1921 *Patna* 498, *Dist.*
[P 414 C 2]

Badri Das—for Appellant.

Jagan Nath Aggarwal, *Tara Singh Narola* and *Sheocharan Das*—for Respondents.

Judgment.—This is an appeal by a judgment-debtor under O. 43, R. 1 (j), Civil P. C., against an order refusing to set aside a sale. The refusal was based on two grounds, viz., (1) that the judgment-debtor's application was not entertainable as he had failed to implead the auction-purchaser as a respondent, and (2) that he had failed to produce any evidence in proof of his objections. Both these grounds are untenable.

With regard to (1), the executing Court has relied on *Ajuddin Ahamed* v. *Khoda Bux* (1) which was followed by a Judge of the Patna High Court in *Sumitra Kuer* v. *Damri Lall* (2). In the former case a Division Bench of the Calcutta High Court held that

under the present Code of Civil Procedure, the auction-purchaser is a necessary party to a proceeding for setting aside an auction-sale and that, therefore, a Court has no jurisdiction to hear an application for setting aside a sale under O. 21, R. 90, Civil P. C., to which one of the auction-purchasers is not added as a party until after the expiry of the period fixed by law for making him a party.

This view was expressly dissented from in *Bibi Zainab* v. *Paras Nath* (3), and contrary view was taken in *Ganesh Bal Naik* v. *Vithal Vaman Mahalya* (4), *Raj Chandra Das* v. *Kali Kanta Das* (5), *Abdur Rahman* v. *Har Narayan Das* (6), *Ghazanfar Husain* v. *Ram Ratan* (7) and *Iswardas Marwari* v. *Biseswar Lal Marwari* (8).

Now, the law which requires that the auction-purchaser should be heard before passing an order affecting him is contained in the proviso to Cl. (2), R. 92, O. 21, Civil P. C. That proviso runs thus:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

It is clear that the requirements of the above proviso are fulfilled if no final order affecting the auction-purchaser is passed unless notice of the application to set aside the sale is given to him. This proviso does not fix any period for giving that notice to the auction-purchaser, and there is no provision in the Indian Limitation Act for such notice. As no order affecting the auction-purchaser had yet been made the application could not have been thrown out on the ground No. (1).

As regards the second ground, the date fixed for evidence was 22nd November 1926. On that date eight out of the 15 witnesses summoned by the judgment-debtor were in attendance but they were not examined and the case was adjourned to the following day for hearing arguments on the petition filed by the auction-purchaser. No witnesses, however, appeared the next day, but even if the judgment-debtor was responsible for their non-appearance on that date, he was entitled to have his remaining witnesses summoned and examined. It cannot be said that he failed to produce any evidence.

I, therefore, set aside the order of the executing Court confirming the sale and direct that the judgment-debtor's application be enquired into and disposed of according to law. The respondents to pay the judgment-debtor's costs in this Court.

N.K. *Order set aside.*

(1) [1919] 50 I. C. 5.
(2) A. I. R. 1921 Patna 498.
(3) A. I. R. 1924 Patna 37=2 Pat. 800.
(4) [1913] 37 Bom. 387=19 I. C. 475=15 Bom. L. R. 244.
(5) A. I. R. 1923 Cal. 394.
(6) A. I. R. 1922 Oudh. 129.
(7) [1914] 17 O. C. 306=25 I. C. 907.
(8) A. I. R. 1926 Pat. 266.

A. I. R. 1928 Lahore 414

TEK CHAND, J.

Manigir and *others*—Appellants.

v.

Hazarigir and *another*—Respondents.

Misc. Second Appeal No. 491 of 1927, Decided on 13th December 1927, from order of Dist. Judge, Hissar, D/- 15th November 1926.

(a) *Civil P.C., S.* 104 (2)—*First appeal under O.* 43, *R.* 1 (*g*)—*No second appeal lies.*

Where though the memorandum of appeal filed by appellants in the Court of the District Judge purported to be one under S. 96, O. 21, R. 92, and O. 43, R. 1 (j), Civil P. C., in reality the appeal lay only under the last provision, *Held* that no second appeal lay under S. 104 (2) : 168 *P. R.* 1919 ; *A. I. R.* 1923 *Lah.* 592, and 4 *P. W. R. Rev.* 1912, *Foll.* [P 416 C 1]

(b) *Civil P. C., S. 115—Decision of a case without joining a necessary pary.on an erroneous view of the law by the District Judge is open to revision.*

The order of the District Judge who deciding the case without joining a necessary party on an erroneous view of the law is open to revision : *A. I. R.* 1923 *P. C.* 142; 50 *I. C.* 914; *A. I. R.* 1923 *Cal.* 394 and 44 *C. L. J.* 565, *Foll.* [P 417 C 1]

(c) *Civil P. C., O. 21, R. 92 — Auction-purchaser is not a necessary party to proceedings under S. 92.*

An order under R. 92 cannot be made until the auction-purchaser has notice of the proceedings. It is nowhere stated that it is obligatory on the applicant to make the auction-purchaser a party to the application, nor is it necessary that the notice to the auction-purchaser must be served in a particular manner or within a particular period. The auction-purchaser may be summoned at the instance of the objector or he may intervene in the enquiry into the objections of his own accord or he may be brought before the Court under a precept issued by that Court suo motu. All that is required is that he must be heard before an order adverse to him is made : *A. I. R.* 1923 *Cal.* 394; *A. I. R.* 1924 *Pat.* 37 and 37 *Bom.* 387, *Foll.*; 50 *I. C.* 5 & *A.I.R.* 1921 *Pat.* 493, *Dist.* [P 417 C 1]

M. L. Puri—for Appellants.

Zafarullah Khan—for Respondents.

Judgment.—Kundan Lal, respondent 4, to whom a certain sum of money was due by Kishen Gir, deceased, Gosain of Mauza Jodhka in Sirsa Tahsil of the Hissar District, obtained a money decree against Kishen Gir's five sons, two of whom were majors and the other three were minors. The amount of the decree together with costs was Rs. 1561-14-0 which was recoverable only from the estate of the deceased. On the decree-holder's application, 539 bighas of land belonging to the deceased was attached and a proclamation for sale was issued, it being specifically provided that only so much of the land was to be sold as was sufficient to discharge the decretal amount.

On 17th July 1925 Mani Gir, Kanwal Gir and Bhur Gir, the three minor sons of Kishen Gir deceased, filed an application in the executing Court objecting to the attachment of the aforesaid property on the ground that they were governed by agricultural custom, that the land was ancestral, that the debts for the payment of which the decree had been passed had not been raised for necessity and were, in any case tainted with immorality. Before these objections could be disposed of the auction was held on 18th July 1925, and the bid for Rs. 16,000 by Khan Sahib Yakin-ud-Din, respondent 3, for the entire land was accepted. The Sub Divisional Officer, Sirsa, who conducted the sale, noted that a number of persons were present at the auction but Yakin-ud-Din was the only bidder. He also recorded that Hazari Gir and his party were present and had protested that the price offered was too low and had requested that the land be resold at Sirsa, or in the alternative, the judgment-debtors be allowed to effect a private sale with a view to raise the requisite money to pay off the decretal amount. There is also a note that the auction-purchaser had not paid 25 per cent of the sale price on the day on which the auction had taken place and that he had been asked to deposit the amount in the treasury on 20th July.

On 20th Hazari Gir judgment-debtor appeared before the Sub-Divisional Officer and actually produced the entire decretal amount Rs. 1,561-14-0 in cash and prayed that "the sale proceedings be stayed." On the same day the auction-purchaser Yakin-ud-Din also appeared with 25 per cent of the sale price. He was allowed by the Sub-Divisional Officer to deposit the amount into the treasury, but the judgment-debtors were directed to make their submissions to the executing Court, the Senior Subordinate Judge of Hissar.

On 21st July 1925, the judgment-debtors, Hazari Gir and Jugal Gir, filed an application in the executing Court alleging a number of irregularities in publishing and conducting the sale. This application is headed

In re execution case Kundan Lal, decree-holder v. Hazari Gir and others. judgment-debtors.

It may be noted that the auction-purchaser was not specifically mentioned as a party to these proceedings. The Court directed that this application should come up for disposal together with the report of the auctioneer on 24th July 1925. On that date the judgment-debtors produced in the executing Court a receipt purporting to have been executed by the decree-holder on 22nd July 1925 and to have been verified before the Tahsildar of Bhiwani, reciting that he had received the entire decretal amount from the judgment-debtors and that nothing more was due to him. The Court directed this receipt to be placed on the record and passed an order that as the auction-purchaser

was not present, proceedings would be ex parte against him. An issue was struck as to whether there had been irregularities in publishing and conducting the sale which had caused any substantial loss to the judgment-debtors, and the hearing was adjourned to 18th August 1925, for evidence. In the meantime the auction-purchaser paid the remaining three-fourths of the sale price on 5th August 1925. On 18th August 1925, when the case came up for hearing before the Court the auction-purchaser appeared through counsel and enquiry into the objections filed by the minor judgment-debtors Mani Gir etc. on 17th July 1925 and those filed by the adult judgment-debtors, Hazari Gir and Jugal Gir, on 21st July 1925, proceeded. Eventually both sets of objections were dismissed by the Senior Subordinate Judge on 6th November 1925. They preferred separate appeals to the learned District Judge who dismissed the appeal preferred by Hazari Gir and Jugal Gir but accepted the one preferred by the minors, Mani Gir etc. and remanded the case to the executing Court for decision of certain points. Both sets of objectors have come up to this Court and have filed two separate appeals.

I will first take up the appeal by Hazari Gir and Jugal Gir. (Civil appeal No. 492 of 1927). The objections filed by these objectors on 21st July 1925, had been dismissed by the executing Court on the merits, but their appeal was dismissed by the learned District Judge without recording a finding as to the alleged irregularities in publishing and conducting the sale as he was of opinion that the executing Court was debarred from enquiring into these objections by reason of the fact that the auction-purchaser had not been impleaded as a party within 30 days of the sale which had taken place on 18th July 1925 Mr. Zafrullah Khan for the respondents has raised a preliminary objection that this appeal is incompetent. He argues, and in my opinion rightly, that though the memorandum of appeal by these appellants filed in the Court of the District Judge purported to be one under S. 96, O. 21, R. 92 and O. 43, R. 1 (j), Civil P. C., in reality the appeal lay only under the last provision, and that being the case, no second appeal lies under S. 104 (2), Civil P. C. This view is supported by *Jiwan Singh* v. *Sawan Mal* (1), *Jaggan Nath* v. *Daud* (2), *Nihal Devi* v. *Kishore Chand* (3). Mr. Mukand Lal Puri for the appellants made a feeble attempt to meet the position taken up by Mr. Zafrullah Khan but was unable to urge anything substantial in support of his contention. I allow the preliminary objection and I hold that no appeal lies.

Mr. Mukand Lal puri, prayed next that in the event of this Court holding that no second appeal lay, the memorandum of appeal be treated as a petition for revision. Mr. Zafrullah Khan objected to this prayer on the ground that even if it be assumed that the learned District Judge has taken an erroneous view of the law, a mere illegality is not a good ground for revision. Both the learned counsel have addressed me at length on this point, and after giving the matter careful consideration I am of opinion that the decision of the learned District Judge is open to revision and this Court may, if sufficient grounds are made out, interfere on the revision side. As already pointed out the learned District Judge has not decided the objections raised by the petitioners on their merits but has refused to give an adjudication thereon on the ground that the auction-purchaser had not been impleaded as a party within 30 days from the date of the sale. If it can be shown that the learned District Judge was in error in assuming that it was necessary for the objectors to implead the auction-purchaser within 30 days, it would follow that he had refused to exercise a jurisdiction which was vested in him by law, and it would certainly be a good ground for interference by this Court under S 115, Civil P. C., or the corresponding S. 44, Punjab Courts Act. Reference may in this connexion be made to a Single Bench decision of the Chief Court where the present Chief Justice interfered on the revision side under somewhat similar circumstances, *Khairan* v. *Alliance Bank of Simla* (4). Similarly the Calcutta High Court in *Raj Chandra Das* v. *Kali Kanta Das* (5) and *Kedar Hura* v.

(1) [1919] 168 P. R. 1919=2 L. L. J. 41=54 I. C. 941=76 P. L. R. 1920.
(2) A. I. R. 1923 Lah. 592=4 Lah. 243.
(3) [1912] 4 P. W. R. Rev. 1912=15 I. C. 914.
(4) [1919] 50 I. C. 914.
(5) A. I. R. 1923 Cal. 394.

Asutosh Roy (6) set aside on revision the orders of the lower appellate Courts rejecting objections to an auction sale on the ground that the auction-purchaser had not been brought on the record within 30 days. The point is covered by the principle of the recent Privy Council judgment in *Umed Mal* v. *Chand Mal* (7) where their Lordships upheld the action of the Chief Commissioner, Ajmer Merwara in interfering under S. 115, Civil P. C., with the order of the District Judge who had decided the case without joining a necessary party on an erroneous view of the law. I hold, therefore, that the order of the District Judge is open to revision.

As stated already the learned District Judge has rejected the appeal of the petitioners on the mere ground that the auction-purchaser had not been impleaded within 30 days of the sale. Now there is no provision in the Civil Procedure Code or the Limitation Act or any other Statute which makes it obligatory on a person who is objecting to a sale under Rr. 89, 90 or 91 of O. 21, to implead the auction-purchaser within a particular period. All that is laid down in R. 92 is

> that no order on applications made under Rr. 89, 90 or 91 shall be made unless notice of the application has been given to all persons affected thereby.

To put the matter briefly this means that an order under R. 92 cannot be made until the auction-purchaser has had notice of these proceedings. It is nowhere stated that it is obligatory on the applicant to make the auction-purchaser a party to the application, nor is it necessary that the notice to the auction-purchaser must be served in a particular manner or within a particular period. The auction-purchaser may be summoned at the instance of the objector or he may intervene in the enquiry into the objections of his own accord or he may be brought before the Court under a precept issued by that Court suo moto. All that is required is that he must be heard before an order adverse to him is made. In the present case the learned District Judge has found as a fact that the auction-purchaser's counsel was present in Court on 18th August 1925 long before the objections were disposed of. It must, therefore, be held that the provisions of R. 92 have been fully complied with.

I am not unmindful of the fact that in *Ajiuddin Ahmed* v. *Khodabux* (8) and *Sumitra Kuer* v. *Damri Lall* (9) the Calcutta and the Patna High Courts have respectively ruled that the auction-purchaser was a necessary party to the proceedings for setting aside the auction sale and that he must be impleaded within the period of 30 days prescribed in Art. 166, Limitation Act. But the view taken in both these cases was not accepted in subsequent decisions of those Courts, vide *Raj Chandra Das* v. *Kali Kanta Das* (5) and *Zainab Bibi* v. *Paras Nath* (10). The Bombay High Court in *Ganesh Bal Naik* v. *Vithal Waman* (11) has also held that there is no period of limitation prescribed within which the auction-purchaser should be brought on the record in such proceedings. The same view has been taken in *Ghazanfar Husain* v. *Ram Ratan* (12), *Abdur Rahman* v. *Har Narayan* (13), *Ishwardas Marwari* v. *Biseswar Lal Marwari* (14), and also in a ruling of the Punjab Chief Court in *Sewak Ram* v. *Kundan Lal* (15). Mr. Justice Zafar Ali has discussed this question recently in *Kirpa Ram* v. *Nand Lal* (16) decided on 25th November 1927 and has arrived at the same conclusion. It must, therefore, be held that the decision by the lower Court on this point is erroneous and that the application of the petitioners under O. 21, R. 90 was not barred by reason of their failure to implead the auction-purchaser within 30 days of the sale.

This being my view on this point, it is not necessary to give a decision on the further question raised by Mr. Mukand Lal Puri that under Art. 166, Limitation Act, the terminus a quo for an application to have a sale set aside is not the date on which the auction is held but the date on which the 25 per cent of the purchase price is deposited. On this point there is a serious divergence of

(6) [1924] 44 C. L. J. 565.
(7) A. I. R. 1926 P. C. 142=54 Cal. 888=53 I. C. 271 (P. C.).
(8) [1919] 50 I. C. 5.
(9) A. I. R. 1921 Pat. 498.
(10) A. I. R. 1924 Pat. 37=2 Pat. 800.
(11) [1913] 37 Bom. 337=19 I. C. 475=15 Bom. L. R. 244.
(12) [1914] 17 O. C. 306=25 I. C. 907.
(13) A. I. R. 1922 Oudh 129.
(14) A. I. R. 1926 Patna 266.
(15) [1897] 3 P. R. 1897.
(16) A. I. R. 1928 Lah. 413.

judicial authority, but on my decision above, the question does not arise and I need not discuss it any further.

For the foregoing reasons I accept the petition for revision, set aside the judgment and decree of the learned District Judge and remand the case to him for rehearing the appeal and disposal in accordance with law. Costs shall be costs in the cause.

I shall now deal with Civil Appeal No. 491 of 1927 filed by Manigir etc., minors against the order of remand passed by the learned District Judge. Mr. Zafrullah Khan for the respondents raises a preliminary objection to the maintainability of this appeal which has been preferred under O. 43, R. 1 (u) That Rule authorizes an appeal against an order of remand made under O. 41, R. 23. In this case the learned District Judge has not mentioned the section of the Code under which he ordered the remand, but both counsel are agreed that the remand was one under S. 151, Civil P. C. Orders under that section are admittedly not appealable. It follows, therefore, that this appeal is incompetent and must be dismissed with costs. I can find no ground for interference on the revision side.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 418

HARRISON, J.

Bakhshi Sain Das—Judgment-debtor —Appellant.

v.

Punjab National Bank Ltd., Sargodha and *others*—Respondents.

Misc. First Appeal No. 1419 of 1927, decided on 3rd January 1928, from order of Sub.-Judge, 1st Class, Sargodha, D/- 11th April 1927.

(a) *Civil P. C., O. 21, R. 90—Auction-purchaser is not a necessary party to proceedings under R. 90.*

It is not necessary to implead, in the sense of showing as a party in the heading of the application under R. 90, the successful auction-purchaser : *A. I. R. 1928 Lah. 413, A. I. R. 1927 Lah. 681 ; A. I. R. 1928 Lah. 414, Foll. ; 82 I. C. 776 ; 50 I. C. 5, Dist.* [P 418 C 2]

(b) *Civil P. C., O. 21, R. 92 (2)—Sufficiency of notice illustrated.*

Where the auction-purchaser happened to have come to Court to deposit the auction price and was there informed by the Court and given ample time to reply to the application,

Held: that this was quite sufficient notice. [P 419 C 1]

Kishen Dyal—for Appellant.

Hargopal, Murari Lal, Zafrullah Khan and *Lala Sardha Ram*—for Respondents.

Judgment.—Bakhshi Sain Das, judgment-debtor, appeals against an order of the Senior Subordinate Judge of Sargodha, dismissing an objection lodged by him against an auction sale in execution of a decree, or rather two auction sales by which his property in Sargodha and Bhera was disposed of. He has impleaded in his appeal the decree-holder Bank and also the successful auction-purchasers at the sale. I will first deal with the objection taken by some of these auction-purchasers in the trial Court and urged afresh in this Court by counsel for the purchaser of the Sargodha property, Lala Gobind Lal. This is that they were not made parties to the proceedings under O. 21, R. 90, Civil P. C., although they had been made parties by counsel in this Court on appeal. He relies on *Ajuddin Ahmed* v. *Khoda Bux* (1), *Sumitra Kuer* v. *Damri Lall* (2) and *Bapuji Krishna* v. *Janardhan Govind* (3) these being respectively authorities of the Calcutta, Patna and Bombay High Courts. This point has been fully considered by Tek Chand, J., in *Manigir* v. *Hazarigir* (4), in which he has taken the opposite view, namely, that it is not necessary to implead, in the sense of showing as a party in the heading of the application, the successful auction-purchaser. The same view was taken by Jai Lal, J., in *Haji Mahomed* v. *Ghulam Husain Khan* (5), though the finding, as pointed out, was an obiter dictum and also in *Kirpa Ram* v. *Nand Lal* (6). In *Raj Chandra Das* v. *Kala Kanta Das* (7), the Calcutta High Court appears to have changed its view. I do not think it necessary to add anything to the reasoning contained in the judgment of Tek Chand, J., except to say that the very wording, or rather I should say the existence of the proviso to R. 92, leads me to a conclusion precisely con-

(1) [1919] 50 I. C. 5.
(2) A. I. R. 1921 Pat. 498.
(3) A. I. R. 1924 Bom. 130.
(4) A. I. R. 1928 Lah. 414.
(5) A. I. R. 1927 Lah. 681.
(6) A. I. R. 1928 Lah. 413.
(7) A. I. R. 1923 Cal. 394.

trary to the one deduced from the same premises in *Ajuddin Ahmed* v. *Khoda Bux* (1). The reasoning in that ruling appears to have been: because it is necessary to serve notice of the application on the auction-purchaser and because such notices are always served as a matter of course upon the parties to an application, the meaning of the rule or the proviso can only be that such auction-purchasers must previously have been made parties. The existence of the proviso points to my mind to precisely the contrary conclusion. If it were necessary to make the auction-purchasers parties, they would be served as a matter of course, for no proceedings and no appeal can proceed until the parties have been served There would, therefore, be no reason for the insertion of the proviso. The insertion of the proviso points to my mind to the conclusion that it was inserted just because it was not necessary to make the auction-purchaser a party and for no other reason. The ordinary law provides that all parties shall be served and if it be necessary to serve anybody over and above such parties it is necessary to make provision for such service. The existence of such provision requiring the service of any particular individuals can only mean as I read it that such individuals need not be parties to the proceeding. Agreeing, therefore, with the view taken in *Manigir* v. *Hazarigir* (4), I hold that it was unnecessary to make the auction-purchaser a party. Counsel then urged that they received no proper notice as they happened to have come to Court to deposit the auction price and were there informed by the Subordinate Judge and given ample time to reply to the application. This is notice in my opinion and quite sufficient notice.

The final point arises of whether the appeal is in proper form and whether counsel should or should not have added the auction-purchasers in this Court. Technically I think the appeal is not in proper form and the auction-purchasers not having been made parties in the trial Court could only be made parties in this Court by a proper order by a Judge. No such order was obtained. The right course I think would have been to institute an appeal against the decree-holder, who was respondent in the trial Court, and to serve a notice on the auction-purchasers on the analogy of the proviso in R. 92 (2). This is not a question of any importance to my mind and the real thing to be seen is whether they have had proper notice of the appeal.

This brings me to the subject-matter of the application which is so worded that two meanings or more can be formed from almost every sentence used from start to finish. An ingenious objection has been taken to the form of the notice attached to the Court-house—an objection which does not seem to have struck counsel in the trial Court. The person entrusted with this responsible work of drawing up and putting up notices was an unpaid candidate and his work does not appear to have been supervised in any way even by the Clerk of Court. He says that the form of notice was not the correct form as given on p. 1049 of Mulla's Civil Procedure Code, namely, form No. 29, but was form No 27. On the other hand, where he speaks of there being writing on both sides of the form, he would appear to be referring to form No 29 which is printed on both sides as opposed to form No. 27 which is only printed on one side, though in this case the necessary details were written on the back I do not think it necessary to go into this somewhat technical point, as the all important contention of the judgment-debtor is conceded by the other side, and this is that the proclamation posted on a conspicuous part of the property was so posted not more than five days before the auction sale and this refers equally to the property sold in Sargodha and the property sold in Bhera. Not only was this so, but the proclamation by beat of drum was made on the actual date of the auction. The property to be sold consisted of several lots of shops and houses. The auction at Bhera of the four lots is shown by the auctioneer to have taken place on 29th, 30th and 31st and that at Sargodha on 27th and 28th. Counsel for the judgment-debtor has urged that the bids began and ended at Bhera on 31st. The position is very much stronger than is stated by him, for while bidding actually lasted from 30th to 31st, the auction, in the sense that the auctioneer was asking for bids, continued from 29th to 31st, and on 29th there were no bids whatsoever. It is said that a large number of persons attended the auction, but there were only four bidders. These all bade for one piece of property,

two only bade for two other lots, while three bade for the last lot. In Sargodha also there were four bidders only. Now the utter inadequacy of the notice given to the public generally by affixation on the property leads in my opinion to the inevitable inference that the fact of the sale not being sufficiently published the judgment-debtor was prejudiced and materially prejudiced. This inference could of course be rebutted but so far from the evidence of what actually happened on the dates fixed rebutting that inference, it confirms and strengthens it in every way. It appears to me, therefore, that a material irregularity or irregularities, did lead to substantial injury and it is, therefore, necessary to order a re-sale. Counsel for the auction purchasers have represented that their clients have lost the interest on their money for a considerable time and they ask to have restitution made by the decree-holder. The decree-holder, I should mention, does not resist the application for a fresh sale. This contention appears to me to be perfectly sound. The auction-purchasers are not to blame for the irregularities committed and I, therefore, order that the decree-holder refund the sums realized by him in consequence of these auction sales on or before 1st February 1928. He will also refund the difference between the sum and the sum actually deposited by the auction-purchasers without prejudice to any rights he may have to recover this difference or portion of it from the auctioneer. I do not adjudicate on the question of whether this order sets aside the order of confirmation, which must precede the payment of a fee to the auctioneer. Under the peculiar circumstances of the case I order that all parties bear their own costs,

N.K. *Order accordingly.*

A. I. R. 1928 Lahore 420

SHADI LAL, C. J., AND BHIDE, J.

Arjan Das—Kalu Mal—Defendants—Appellants.

v.

Walaiti Ram-Jahru Mal—Plaintiffs—Respondents.

First Appeal No. 672 of 1925, Decided on 13th December 1927, from decree of Sr. Sub-Judge, Ludhiana D/- 4th February 1925.

(a) *Contract Act, S. 30— Settlement of account—Setting off losses against profits—Transactions do not differ from payments and repayments in cash.*

To set off the losses against the profits on the purchases and effect a settlement does not in any way differ in substance from actual payment and repayment in cash; 79 *P. R.* 1908 (*F. B.*), *Foll.* [P 421 C 2]

(b) *Contract Act S. 30— "Badni transaction"—Meaning explained.*

Where the transactions included sales and purchases by the same dealers for a fixed date, coupled with the failure to deliver in practically all cases, *Held*: there was no doubt that the transactions were badni. [P 421 C 2; P 422 C 2]

(c) *Contract Act, S. 30—Badni or wagering transactions—Common intention to wager—Liabilities in respect of such contracts are unenforceable.*

There can be no badni or wagering transactions unless there is a common intention of wager: (*A. I. R.* 1917 *P. C.* 101, *Foll.*) and the finding that the transactions were badni means that the parties had the common intention to wager. The liabilities incurred on such wagering transactions would, therefore, be obviously unenforceable. [P 422 C 1]

(d) *Contract Act, Ss. 30 and 222—Agent entering into wagering contract on behalf of principal, and incurring liability to third party in the transaction — Accounts settled with third party and liability of agent to third party becoming enforceable—Principal is liable to agent.*

Where the agent has, in wagering transactions on behalf of his principal, incurred losses in dealing with third parties and as between the third party and the agent, accounts have been settled and the agent has incurred a liability which has become enforceable in principal is liable to the agent to the extent of such liability: 79 *P. R.* 1908 (*F. B.*), *Foll.* [P 422 C 1]

D. C. Ralli and *Shiv Charan Das*—for Appellants.

Badri Das and *Basant Krishen*—for Respondents.

Bhide, J.—The plaintiffs, who were commission agents, entered into certain transactions for sale of cotton bales on the instructions of the defendants as follows:

(1) 25 bales to Charat Singh-Attar Singh at Rs. 35-6-0 per maund;

(2) 25 bales to Dayal Singh-Chamba Singh at Rs. 35-6-0 per maund; and

(3) 50 bales to Bashi Lal-Tirath Das at Rs. 35-7-0 per maund.

The transactions were entered into in June and July 1917, but delivery was to be made in January 1918. The defendants failed to deliver the bales on the due date and as a result the plaintiffs had to pay to third parties the loss

suffered by them, the market rate on the due date being much higher than the rate at which the sales had been effected. The plaintiffs claimed Rs. 5,028-8-3 on account of the amount so paid.

The defendants admitted having instructed the plaintiffs to enter into sale transactions as alleged but pleaded that the transactions were badni and denied that the plaintiffs had actually suffered any loss. The learned Senior Subordinate Judge, who tried the suit, held that the transactions were badni, but that this made no difference as the defendants were liable to recompense the plaintiffs for the loss incurred by them as their agents. Finding Rs. 3,378-6-0 as the losses actually so suffered, he passed a decree for that amount in favour of the plaintiffs. From this decree the defendants have appealed.

The main points urged on behalf of the appellants were the following :

(1) The plaintiffs had entered into transactions of sales and purchases of cotton on behalf of a number of persons and settlement was made by setting off the total transactions of sales and purchases against each other and adjusting the balance, if any. It has not been shown that any loss was actually incurred in respect of the particular transactions which were entered into on behalf of the defendants and hence the plaintiffs' suit must fail.

(2) The losses, if any, were not actually paid or adjusted before the institution of the present suit. The transactions being of a badni nature, the plaintiffs had incurred no liability enforceable in law. According to the principles laid down in *Behari Lal* v. *Parbhu Lal* (1), the plaintiffs had no cause of action.

(3) It has not been proved that the market rate of cotton on the due date was Rs. 45-11-0 per maund and hence the decree of the lower Court passed at this rate cannot, at any rate, be justified.

The first contention appears to me to be fallacious. It is clear from the evidence that, owing to the non-delivery of the cotton on the due date, the plaintiffs had become liable to pay to third parties losses on account of certain principals who had sold cotton, and had to realise profits from the same parties on account of certain other principals who had purchased the cotton. It was obviously convenient in the circumstances from a business point of view to set off the losses against the profits on the purchases and effect a settlement with the third parties. This is all that the plaintiffs are alleged to have done. As pointed out in *Behari Lal* v. *Parbhu Lal* (1), such a settlement does not in any way differ in substance from actual payment and repayment in cash. The sales made on behalf of the defendants along with others are said to have been taken into account in making the settlement and this seems to be tantamout to saying that the actual losses incurred on their behalf were adjusted or paid up in the settlement.

The third contention also appears to have no force. The defendant Bhagwan Das (P. W. 3) has himself admitted that the market rate was higher on the due date than the rates at which the sales had been effected and that the plaintiffs therefore suffered losses. He gives the market rate at Rs. 40 or Rs. 41 but no reliable evidence has been given in support of this figure. The plaintiffs' witnesses on the other hand including Lala Girdhari Lal, a member of the Karachi Merchants' Association, apparently a disinterested witness, have stated that the market rate on the due date was Rs. 59. The plaintiffs have only claimed at Rs. 45-11-0, the rate fixed by the Karachi Merchants' Association, which is much less than the actual rate.

The second contention requires consideration. The learned Senior Subordinate Judge has found the transactions to be badni and has decided the suit on this basis. It is true that he has given no reasons in detail in support of the finding, but the very nature of the transactions including sales and purchases by the same dealers for a fixed date, coupled with the failure to deliver in practically all cases, leaves no room for doubt that the transactions were badni. The transactions of sales and purchases were entered into by the plaintiffs for different persons, but the names of the principals were not disclosed and the actual transactions took place as between the plaintiffs and third parties. There can be no badni or wagering transactions unless there is a common intention of wager, vide *Bhagwan Das* v.

(1) [1908] 79 P.R.1908=130 P.W.R.1908(F.B.).

Burjoji Rusttonji (2), and the finding that the transactions were badni means in this case that the plaintiffs and the third parties had the common intention to wager. The liabilities incurred by the plaintiffs on these wagering transactions would, therefore, be obviously unenforceable as between them and the third parties. It was urged that the liability was enforceable and the best proof of this consisted in the fact that two decrees were subsequently obtained by the plaintiffs against third parties on the basis of that liability. No copies of any decrees have been produced and it is not known on what basis the decrees were passed. The probability is that, although the transactions were of a wagering character, the plaintiffs did not raise the plea and hence the Court did not enter into the question. The mere fact that decrees were passed is, therefore, by no means conclusive evidence that the liabilities were legally enforceable.

According to the principles laid down in *Behari Lal* v. *Parbhu Lal* (1), if the plaintiffs made any payments or adjusted the accounts in the manner stated therein on the basis of a liability incurred on wagering transactions the plaintiffs would no doubt be entitled to recover the amount from their principals. In the present instance, it is admitted that the loss incurred on the defendants' transactions was not paid in cash, but only by adjustment in accounts. In two cases, however, even this adjustment in accounts had not been made before the institution of the present suit. I understand that in these two cases in which accounts were not adjusted, the accounts at the date of institution only showed that plaintiffs had become liable to pay losses on certain wagering transactions, while on others they had become entitled to realise profits. The parties had not yet decided to set off the transactions of sale and purchase against one another and no debit or credit entries had yet been made. Even the market rate had not been agreed on. In the circumstances it does not appear to me that the case could properly be treated to be at par with case No. 4, in *Behari Lal* v. *Parbhu Lal* (1), as urged on behalf of the respondents. Case No. 4 is stated as follows in *Behari Lal* v. *Parbhu Lal* (1):

> If in such a case the agent already has dealings with the third party and is owed money by him on accounts with which the principal has no concern and the sum lost, as aforesaid being less than the sum due to the agent is settled by a credit in the agent's books, and a debit in the third party's books, the amount so credited and debited is recoverable by the agent from the principal.

and the answer given, is in the affirmative. In the present case the plaintiffs became simultaneously liable to pay losses and entitled to realise profits on certain wagering transactions. The liability could be repudiated in law by either party and neither party had apparently taken any steps before the institution of the suit to adjust the accounts at least in two cases. It, therefore, seems to me that the plaintiffs had only incurred an unenforceable liability in these two cases and nothing further having happened before the institution of the suit the plaintiffs are not entitled to claim any thing from the defendants so far as these two cases are concerned. In the third case the accounts were settled before the institution of the suit in the manner shown at p. 27 of the printed record and this case appears to to be covered by *Behari Lal* v. *Parbhu Lal* (1).

It will appear from the judgment of of the learned Subordinate Judge that the amount due from the defendants in the two cases referred to above, namely Charat Singh, Attar Singh and Dayal Singh-Chamba Mal was Rs. 767-6-0 and Rs 165-4-9 respectively. The amount of loss decreed must, therefore, be reduced by these amounts with interest thereon, and the amount of the miscellaneous expenses must also be proportionately reduced.

The loss suffered by the plaintiffs on account of the debts, in connexion with the transactions with Bashi Mal-Tirath Ram was Rs. 2,357-8-0. The plaintiffs had already received an advance of Rs. 500. The balance due, was therefore Rs. 1,857-8-0.

The plaintiffs became entitled to realize the above sum only on adjustment of accounts with Bashi Mal-Tirath Ram on 26th June 1918 (vide p. 27 of the printed record). They are, therefore, entitled to claim interest at Re. 1 per cent per mensem from that date. This is not disputed. The amount of interest up to

(2) A. I. R. 1917 P. C. 101=42 Bom. 373=45 I. A. 29 (P. C.).

the date of institution of the suit works out to Rs. 287-14-6.

The plaintiffs claimed Rs. 162-12-6 on account of miscellaneous expenses incurred in connexion with the transactions with all the three firms. They may be allowed a proportionate sum for the transactions with Bashi Mal-Tirath Ram. This amount works out to Rs. 116-10-3.

Plaintiffs are, therefore, entitled to a decree for the following amounts :

Rs.	a.	p.	
1,857	8	0	on account of loss suffered.
287	14	6	interst.
116	10	3	miscellaneous expenses.
2,262	0	9	Total

I would, therefore, accept the appeal and setting aside the decree of the lower Court award a decree for Rs. 2,262-0-9 only with proportionate costs throughout in favour of the plaintiffs. Plaintiffs will also get interest at Rs. 6 per cent per annum on the decretal amount from the date of institution to the date of realization.

Shadi Lal, C. J.—I concur.

S.J. *Appeal accepted.*

A. I. R. 1928 Lahore 423

ZAFAR ALI, J.

Munshi Ram — Auction-Purchaser—Appellant.

v.

Sheikh Ghulam Dastgir, Official Receiver and *others*—Respondents.

Misc First Appeal No. 1134 of 1927, Decided on 9th December 1927, from order of Dist. Judge, Jullundur, D/- 4th March 1927.

Provincial Insolvency Act (5 *of* 1920), *Ss.* 4 *and* 75 (2)—*Claim by purchaser of an insolvent's house for recovery of purchase money—Order dismissing claim and making over all property of insolvent to Official Receiver—Appeal lies though creditors of the insolvent are not parties to it.*

The order of a District Judge, passed summarily and without making adequate enquiry in the matter, dismissing the claim of the purchaser of an insolvent's house for the recovery of the purchase money is highly unsatisfactory and as it disposes of a question of title it falls under S. 4, Provincial Insolvency Act of 1920 and is appealable under Cl. (2), S. 75, of that Act, and the creditors are not necessary parties to the appeal : 24 *C. W. N.* 401, *Foll.*

[P 424 C 1]

Badri Das—for Appellant.

Sardha Ram for *Jaggan Nath Aggarwal*—for Respondents.

Judgment. — One Amar Singh of Jullundur City authorized three gentlemen of that City to sell his property for the purpose of paying off his debts. These gentlemen who are described as trustees sold by auction a house of Amar Singh to Munshi Ram, appellant, for Rs. 5,200. A deed of sale was now to be executed by the trustees and registered. Munshi Ram deposited Rs. 5,200 with Lala Dwarka Das, Treasurer, to be paid to the trustees before the Sub-Registrar but no deed was executed because the trustees refused to enter therein an indemnity clause.

Long after that Amar Singh was adjudged an insolvent and the Official Receiver applied to the District Judge for orders about the money that was in the hands of Lala Dwarka Das. The District Judge endorsed the following order on that application :

All moneys in hand should be made over to the Official Receiver. 25th February 1927.

On 4th March 1927, Munshi Ram presented a petition to the District Judge stating that the money was his, and praying that it may not be handed over to the Official Receiver. But the District Judge ordered Lala Dwarka Das, who was with the petitioner at that time, to pay the money to the Official Receiver. This order is in vernacular and runs thus :

Munshi Ram wants to get back the money. For the reasons recorded in the order in English the money be made over to the Official Receiver.

The order in English referred to above was presumably the order of 25th February 1927, which, however, contains no reasons whatsoever.

Now it is clear that it was highly unsatisfactory to dispose of in this summary manner, without any enquiry a matter involving a question of title to a sum of Rs. 5,200. Before making any order the District Judge should have decided whether the money belonged to Munshi Ram or to the insolvent.

Counsel for the Official Receiver objects that the order of the District Judge is not appealable and that even if it is, the appeal must fail because the creditors of the insolvent have not been made respondents. Both these contentions are untenable. The order of the District Judge disposes of a question of title and

hence falls under S. 4, Provincial Insolvency Act of 1920 and is appealable under Cl. (2) of S. 75 of that Act. The creditors are not necessary parties to this appeal as held in *East India Cigarette Manufacturing Co, Ltd.* v. *Ananda Mohan Basak* (1). I accept the appeal, set aside the order of the learned District Judge and direct that the application of the appellant be disposed of in accordance with law after a proper enquiry.

S.J. *Appeal accepted.*

(1) [1920] 24 C. W. N. 401=58 I. C. 10.

A. I. R. 1928 Lahore 424

ADDISON, J.

Bhagat Ram-Anant Ram—Defendants—Appellants.

v.

Harjas Mal-Mehr Chand—Plaintiffs—Respondents.

Second Appeal No. 2066 of 1927, Decided on 19th January 1928, from decree of Dist. Judge, Ludhiana, D/- 18th June 1927.

(a) *Contract Act, S. 62—Plaintiff acting as commission agent for the defendant—Final closing of account—Plaintiff taking hundi for the balance due—No liability remaining standing—Plaintiff suing to recover money due on the hundi—Hundi inadmissible being unstamped—Plaintiff cannot fall back upon original transaction.*

No doubt in certain cases, where a suit on a hundi is not maintainable, the hundi being unstamped, the creditor can fall back on prior accounts between the parties. But each case has to be decided on its own facts, the question being whether a new contract was substitued or whether the hundi was given in course of performing the prior contract and on the latter case the creditor can fall back on the original transaction.

Plaintiff was acting as commission agent for the defendant. The sum due by the defendant to the plaintiff was settled by the plaintiff giving up a certain sum, by the defendent paying Rs. 100 in cash, and by the plaintiff taking a hundi for Rs. 500 from the defendant. A separate receipt was given to the defendant by the plaintiff on the same day. It recited that the account had been finally closed and that the only liability remaining was the hundi for Rs. 500 which was instamped. The hundi was not paid, and the plaintiff brought the suit.

Held: that as the hundi was inadmissible in evidence as it was unstamped and the plaintiff could not fall back upon the original tansaction: *A. I. R.* 1923 *Lah.* 396, *Dist.* [P 424 C 2]

(b) *Limitation Act, Art. 82—Limitation in a suit brought by an agent to recover amount due from his client operates from the date of the payment on behalf of the principal.*

A suit by an agent to recover the amount due from his client must be brought within the period of limitation prescribed by Act. 83 of Sch. 1, Limitation Act. Limitation in such a case operates from the date of the payment on behalf of the principal: 23 *P. R.* 1915; 59 P. *L. R.* 1918; *A. I. R.* 1921 *Lah.* 167; *A. I. R.* 1923 *Lah.* 473; *A. I. R* 1926 *Lah.* 152 and *A. I. R.* 1927 *Lah.* 826, *Foll.*. [P 425 C 2]

Mehr Chand Mahajan—for Appellants.

Shiv Charan Das for *Badri Das*—for Respondents.

Judgment.—The plaintiff firm sued the defendant-firm for the sum of Rs. 585 in the following circumstances:

The plaintiff-firm was acting as commission agents buying and selling for the defendant-firm. According to the plaint, the accounts were settled on 29th August 1924, when a sum of Rs. 834-3-3 was found to be due by the defendant firm to the plaintiff-firm. This sum was settled by the plaintiff-firm giving up Rs. 234-3-3, by the defendant-firm paying Rs. 100 in cash, and by the plaintiff firm taking a hundi for Rs. 500 from the defendant firm. In para. 2 of the plaint it is stated that the bahi account was finally closed on the day of this settlement. A separate receipt was given to the defendant-firm by the plaintiff-firm on the same day. It recited that the account has been finally closed and that the only liability remaining was the hundi for Rs. 500.

The hundi was not paid. and the plaintiff-firm brought the present suit on 19th March 1926. It is a suit on the hundi, i. e., for Rs. 500 together with Rs. 85 on account of interest at the customary rate of Re. 1 per cent per mensem. The trial Judge held that the hundi was inadmissible in evidence as it was unstamped, that the plaintiff-firm could not fall back upon the original transactions, that no interest had been agreed to, and that the suit was within time whether it was considered to be a suit on the hundi or a suit on the original cause of action, as in the latter case Art. 85, Lim. Act, would apply The District Judge on appeal held that the hundi was inadmissible in evidence, but he held further that it only operated as a conditional discharge of the old account, and that the plaintiff-firm could fall back upon the original transaction. He further held that the suit was within

time on the original cause of action. as Art. 85, Lim. Act, applied. He allowed interest at the customary rate of 12 per cent. per annum and thus decreed the claim for Rs. 585. Against this decision this second appeal has been preferred. There is no doubt that there is a class of cases where it has been held that, if a hundi is insufficiently stamped and is given in renewal of a prior hundi, etc. and the suit on the hundi is not maintainable owing to its not being properly stamped, the creditor can fall back upon the prior hundi and in some cases upon the prior accounts. Each case has to be considered on its own merits. The real question is whether a new contract was substituted in fact under S. 62, Indian Contract Act, or whether the hundi was only given in the course of performing the former contract, i. e., the giving of the hundi was a conditional payment towards the original cause of action. It has been contended on behalf of the appellant before me that in the present case the original contract was not in the course of performance but that a new contract was entered into upon the hundi.

According to the accounts, on which is based the original cause of action, Rs. 834-3-3 were due on 29th August 1924. The plaintiff-firm gave up Rs. 234-3-0, the defendant paid Rs. 100 and an insufficiently stamped hundi was taken for Rs. 500. This certainly looks like entering into a new contract, because it was not a part of the performance of the old contract to give up part of what was due until the whole contract was closed. It seems to me that it was clearly intended that the old contract should be put an end to finally and that the hundi for Rs. 500 was given as a new contract owing to the giving up by the plaintiff-firm of so much and the defendant-firm paying so much. The old basis was intended to be done away with altogether. Besides, it is admitted in the plaint that the accounts were finally closed and the receipt given by the plaintiff-firm on the same date also stated that the old account was closed and that no liability remained except on this hundi. It would be sufficient to revive the old account in face of the terms of the receipt to the effect that the old account has been cancelled. In my opinion the lower appellate Court erred in holding that this was a case similar to that decided in *Rahmat Ali* v. *Dewa Singh* (1). That case was totally different, and I hold that the suit only lay upon the hundi, and that the plaintiff-firm was not entitled to fall back upon the original cause of action.

I further hold that, even if the plaintiff-firm can be allowed to fall back upon the original cause of action, the suit on the original cause of action is time barred. In a suit of this nature Art. 83 Lim. Act, applies and not Art. 85. It has been held in *Manghi Ram* v. *Ram Suran* (2), *Surab Dial* v. *Devi Ditta* (3) and *Kadri Pershad* v. *Harbhagwan* (4) *A. I. R.* 1923 *Lah.* 473, *A. I. R.* 1926 *Lah.* 152 and in *Kirpa Ram Lachhman Das* v. *Sawan Mal Gopi Chand* (5) that a suit by an agent to recover the amount due from his client must be brought within the period of limitation prescribed by Art. 83 Sch. 1, Lim. Act. Limitation in such a case operates from the date of the payment on behalf of the principal. In the present case the limitation has expired, therefore, on the original cause of action before the present suit was brought. The period of limitation under Art. 83 is three years from the date when the plaintiff is actually damnified, and it is clear from S. 222, Contract Act, that a person, who deals with a commission agent, is bound to indemnify him. In these circumstances the appeal must also succeed on the question of limitation, even if it were held that the plaintiff could fall back on the original cause of action.

I accept the appeal, set aside the decree of the lower appellate Court and restore that of the trial Judge dismissing the suit with costs in the trial Court and in this Court.

N.K. *Appeal allowed.*

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(1) A. I. R. 1923 Lah. 396=4 Lah. 151.
(2) [1915] 23 P. R. 1915=100 P. L. R. 1915=26 I. C. 415=35 P. W. R. 1915.
(3) [1918] 59 P. L. R. 1918=46 I. C. 541=139 P. W. R. 1918.
(4) A. I. R. 1921 Lah. 167.
(5) A. I. R. 1927 Lah. 826.

A. I. R. 1928 Lahore 426

TEK CHAND, J.

Lal Singh—Plaintiff—Petitioner.

v.

Mt. Kartaro — Defendant — Respondent.

Civil Revn. No. 270 of 1927, Decided on 13th December 1927, from order of Dist. Judge, Ferozepur, D/- 6th December 1926.

Civil P. C., O. 3, R. 5—Notice to duly appointed pleader conducting the case amounts to notice to the party.

The service of a notice on the duly appointed pleader of a party to a suit who had been conducting the case up to the last hearing of the case when the case was postponed to a further date and who had not intimated to the Court that he was no longer appearing in the case, nor had taken any steps to get his vakalatnama cancelled, is equivalent to service on the party and he can not withdraw merely by writing on the notice that service should be effected on the party's agent; 13 *C. W. N.* 142, *Dist.* [P 426 C 2]

Mehr Chand Mahajan—for Petitioner.

Kishan Dayal—for Respondent.

Judgment.—The plaintiff Lal Singh instituted a suit in the Court of the Subordinate Judge, Ferozepore, for a declaration that he was the owner of certain property. The suit was fixed for hearing for 25th May 1926, but on that date the Court was closed on account of the prevalence of plague. On 31st May 1926. separate notices were issued to the plaintiff and his pleader, Lala Khairati Ram, that the case would be heard on the 15th June 1926. The notice sent to the plaintiff could not be served on him as he had gone to China but was delivered to his minor son, aged 16. On the notice sent to Lala Khairati Ram he noted on the 11th June 1926, that the plaintiff's Mukhtar should be served. No steps were, however, taken to serve the plaintiff's Mukhtar. On 15th June 1926, there was no appearance on behalf of the plaintiff and the suit was dismissed under O. 9, R. 8, Civil P. C.

On 14th August 1926, the plaintiff's Mukhtar through the same pleader Lala Khairati Ram filed an application for having the dismissal in default set aside, stating that when the case was adjourned on 25th May he was informed that fresh notices would be sent informing the parties of the dates on which the case would be heard but that no such notice had been received by him and that on going to the Court on that morning he had discovered that the suit had been dismissed in default on 15th June 1926. This application was dismissed by the Subordinate Judge and his order was affirmed on appeal by the District Judge.

A petition for revision has been filed in this Court and Mr. Mehr Chand Mahajan has argued that in this case there had been no proper service of the adjourned date of hearing and the lower Courts have acted illegally and with material irregularity in not restoring the suit. Mr. Kishen Dayal for the respondent has challenged the finding of the learned District Judge that service on the minor son of the plaintiff was not effective, but I see no force in his contention and uphold that finding.

Mr. Mehr Chand's main contention is that the learned District Judge is in error in holding that service on Lala Khairati Ram was good service on the petitioner under O. 3, R. 5, Civil P. C. He argues that O. 3, R. 5, Civil P. C., merely raises a presumption that notice to the pleader is notice to the party, but that this is a rebuttable presumption and in this particular case it had been rebutted by the endorsement of the pleader on the back of the notice that the plaintiff's mukhtar should be informed. In support of this contention the learned counsel has relied upon a decision of the Calcutta High Court reported as *Sandya* v. *Upendra Chandra Sinha* (1). After giving full consideration to his arguments, I am of opinion that they are devoid of all force. Even if the ruling lays down the law correctly a matter on which I wish to express no opinion in this judgment there is no doubt that in this case the circumstances are such that notice to the pleader must be considered to be notice to the party. Lala Khairati Ram was the duly appointed pleader of the plaintiff and had been conducting the case up to 25th May 1926. He had not intimated to the Court that he was no longer appearing in the case nor had he taken any steps to get his vakalatnama cancelled. On the other hand, we find that the application for restoration was signed and presented by him on 14th August 1926, and it was he who preferred the appeal against the order of dismissal in the Court of the District Judge. There can be no manner of doubt that in these circumstances

(1) [1909] 13 C. W. N. 142=2 I. C, 547.

service on him was equivalent to service on the plaintiff and he could not withdraw merely by writing on the notice that service should be effected on the muhtar.

I, therefore, hold that the decision of the learned District is right and accordingly I dismiss the petition for revision with costs.

S.J. *Petition dismissed.*

A. I. R. 1928 Lahore 427 (1)

TEK CHAND, J.

Wadhawa—Defendant—Appellant,

v.

Jai Kishan Das—Plaintiff — Respondent.

Second Appeal No. 1063 of 1927, Decided on 10th November 1927, from decree of Dist. Judge, Sialkot, D/- 24th February 1927.

Evidence Act, Ss. 45 and 60—Reports of experts are not legal evidence unless they appear and are examined in Court—Evidence—Expert.

The reports of the experts are not legal evidence unless they appear in Court as witnesses and are examined by both parties in respect of their opinion. [P 427 C 2]

Balkishen Mehra—for Appellant.

Lal Chand and *Hazara Singh* — for Respondent.

Judgment.—The plaintiff instituted the suit out of which this second appeal has arisen, for ejectment of the defendant from two houses (Nos. 89 and 90) which he alleged the defendant had mortgaged to him with possession and in respect of which he had executed rent-deeds in his favour. The trial Court decreed the suit with regard to house No. 89 but dismissed it with regard to house No. 90, holding that the relationship of landlord and tenant was not proved in respect of that house. On appeal the learned District Judge reversed this finding and held that there was sufficient oral and documentary evidence on the record to prove that the deed (Ex. P. 2) relating to house No. 90 had been duly executed by the defendant. He accordingly decreed the plaintiff's suit in full.

On second appeal the only point urged is that the lower appellate Court has acted illegally in excluding from consideration the reports of experts from the Finger Print Bureau at Phillaur and Allahabad to the effect that the thumb-impression on the rent-deed in question did not tally with the admitted thumb-impression of the defendant. The learned District Judge held this evidence to be inadmissible because the experts were not examined in Court in respect of their reports.

After hearing both counsel I am of opinion that the learned District Judge acted rightly in excluding this evidence. It is obvious that the reports of the experts are not legal evidence unless they appear in Court as witnesses and are examined by both parties in respect of their opinions.

I, therefore, see no force in this appeal and dismiss it with costs.

S.J. *Appeal dismissed.*

A. I. R. 1928 Lahore 427 (2)

ZAFAR ALI, J.

Sri Ram-Mahtab Singh—Plaintiff—Petitioner.

v.

Mahtab Hassan—Defendant—Respondent.

Civil Revn. Petn. No. 405 of 1927, Decided on 10th December 1927, from order of Sr. Sub-Judge., Hissar, D./- 14th March 1927.

Civil P. C., O. 17, Rr. 2 and 3—Decision of lower appellate Court setting aside an ex-parte decree on the ground that original decree was ex parte and not on merits—Court has jurisdiction to so decide and no revision lies.

Where a Court has jurisdiction to determine a question and does determine that question, it cannot be said to have committed a material irregularity because it has come to an erroneous decision; 11 *Cal.* 6 (*P. C.*), *Applied.*

Where the lower appellate Court set aside a decree that was passed in the absence of the defendant holding that it was an ex-parte decree under O. 17, R. 2, Civil P. C. and the plaintiff applied for revision of this order on the ground that the lower appellate Court had no jurisdiction to set aside the decree as it was a decree on the merits passed under O. 17, R. 3, Civil P. C.

Held : that the lower appellate Court had jurisdiction to determine the question whether the decree was passed under O. 17, R. 2 or under O. 17, R. 3, and having decided that question it cannot be said to have exercised a jurisdiction not vested in it even though it came to an erroneous conclusion. [P 428 C 1]

D. C. Ralli for *J. N. Aggarwal*—for Petitioner.

Niaz Muhammad—for Respondent.

Judgment—The Court below has set aside a decree that was passed in the

absence of the defendant holding that it was an ex-parte decree under O. 17, R. 2, Civil P. C. The plaintiff applies for revision of this order on the ground that the Court below had no jurisdiction to set aside the decree as it was a decree on the merits passed under O. 17, R. 3, Civil P. C. Now there can be no manner of doubt that the Court had jurisdiction to determine the question whether the decree was passed under O. 17 R. 2, or under O. 17 R. 3, and having decided that question it cannot be said to have exercised a jurisdiction not vested in it even though it came to an erroneous conclusion. Their Lordships of the Judical Committee have laid down in *Amir Hassan Khan* v. *Sheo Baksh Singh* (1) that it is settled law that where a Court has jurisdiction to determine a question and does determine that question, it cannot be said to have committed a material irregularity because it has come to an erroneous decision. I, therefore, see no reason for interference and dismiss this application for revision with costs.

S.J. *Application dismissed.*

(1) [1885] 11 Cal. 6=11 I. A. 237=4 Sar. 559 (P. C.)

A. I. R. 1928 Lahore 428

HARRISON, J.

Ghulam Muhammad and *others*—Defendants—Appellants.

v.

Kalim Ullah and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 2333 of 1927, Decided on 19th January 1928, from decree of Dist. Judge, Hoshiarpur, D/- 7th June 1927.

(a) *Evidence Act, Ss.* 11, 13 *and* 32—*Document containing recitals of boundaries of land in dispute—Executant not dead but not coming to give evidence—Document is not admissible.*

Recitals in documents regarding boundaries executed by third parties in favour of the plaintiffs are not admissible in evidence if the executant is not dead and does not come to corroborate them: *A. I. R.* 1927 *Lah.* 448, *Foll.*; *A. I. R.* 1927 *Cal.* 230; *A. I. R.* 1916 *P. C.* 5, *Dist.* [P 429 C 1]

(b) *Civil P. C., O.* 13, *R.* 1—*Admissibility of evidence as opposed to its irrelevancy can be objected at the first hearing only.*

A document can be objected to as irrelevant at any time; a document can be objected to as inadmissible as opposed to irrelevant at the first hearing only. [P 429 C 1]

Muhammad Rafi—for Appellants.

Badri Das and *Niaz Muhammad*—for Respondents.

Judgment.—The plaintiff in this case brought a suit in which they claimed the northern portion of a certain property as being their ancestal property, the middle portion as having been acquired by purchase, and an injunction restraining the defendants from interfering with their building a wall between the point H and point K on the map Ex. P. 2, this being on the boundary of the third and southern portion which admittedly belonged to them. The wall will have the effect of blocking two windows in the defendants' house. In the trial Court the plaintiffs obtained a decree for both the northern and middle portions but their suit for injunction was dismissed. Both sides appealed and the District Judge accepted the appeal of the plaintiff, dismissed the appeal of the defendants and decreed the claim in full, i. e., all the three reliefs. The defendants have presented a second appeal as regards all the three reliefs.

As far as the middle portion is concerned the appellants wish to attack the finding of fact as being based on insufficient evidence and also on unsatisfactory evidence, and this more especially because they did not produce a certain witness, namely, their own vendor. I hold that this finding cannot be challenged on second appeal. It is based on evidence and it is a clear and definite finding.

As regards the injunction, counsel contends that the District Judge has failed to apply his mind and this is shown by the briefness of the passage in his judgment which deals with the oral evidence, namely, "the oral evidence produced is not convincing." He decided the case on documentary evidence, he has not believed the oral evidence and I cannot see any reason for making a presumption contrary to the usual presumption that all official acts are regularly performed and for supposing that the District Judge had not applied his mind before giving this tersely expressed conclusion. I find that this finding also cannot be challenged on second appeal.

As regards the northen portion, an important point of law has been raised and this is, that the District Judge has relied partly on inadmissible and irrelevant evidence consisting of recitals in certain documents regarding boundaries,

those documents having been executed by third parties in favour of the plaintiffs. Counsel points out that not only are these admissions, but apart from this, as laid down in *Lajpat Rai* v. *Faiz Ahmad* (1), such recitals are wholly inadmissible. He further points out that it is impossible for a Court of second appeal to say what decision would have been come to had this evidence been excluded and, therefore, he is entitled to a remand for a fresh decision. He relies upon *Lajpat Rai* v. *Faiz Ahmad* (1), *Srinivas Das* v. *Meher Bai* (2), *A. B. Miller* v. *Mahadeo Das* (3) and *Sabdi Bepari* v. *S. H. Budhai* (4). Counsel for the respondents lays stress in his turn on the same ruling, namely, *Lajpat Rai* v. *Faiz Ahmad* (1) when read with a certain passage in *Sabdi Bepari* v. *S. H. Budhai* (4) and *A. I. R.* 1927 *Cal.* 230. The passage in *Sabdi Bepari* v. *S. H. Budhai* (4) which is relied on will be found at p. 951 and is as follows:

> As pointed out by the Judicial Committee in the case of *Ram Kishan Das* v. *Babu Madho Das* and by a number of decisions of this Court, when a question is raised whether a document is admissible or not on the ground of want of registration or on the ground that the document is irrelevant it can be raised at any stage of the case. It is such objections as can only be remedied if taken at the earliest stage that are not allowed to be raised at a later stage, e. g., the question of the admissibility of a copy in the absence of evidence that the original has been lost.

With this counsel reads the passage in *I. L. R.* 8 *Lah.*, which says

> as the executants were not produced in the present case nor were stated to be dead, the document were not shown to be admissible in evidence.

In *A. I. R.* 1927 *Cal.* 230 it was definitely laid down by a Division Bench that the evidence of the executant himself is admissible and is fortified by the contents of the document which he executed in the past. Counsel for the appellants contends that the Privy Council ruling, *Srinivas Das* v. *Meher Bai* (2) was not brought to the notice of the Judges, who decided that case. Even if I accept the view put forward by counsel for the respondents, it appears to me that in this case the test cannot be applied with success. A document can be objected to as irrelevant at any time; a document can be objected to as inadmissible as opposed to irrelevant at the first hearing only. Counsel contends that had an objection been raised and had he produced his witness, the executant, in answer to that objection, he could then have tendered his documents in support of the witness' oral evidence. Not only does the argument depend on many suppositions including the presumption that the witness, when produced, would have given evidence supporting the respondents, but it further treats the objection as a mere technicality, which has only to be disclosed to be put right. It is true that in the case of a copy evidence is necessary to prove the loss of the original, but the copy has in itself a certain potential value from the beginning and is neither irrelevant nor inadmissible but only conditionally inadmissible. This document is wholly valueless in itself, though, if several circumstances be presupposed, it does become relevant and admissible for a purpose wholly different from that claimed for it as its face value. The absence of the necessary circumstances cannot be made good at any later stage because they are essential antecedent conditions without whose presence the document may be said to have no reality as evidence. In my opinion, therefore, these two documents do not satisfy the ingenious test suggested by counsel for the respondents and are irrelevant and inadmissible and must be ignored.

I dismiss the appeal regarding the middle portion and the injunction. Regarding the remainder, I remand the case for fresh decision in view of what has been said above so far as this portion is concerned, costs will follow the result, but so far as the middle portion and the injunction are concerned, the appeal is dismissed with costs which may be taken as 2/3rds of the whole.

N.K. *Appeal partly dismissed.*

(1) A. I. R, 1927 Lah. 448=8 Lah. 651.
(2) A. I. R. 1916 P. C. 5=41 Bom. 300=44 I.A. 36 (P. C.).
(3) [1897] 19 All. 76=23 I. A. 106=7 Sar. 78 (P. C.).
(4) A. I. R. 1925 Cal. 870=82 I. C. 949.

A. I. R. 1928 Lahore 429

TEK CHAND, J.

Makhan Lal—Defendant—Appellant.

v,

Moti Ram—Plaintiff—Respondent.

Second Appeal No. 1446 of 1927, Decided on 19th December 1927, from decree of Addl. Dist. Judge, Jullundur, D/- 22nd March 1927.

(a) Cosharer—Plaintiff claiming to be exclusive owner but found to be joint owner—Suit should proceed on the basis of joint ownership.

If a plaintiff comes into Court claiming to be exclusive owner of certain property but he is found to be a joint owner with the defendant, the Courts should proceed to decide the case on the basis of joint ownership. [P 431 C 1]

(b) Cosharer—Party Wall—Exclusive ownership.

There may be cases in which a wall which is a party wall up to a certain height may above that be the separate property of one of the owners: *Watson* v. *Arnold*, (1872) 8 *Ch. A.* 1084, *Foll.* [P 432 C 1]

Ram Lal Anand—for Appellant.

Mehr Chand Mahajan for *Jagan Nath Agarwal*—for Respondent.

Judgment.—The plaintiff-respondent Moti Ram and one Nathu Sheikh were the owners of two adjoining houses in Jullunder Cantonment, which were separated by a kacha wall 8 ft. high. Nathu died leaving him surviving a widow Mt. Manto and a brother Lal Mahammad. On 23rd August 1923 an agreement was executed between Lal Muhammad and the plaintiff whereby the plaintiff was allowed to raise the height of the aforesaid wall by building it in pucca brick work and it was stipulated that the part so built would be his exclusive property. It appears that in accordance with this agreement the plaintiff-respondent raised the height of the wall by 3 ft., building this additional portion pucca. About a year later, on 18th August 1924, Mt. Manto, widow of Nathu 2 sold the house to Makhan Lal, defendant-appellant. This sale-deed was attested by Lal Muhammad and his son Kallan but no mention was made in it of the agreement which Lal Mohammad had executed in favour of the plaintiff on 23rd August 1923. Soon after the defendant Makhan Lal began to rebuild portions of the house which he had bought and in doing so he placed his rafters on the pakka portion of the wall intervening between this house and the house of the plaintiff, which portion the plaintiff had built in pursuance of the aforesaid agreement. The plaintiff objected to the defendant placing his rafters in this portion of the wall and on the defendant's refusal to remove them the plaintiff, on 1st December 1925, instituted the present suit asking for a permanent injunction ordering the defendant to remove his rafters from the portion aforesaid and not to build any structure over it nor to open any ventilators in it. The suit was dismissed by the trial Court but has been decreed by the learned District Judge.

On second appeal the first point taken by Mr. Ram Lal Anand on behalf of the defendant-appellant is that the learned District Judge having found that the agreement entered into by Lal Muhammad in favour of the plaintiff was not authorized by Mt. Manto and was therefore not binding on her or her transferee, (the defendant-appellant) the learned District Judge ought to have dismissed the suit and not set up an entirely new case for the plaintiff respondent I have examined the pleadings in the case and carefully considered the reasoning of the learned District Judge and the arguments of both counsel and have reached the conclusion that the point on which the learned District Judge has decided the case against the appellant is fully covered by the pleadings of the parties. It is no doubt true that in the plaint the plaintiff relied largely on the aforesaid agreement but in para. 4 of the plaint he put forward an alternative claim independent of the agreement, and the pleas of the defendant and the evidence that he led leave no doubt that he was fully cognizant of this part of the plaintiff's claim. Moreover, grounds 6 and 7 of the plaintiff's memorandum of appeal to the District Judge fully set out this point, which was argued before him without any objection on the part of the defendant-appellant. I, therefore, see no force in this contention and hold that the decision of the learned District Judge is not vitiated by his having set up a case not covered by the pleadings of the parties.

It is next contended that the plaintiff had claimed the wall to be his exclusive property and as soon as the District Judge found that the kacha wall was joint he should have at once dismissed the suit. I see no force in this contention also, as it is settled law that if a plaintiff comes into Court claiming to be exclusive owner of certain property but he is found to be a joint-owner with the defendant, the Courts should proceed to decide the case on the basis of joint ownership.

The next question which has been debated before me is whether the defendant appellant is bound by agreement which had been executed by Lal Muhammad in

favour of the plaintiff long before the defendant bought the house from Mt. Manto. As pointed out already the house belonged originally to Nathu, a Sheikh residing in the Jullunder Cantonment and presumably governed by Mahomedan Law, under which on Nathu's death ¾ths of the house vested in Lal Muhammad and 1/4th in his widow. It is not contended on behalf of the appellant, and indeed there is no evidence on this point on the record that Nathu was governed by customary law. The facts and the circumstances of the case clearly show that when the appellant bought the house in 1924 he was fully aware of the fact that Lal Muhammad had executed an agreement in favour of the plaintiff and in order to lay the foundation of future litigation with the plaintiff, he purposely got the sale-deed executed by Mt. Manto reciting that she was the sole owner of the house, but at the same time he took the precaution of having the deed attested by Lal Muhammad and his son Kalan. There is no doubt whatsoever that this was merely a device to get over the obligation which Lal Muhammad as the owner of the 3/4ths of the house had incurred in favour of the plaintiff in respect of the intervening wall by the agreement of the 23rd August 1923. The learned District Judge has held that Lal Muhammad had no right in the house simply because in the sale-deed by Mt. Manto in favour of the defendant it is stated that she was the sole owner. This admission, however, is not binding on the plaintiff, who was not a party to that deed. In these circumstances the presumption that the parties are governed by Muhammadan Law must prevail and it must be held that Lal Muhammad owned 3/4ths share in the house and the agreement executed by him in favour of the plaintiff was not wholly ineffectual. It must be borne in mind that the defendant-appellant purchased the house with his eyes open long after the agreement had been executed and the height of the wall raised by the plaintiff at his own expense in pursuance thereof. That the defendant was fixed with the knowledge of this agreement is proved not only by the device adopted by him in ostensibly buying from Mt. Manto and having the deed executed by Lal Muhammad and his son but also by the further fact that at the trial he asserted that he had placed his rafters in the pucca wall with the consent of the plaintiff's son Ganeshi Lal. This was, however, denied by Ganeshi Lal and has been held to be unproved by the learned District Judge. Then there is the point rightly emphasized by the District Judge, that in paras. 4 and 5 of the jawab dawa the defendant described the increased portion of the wall as "the property of the plaintiff" and rested his case mainly upon the consent obtained from the plaintiff's son for the insertion of the rafters. I must, therefore, hold that the plaintiff was the owner of the newly built portion of the wall and the defendant had no right to place his rafters in it, without his consent, which is not proved on the record.

In this view of the case it is not necessary to decide the legal point whether when one of the co-owners of a jointly-owned party-wall raises its height at his own expense, the increased portion is or is not owned exclusively by such owner or whether it becomes the joint property of both.

So far as the case-law in India is concerned the authorities on the point are not uniform. In *Kanakayya* v. *Narasimulu* (1), it was held by one of the Judges (Parker, J.) that where one of the two tenants-in-common of a party-wall raised its height with a view to build a superstructure on his own tenement the other tenant-in-common who had not consented to the addition to the wall but had suffered no inconvenience therefrom was entitled to sue for the removal of the newly erected portion. In support of this conclusion reliance was placed upon the well-known English authority: *Watson* v. *Gray* (2). The other Judge, Subramania Ayyar, J., was not inclined to support this view but ultimately agreed with his colleague. This decision was followed by the Allahabad High Court in *Ikram Ullah Khan* v. *Md. Yunis Ali Khan* (3). The Bombay High Court has, however, taken the contrary view and a Division Bench has held in *I. L. R.* 49 *Bom.* 586 that where one of the owners of a party-wall raises its height with the consent or acquiescence of the other owner such raised portion is also a party-wall and

(1) [1896] 19 Mad. 33.
(2) [1880] 14 Ch. D. 192=49 L. J. Ch. 243=44 J. P. 537=28 W. R. 438=42 L. T. 294.
(3) [1915] 13 A. L. J. 473=30 I. C. 89.

that neither owner is at liberty to open windows etc., in the portion so raised. In that case the Madras judgment above-cited was expressly dissented from. This ruling has been followed by the Bombay Court in *Shivputrappa Parappa* v. *Shivrudrappa Kalappa* (4) and in *A.I.R.* 1926 *Bom.* 545. It is, however, not necessary to decide which of these two rival views is correct as Mr. Ram Lal concedes that the point directly decided in *Kanakayya* v. *Narasimhalu* (1), does not arise here as the present is not a suit by Makhan Lal (defendant) for removal of the portion of the wall recently built. Similarly, before the appellant can get any support from the Bombay rulings he must establish that the party-wall was raised with his consent or acquiescence or with the consent or acquiescence of his vendor. Throughout the trial the defendant-appellant strenuously contended that no such consent or acquiescence had been given and he cannot now be allowed to turn round and seek relief on the assumption that such consent or acquiescence existed in fact.

Mr. Ram Lal finally argued that it was a legal impossibility that the lower portion of a wall be joint and the upper portion be exclusively owned by one of the co-owners alone, but he was unable to cite any authority in support of his assertion. For the proposition there may be cases in which a wall which is a party-wall up to a certain height may above that be the separate property of one of the owners, reference may be made to the leading English authority *Watson* v. *Arnold* (5), and the other authorities collected in the Peacock's Law of Easements in British India, 3rd edition, pp. 187 and 188.

For the forgoing reasons I uphold the conclusions of the learned District Judge and dismiss the appeal but having regard to all the circumstances of the case I direct that the parties shall bear their own costs throughout.

N.K. *Appeal dismissed.*

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(4) A. I. R. 1926 Bom. 387.
(5) [1872] 8 Ch. A. 1084.

A. I. R. 1928 Lahore 432

ADDISON AND JOHNSTONE, JJ.

Feroze Din and *others*—Defendants—Appellants.

v,

Nawab Khan and *others*—Plaintiffs and Pro-forma Defendants—Respondents.

First Appeal No. 21 of 1922, Decided on 27th June 1927, from decree of the Sr. Sub-Judge, Hoshiarpur, D/- 1st October 1921.

(a) *Custom (Punjab)—Mahomedan Rajput of Garhshanker—Nearest reversioner can bring a declaratory suit.*

The nearest reversionary heirs of a deceased Mahomedan Rajput of Garhshanker can bring a declaratory suit that a decree obtained by his widow and illegitimate sons is invalid. The daughters are not reversionary heirs and the fact that one of them has, since the passing of the decree, given birth to a son does not alter the situation. [P 433 C 2]

(b) *Evidence Act, S.* 101—*Onus immaterial.*

Where the parties have produced all their available evidence, the dispute on the point of onus is mainly of an academic nature. [P 435 C 1]

(c) *Civil P. C., O.* 13, *R.* 4—*Admittance of documents by Court under the rule does not make unproved documents as proved.*

The admittance of documents under O.13, R.4, is not binding on the parties, and unproved documents cannot be regarded as proved merely because they are so admitted by the Court. [P 436 C 2]

(d) *Mahomedan Law—Legitimacy—Acknowledgment raises only a presumption of marriage.*

Acknowledgment raises a presumption of marriage, but the presumption is capable of being set aside by contrary proof. Marriage will be held proved and legitimacy established, unless the marriage is disproved : *A. I. R.* 1922, *P. C.* 159 and 32 *All.* 345, *Foll. (Case Law considered).* [P 437 C 1]

(e) *Evidence Act, S.* 115—*Attestation does not amount to estoppel.*

Mere attestation of deed cannot amount to an estoppel, since attestation does not fix an attesting witness with knowledge of the contents of a document. [P 438 C 2]

Moti Sagar, Jiwan Lal Kapur, Hem Raj and *Niaz Mohammad*—for Appts.

Badri Das, Jagan Nath Bhandari and *Mohammad Shafi*—for Respondents.

Johnstone, J.—The parties to this appeal are Muhammadan Rajputs of Garhshankar, a small town of about 5,000 inhabitants, in the Hoshiarpur District. Seven plaintiffs instituted the suit and were later on joined by an eighth, defendant 5, mentioned in the plaint. These eight persons claim to be, and it is

not denied that they are, reversioners in the third degree of one Chaudhri Ghulam Jillani Khan, who died in 1912, leaving a widow Mt Basri (defendant 1) and three reputed sons (defendants 2 to 4) by Mt. Begam. There are also two daughters, one of whom was married but had no child when the suit was brought, while the other was at the date of institution an unmarried minor, but has since married and given birth to a son.

Defendants 2 to 4 claimed to be the legitimate sons of the Chaudhri by Mt. Begam, who was formarly a tawaif, i. e., dancing girl or prostitute by profession.

On the death of the Chaudhri mutation was effected in the revenue papers and with the consent of Mt. Basri defendants 2 to 4 succeeded to half the estate. Against this order the plaintiffs appealed to the Collector who held that defendants 2 to 4 were illegitimate and directed mutation to be made in the name of Mt. Basri only. An appeal to the Commissioner against the order of the Collector was unsuccessful.

The next step was taken by defendants 2 to 4, who instituted a declaratory suit against Mt. Basri only. The appellants obtained information of that suit and applied to be made parties. The Court refused to implead them and, on Mt. Basri's confessing judgment, a decree was passed in favour of defendants 2 to 4 to the effect that they were in possession of half the estate as sons and heirs of the deceased Chaudhri. A petition for revision filed by the Collector in the Chief Court was rejected.

The present suit was filed by the plaintiffs in January 1919. After explaining the previous history the plaintiffs prayed for a declaration (a) that defendants 2 to 4 are not the sons of the deceased Chaudhri and (b) that the decree obtained by defendants 2 to 4 in collusion with Mt. Basri is invalid and shall not affect their own rights as reversioners.

Various preliminary pleas were preferred by the defendants. Those relating to the status of the plaintiffs as reversioners of the deceased and to the question of limitation have been abandoned. The other main preliminary pleas were (a) that the plaintiffs had no locus standi to sue in the presence of daughters and particularly of the unmarried daughter, and (b) that while part of the property in suit is ancestral, the other part is self-acquired. On merits it was pleaded that defendants 2 to 4 were the legitimate sons of the Chaudhri, that they had been admitted by the brotherhood and even by some of the plaintiffs as sons of the Chaudhri and had been acknowledged by the Chaudhri himself as legitimate sons. It was denied that Mt. Begam was not the lawful wife of, and married to the Chaudhri.

On these pleadings issues were framed and the lower Court came to the following findings :

(a) That the plaintiffs had a locus standi to sue.

(b) That there was acknowledgment by the Chaudhri of paternity if not of legitimacy.

(c) That the alleged marriage between him and Mt. Begam was not proved, and was in fact disproved.

(d) That at the time when defendants 2 to 4 were born Mt. Begam was living at her own house as a prostitute, and

(e) That they, having been born out of wedlock in such circumstances could never have acquired the status of legitimate sons, even if acknowledgement of legitimacy had been proved.

On these findings the plaintiffs' suit was decreed with costs against defendants 2 to 4.

Since the passing of the decree and institution of the appeal Mt. Basri had died and her daughters have been brought on to the record as her legal representatives. The decision in this appeal will in no way affect their rights as heirs of Ghulam Jillani Khan.

The first question which calls for a decision is whether the plaintiffs had a locus standi to sue. There is, in my opinion, no difficulty in providing the answer to that question. The plaintiffs are the nearest reversionary heirs of the deceased Ghulam Jillani Khan. The daughters are not reversionary heirs and the fact that one of them has, since the passing of the decree, given birth to a son does not alter the situation. That son may have rights as against the plaintiffs, but a question of that kind will have to be raised, if ever, in a subsequent suit. Mr. Moti Sagar relied on *Rani Anand Kaur* v. *Court of Wards* (1). That was a case of an adoption by a Hindu widow. It was held that a suit to contest the

(1) [1881] 6 Cal. 764=8 I. A. 14=4 Sar. 195 (P. C.).

adoption might, in certain circumstances, be brought by a contingent reversionary heir, but that as a rule a suit of that kind must be brought by the presumptive reversionary heir. The authority cited does not assist the defendants' case. The general rule is laid down for the Punjab in para 67, Rattigan's Digest of Customary Law, which states that the proper person to contest an alienation is the nearest reversionary heir. For a similar case I would refer to *Tek Chand* v. *Soman Singh* (2). That rule is equally applicable to the facts of the present appeal.

The second preliminary contention was that no distinction had been made between the ancestral and self-acquired property left by the deceased. It is not denied that, in respect of the ancestral property in suit the plaintiffs have a right to sue, for, when the suit was brought they were the persons entitled to succeed to the ancestral land on the death of the widow, whose estate was a limited one. It is clear, too, that the plaintiffs have contingent rights in the self-acquired property. On the date of the suit only the widow and daughters were in existance, and not the daughters' sons. The females mentioned would take a mere life estate in the self-acquired property, though the daughters' sons, had they been in existence, would usually succeed in preference to the collaterals as absolute owners with respect to the self-acquired land. There is no bar, therefore, to the plaintiffs' suing for a declaration with regard to both kinds of property. It is unnecessary at this stage to determine what property is ancestral and what is not ancestral. The suit as brought by the plaintiffs cannot rightly be described as a speculative suit and I would hold that both of the preliminary contentions urged by the defendants' counsel must be overruled.

The question of onus with regard to proof of legitimacy or the contrary has not been argued at any length. The lower Court placed the onus on defendants 2 to 4 to prove that they were legitimate. It is contended before us that the onus in such matters is always on the person alleging illegitimacy. In the present case, however, after the plaintiff in their plaint had alleged illegitimacy. the defendants pleaded, para 2 of their written statement, that Ghulam Jillani Khan had admitted defendants 2 to 4 as his sons by words and acts. It was nowhere definitely stated in these pleas that Mt. Begam was the married wife of the deceased ; only the converse was denied, and then it was remarked that Mt. Begam and the deceased had all along been declaring themselves as husband and wife and treating each other as such. In view of the pleadings I consider that the burden of proof was not wrongly placed on the defendants. The parties having produced all their available evidence, the dispute on the point is now mainly of an academic nature.

Before discussing the evidence and the legal questions which arise in the appeal, I must advert for a moment to the manner in which documents were admitted on to the record. It appears that when the documents were filed, they were then and there stamped by the Judge as being "admitted in evidence" under O. 13, R. 4, Civil P. C. At that time none of the documents had been proved, and in the result a considerable number of documents of both parties was never proved during the trial of the suit. This practice is condemned as being entirely illegal. The position now is that all the documents have been formally admitted, though some are not proved. The Judge though asked by the defendants to do so, did not remove unproved documents from the record, and the question is whether we should consider all the documents to be admitted or only those which were proved at the trial. I would hold that the admittance under O. 13, R. 4, was wrong and was not binding on the parties, and that unproved documents cannot be regarded as proved merely because they were wrongly admitted by the Court I shall, therefore, when dealing with the documents, rely on only such as were proved at the trial.

The defendants made an attempt to prove that a formal marriage between the deceased and Mt. Begam had taken place about the year 1894. The attempt was, in my opinion, a complete failure. (After discussing evidence and concluding that no marriage took place before defendants 2 to 4 were born and that the defendants proved that the deceased had acknowledged them as his legitimate sons, proceeded.)

(2) [1916] 27 P. R. 1916=218 P. W. R. 1915 =34 I. C. 831=147 P. L. R. 1916.

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Jammu & Kashmir

It will, I think, be convenient at this stage, to examine the legal position which is established when a father acknowledges sons born out of wedlock as legitimate. A considerable body of authority has been brought to our notice, and I propose, as briefly as possible to discuss it.

The first case cited before us was *Khajah Hidayat Oollah* v. *Rai Jan Khanum* (3). At p. 318 the view taken by their Lordships was that, where a child has been born to a father, of a mother, where there has not been mere casual concubinage but a more permanent connexion, and where there is no insurmountable obstacle to such a marriage, then according to the Muhammadan Law the presumption is in favour of such a marriage having taken place. In that particular case it was found that the mother of the child had been taken into the father's house a year before the child's birth, that the child had been born under the father's roof and that there had been a consecutive course of treatment for seven or eight years. On those facts and the inferences drawn from them it was held that acknowledgment had been proved and that the child was legitimate. The difference between the facts just mentioned and the facts proved in the present appeal are at once apparent. It is evident, too, that in the authority cited, no attempt was made to establish the existence of any "insurmountable obstacle."

In *Mahomed Banker Hossain Khan* v. *Shurfoon Nissa Begum* (4), their Lordships affirmed the general proposition that, according to the Muhammadan Law the legitimation or legitimacy of a child of Muhammadan parents may properly be presumed or inferred from circumstances, without proof, or at least without any direct proof, either of a marriage between the parents or of any formal act of legitimation.

The position is succinctly stated in a passage taken from *Ashruffoodowlah Ahmed Hossain* v. *Hyder Hussein Khan* (5) to which reference has frequently been made in the case law of later years :

> An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged by the father he acquires the status of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated it is by force of an acknowledgment express or implied, directly proved or presumed.

It is also laid down that the acknowledgment and recognition of children by a Muhammadan as sons, giving them the status of sons capable of inheriting as being of legitimate birth may, without proof of express acknowledgment of them, be inferred from his treatment of such children, provided that certain conditions negativing this relationship are absent. The concluding proviso to this later dictum is important and is repeated in a different way in *Sadakat Hossein* v. *Mahomed Yusuf* (6)

> The acknowledgment and recognition of a natural son by a Muhammadan as his son gives him the status of a son capable of inheriting as a legitimate son, unless certain conditions exist.

Another way of stating the case is found in *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (7) where Mahmood, J. observed :

> A child whose illegitimacy is proved beyond doubt, by reason of the marriage of its parents being either disproved or found to be unlawful cannot be legitimatised by acknowledgment.

Again in *Ghazanfar Ali* v. *Kamiz Fatima* (8) it was held that there was no evidence of marriage between the parents, and that the presumption of marriage which might have arisen from their prolonged cohabitation did not apply because the mother, before she was brought to the father's house, was admittedly a prostitute.

There is thus a multiplicity of authority for the view taken that a presumption of marriage, derived from a long course of treatment and from acknowledgment, can be rebutted by positive disproof of marriage. The latest pronouncement on the subject is to be found in *Habibur Rahman Chowdhuri* v *Altaf Ali Chowdhury* (9). At p. 864-5 their Lordships of the Privy Council have summarized the law. Acknowledgment raises a presumption of marriage, but the presumption is capable of being set aside by contrary proof. Marriage will be held proved and legitimacy established, unless the marriage is disproved. The facts out of which that appeal arose are not

(3) [1844] 8 M. I. A. 295=6 W. R. P. C. 52.
(4) [1860] 8 M. I. A. 136=3 W. R. P. C. 37.
(5) [1866] 11 M. I. A. 94=7 W. R. P. C. 1=1 Suther 659=2 Sar. 223 (P. C.).
(6) [1884] 10 Cal. 663=11 I. A. 91=4 Sar. 519 (P. C.).
(7) [1888] 10 All. 289.
(8) [1910] 32 All. 345=6 I. C. 674=37 I. A. 105 (P. C.).
(9) 48 Cal. 856=A. I. R. 1922 P. C. 159=I. A. 114 (P. C.).

similar to those which have been proved before us. There the woman in the case was definitely proved to have been employed as a mistress from time to time, being "dismissed" at intervals from the man's house.

So far it has been held that an acknowledgment is proved on the record, and therefore, according to the authorities, a presumption in favour of a marriage having taken place between Ghulam Jillani Khan and Mt. Begam has arisen. That presumption is, however, rebuttable and the only question which remains to be decided in this part of the appeal is whether or not the plaintiffs have positively disproved marriage.

Mt. Begam did not begin to reside in Ghulam Jillani's house until 1898 or thereabouts and before then she lived in patti Raike and was described as a tawaif. She admittedly had a paramour before she started relations with Ghulam Jillani and her first two sons by the latter were born out of wedlock. The initial presumption will be that that illicit connexion continued, as is laid down in *All India Reporter* 1927, *Lahore*,, *p.* 48. In support of the proposition that no change occurred subsequently, at least until 1898, the following points deserve notice :

1. Mt. Begam had private accounts long after the birth of the youngest of the defendants. The first document to which a reference has been made is exhibited as P. W. 1 (paper book, Part 3, pp. 164-5). The account is aginst the name of Mt. Begam, prostitute, daughter of Mt. Chando (admittedly a prostitute also). This account began in 1891 and continued till 1894. Then at p. 66 of Part 3 is another account with the same shopkeeper, and Mt. Begam is again described in the same way. It opens in 1899 and ends in September 1904. The documents are proved by Ghisu Mal (P. W. 3), the son of the shopkeeper Ganga Ram. In the middle of the period covering the above mentioned accounts, Mt. Begam executed two bonds (Part 3, p. 171), one of which (P. 5) is proved by Salamat Rai (P. W. 73). This bond is dated 11th December 1895 and Mt. Begam there also describes herself as a tawaif by caste.

2 In certain civil litigation Mt. Begam was a party. (a) The first case is *Chando* and *Begam* v. *Gauri* and *others* (part 3, p. 86). The plaintiffs describe themselves as *nats* (*jats* is a misprint). The appellate order in that case is at Part 3, p. 62 and Gauri's application for execution at pp. 56-7. This suit was followed up by one instituted by Ghulam Jillani Khan (Part 3, p. 155).

(b) *Begam* v. *Prabbu* and *others*—This litigation began in 1894. Mt. Begam again described herself as a tawaif (Part 3, p. 31) and impleaded Ghulam Jillani Khan as a defendant ; and he says in a statement appearing at p. 21 of Part 3, that he lives in the house of the plaintiff. No reliance need be placed on the heading of the pleas filed by Ghulam Jillani (Part 3, p. 175) since he had to repeat the heading of the plaint, but the litigation is produced to show that Ghulam Jillani Khan knew in 1894, after the birth of the youngest defendant, that Mt. Begam was still publicly admitting herself to be a tawaif and not the wife of any-one. It is proved too, by the evidence of several witnesses that Mt. Begam personally attended the Court in this suit—vide Sundar Das (P. W. 39) and Mangal Das (P. W. 60).

(c) The third litigation was between *Mt. Tabi* and *Mt. Begam* in 1896. Here also Mt. Begam is entered as a tawaif and no objection is made to that designation. In this suit Mt. Begam not only appeared in person but actually cross-examined witnesses, as appears from a reference to Part 3, pp. 30 and 38 and Part 4, pp. 10 and 11. Her personal attendance is deposed to by several witnesses.

(3) I would next refer to the statements of certain men, since dead, who described Mt. Begam in 1897 as the paramour of Ghulam Jillani. These statements are in Part 3, pp. 72, 74, 75 and 76, and there is another statement of a similar kind, made in 1893 at page 47.

(4) It is proved, further, by the clearest of evidence that Ghulam Jillani married twice long after his intimacy with Mt Begam began. I have already alluded to a marriage with Mt. Barkat, which took place not before 1893, and it is not denied that after the close of the century he married Mt. Basri. According to respectable witnesses for the plaintiffs, these marriages were made in order to enable Ghulam Jillani to beget legitimate children.

(5) A reference was also made by the plaintiffs' counsel to two other documents, in order to show that Ghulam Jillani did not have common interests with his son Firoze Din (defendant 2). These documents refer to mortgages by Ghulam Jilani in which Firoze Din tried to substitute himself in place of his father. That is a possible interpretation but not the most probable, since later on Ghulam Jillani married off Firoze Din and another defendant, and the more reasonable explanation is that the father instructed his son to take his place. The documents referred to are at Part 4, pp. 1—3, and Part 2, p. 152.

(6) Finally, the plaintiffs' counsel alluded to the previous history, as set out in the plaint and supported by some documents, which shows that officially the defendants were not regarded as legitimate sons, until the civil suit between these sons and Mt. Basri, in which, it is alleged, Mt. Basri colluded with them and confessed judgment.

In summing up this portion of the case I would remark that the facts set forth in the last few paragraphs are sufficient to disprove marriage. The most important factor is undoubtedly the manner in which the liaison began. That has already been described. It is apparent from various passages in the evidence that these illicit relations between men and women in that locality are exceedingly common, and that the parties to them are not regarded with reprobation on that account. There was, therefore, nothing unusual in Ghulam Jillani cohabiting with a prostitute. Indeed. he had already had a similar liaison with another woman of the same type. There is no doubt that Mt. Begam was an ordinary prostitute at the start. Her subsequent conduct in appearing in public, living among prostitutes, conducting her own litigation and other business and throughout describing herself as a tawaif constitute in my view, a positive disproof of marriage. The case is on all fours with that which I have cited above, namely, *Ghazanfar Ali* v. *Kamiz Fatima* (8).

It was further contended by the counsel for the plaintiffs that the parties are actually governed by the customary law of the Punjab and that the question of acknowledgment under the Muhammadan Law did not arise. There is some force in this contention per se, but the plea regarding custom was not taken at the outset of the suit. It is true the customary law does not as a rule recognize the principle of acknowledgment (vide the Punjab Chief Court judgment appearing at Part 3, p. 124), but in the absence of a definite pleading, I am not prepared to hold that the plaintiffs are entitled to rely on a position which they did not take when they instituted the suit.

The plea of estoppel, which the defendants perferred in their written statement, has not been argued before us. All that I need say is that the mere attestation, by one of the plaintiffs, of one or two deeds in which Feroze Din was described as the son of Ghulam Jillani cannot amount to an estoppel, since attestation does not fix an attesting witness with knowledge of the contents of a document.

In conclusion I hold that the marriage between Ghulam Jillani and Mt. Begam was not proved; that he did acknowledge his sons, but that marriage having been positively disproved the presumption arising from acknowledgment has been completely rebutted. I would accordingly dismiss the appeal with costs.

Addison, J.—I concur.

R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 437

DALIP SINGH, J.

Lajja Ram and *others*—Plaintiffs—Appellants.

v.

Abdul Rahim Khan and *another*—Defendants—Respondents.

Second Appeal No. 2244 of 1927, Decided on 2nd February 1928, from decree of Addl. Dist. Judge, Karnal, D/- 21st May 1927.

Hindu Law—Joint family — Alienation to purchase another property — Necessity not proved—Sale is not binding on the son.

A Hindu father is not entitled to sell joint ancestral property in order to get a better for himself in addition to one already possessed unless necessity for getting a new house is established. [P 438 C 1, 2]

Anant Ram Khosla—for Appellants.

Shuja-ud-Din—for Respondents.

Judgment.—This appeal arises out of the usual declaratory suit brought by the sons of a Hindu father to set aside an alienation by way of sale made by their father. The area of the land sold is 55 bighas 11 biswas and it was sold for Rs. 500 on 19th June 1911. It has been held by the Courts below that the land was the ancestral property of defendant 1, the father of the present plaintiffs. It has also been held by the trial Court that only Rs. 300 consideration passed and no necessity had at all been established and, therefore, the sale was not binding, except as to part of the consideration, namely, Rs. 300. In appeal the learned District Judge held that all the consideration for the sale was proved and he further held that Rs. 190 were paid for bullocks which were necessary for the vendor who was carrying on agriculture at the time. He further held that as regards the remaining sum of Rs. 300 a house had been purchased by the vendor and this was done in order to better himself because he could not manage the house property that he acquired. Rs. 10 which is the rest of the consideration money, counsels on both sides before me agree, might well be put for expenses.

In second appeal here the items of Rs. 190 and Rs. 10, i. e., Rs 200 have not been contested and indeed it is a finding of fact that the bullocks were necessary and that the money passed. The argument has centred round the question whether a Hindu father is entitled to sell joint ancestral property in order to get a better house for himself in addition to the one that he already possessed. It is admitted and I have been through the record and seen that there is no evidence whatsoever, that the vendor could not manage the alienated property and was entitled to acquire house property. In these circumstances as it is proved on the record that the vendor had another house which he is occupying as a residential house and as he had only one son living at the time there is nothing whatever to show that there was any necessity for him to alienate for acquiring a fresh house. It is true that the vendor admits that his old house was only thatched house, but there is nothing whatever to show that this house was insufficient for his needs.

I, therefore, accept the appeal, set aside the decree of the learned District Judge and give the plaintiffs a decree for possion of the land subject to payment of Rs. 200 to the vendee, defendant 2. I leave the parties, in the circumstances to bear their own costs throughout.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 438

BHIDE, J.

Dhanpat Mal Labha Mal—Plaintiff—Petitioner.

v.

Agent, B. B. & C. I. Ry. Co., Bombay—Defendant—Respondent.

Civil Revn. Petn. No. 552 of 1927, Decided on 15th March 1928, to revise decree of Senior Sub-Judge, Gujrat, D/- 7th June 1927.

Railways Act (9 of 1890), S. 77—Claim for damages for loss of goods—Notice given to one of the two railway companies and forwarded by it to the other—Latter company making enquiries in the matter and repudiating its liability—Absence of notice cannot be pleaded by the latter railway company—Evidence Act, S. 115.

Where a person whose goods were lost in transit sued the two railway companies by whom the goods were carried jointly, but gave notice to only one of them who forwarded the same to the other upon which the other railway company made enquiries into the matter and sent reply to the owner of the goods admitting that the loss took place on their line but repudiating their liability on the basis of risk-note.

Held: that as the other railway had taken notice of the plaintiff's claim, made enquiries, and sent him a definite reply repudiating their liability, it would have been futile for the plaintiff to send any separate notice to them and this clearly estopped the railway from pleading absence of notice as a bar to the plaintiff's suit as against them: *A. I. R.* 1926 *Lah.* 253; *A. I. R.* 1922 *Mad.* 362 (*F. B.*) and 26 *Bom.* 669, *Dist.* [P 440 C 1]

R. C. Manchanda—for Petitioner.
C. H. Garden Noad—for Respondent.

Judgment.—This was a suit for recovery of Rs. 210 as the costs of eight tins of vegetable oil and damages. The plaintiff alleged that defendant 1 sent him a consignment of 125 tins from Bombay, but at the time of delivery eight tins were missing. He sued jointly defendant 1, B. B. & C. I. Ry, and N. W. Ry. The trial Court passed a decree for

Rs. 210 against the B. B. & C. I. Ry. on which the loss was found to have occurred. On the appeal the learned Senior Subordinate Judge held that plaintiff had failed to prove that he gave any notice of his claim to the B. B. & C. I. Ry. as required by S. 77, Railways Act, and on this ground dismissed the suit. Plaintiff has filed an application for revision and seeks to set aside this order on the ground that the lower appellate Court acted with material irregularity in dismissing the suit on the aforesaid ground. The admitted facts are that no notice of the claim was given by the plaintiff direct to the B. B. & C. I. Ry. A notice was sent to the N. W. Ry. and was forwarded by them to the B. B. & C. I. Ry. The B. B. & C. I. Ry made inquiries into the matter and sent a reply to the plaintiff's counsel on 27th May 1926, admitting that the loss took place on their line between Sabarmati and Palampur, but repudiating their liability on the basis of the risk-note. The plaintiff then instituted his suit on 18th June 1926.

It is contended on behalf of the appellant that the B. B. & C. I. Ry. had notice of the claim through the N. W. Ry. and this was sufficient for the purposes of S. 77, Railways Act. *Devi Ditta Mal* v. *Secy. of State* (1) and *Mahadeva Ayyar* v. *S. I. Ry. Co.* (2) have been relied upon in support of the contention. On behalf of the respondent, on the other hand, reliance is placed chiefly on *E. I. Ry. Co.* v. *Jethmull Ramanand* (3).

In *Devi Ditta Mal* v. *Secy. of State* (1) the only question decided was that a notice addressed to the "Traffic Manager Claims" was sufficient when the latter had been authorized by the agent to receive applications in connexion with claims for compensation. In the present instance, it cannot be argued that the N. W. Ry to whom the notice was given had been authorized by the B. B. & C. I. Ry. to receive notices of claims on their behalf. In *Mahadeva Ayyar* v. *S. I. Ry. Co.* (2) it was held that it would be sufficient for the purposes of S. 77, Railways Act, if the agent or manager had notice of the claim within the specified time. But in that case the claim had been addressed to the District Traffic Superintendent of the Railway concerned and the facts were thus more or less similar to those in *Devi Ditta Mal* v. *Secy. of State* (1). The facts in *E. I. Ry. Co.* v. *Jethmull Ramanand* (3), however, were similar to those in the present case. In that case a notice which was originally sent to the B. B. & C. I. Ry. was communicated by the latter to the E. I. Ry., and the solicitors of the E. I. Ry. had addressed a letter to the plaintiff saying that they would look through the file of papers and write again. No further communication was, however, apparently addressed by the E. I. Ry. or their Solicitors to the plaintiff. In these circumstances it was held that the notice was not sufficient so far as the E. I. Ry. was concerned. The present case is distinguishable in so far as the B. B. & C. I. Ry. definitely treated the notice as though it were in respect of a claim made against themselves, made enquiries and sent a reply to the plaintiff repudiating the claim of the plaintiff. This will b clear from their letter dated 27th May 1926, which is reproduced below:

> With reference to your letter of 12th March 1926 to the address of the Agent, N. W. Ry., Lahore, written on behalf of your clients Messrs. Dhanpat Rai Labhoo Mal, merchants, Gujrat, I beg to inform you that I have had the matter carefully enquired into and find that the eight tins were stolen from a running train between Sabarmati and Palampur and the loss was not due to any misconduct on the part of the railway staff. Moreover, the sender has executed risk-note B which indemnifies the railway against all liability.
>
> Under the circumstances your clients' claim was correctly repudiated and I regret, it cannot be entertained.

The letter which was sent by the solicitors of the E. I. Ry. in the Bombay case referred to above did not commit them in any way. The following observations of the learned Chief Justice of the Bombay High Court at p. 685 of *I. L. R.* 26 *Bom.* with respect to that letter are significant:

> But is not this ascribing too much to this letter? It must be noted (1) that according to its own terms it was written at a time when Messrs. Morgan and Company had not read through the file of papers relating to the matter: (2) that the letter does not speak of the claim, or expressly treat it as one made on the E. I. Ry. Co.: (3) that the validity of the claim was not recognized then or in any subsequent correspondence brought to our notice: (4) that it is not shown that but for this letter the plaintiffs would have preferred a claim on the E. I. Ry. Co., as required by S. 77.

It seems to me from the above observations that if the letter in the Bombay

(1) A. I. R. 1926 Lah. 253=7 Lah. 238 (F. B.).
(2) A.I.R. 1922 Mad. 362=45 Mad. 135 (F. B.).
(3) [1902] 26 Bom. 669=4 Bom. L. R. 495.

case were of the type addressed by the B. B. & C. I. Ry. to the plaintiff in the present case, the decision in that case would very probably have been different. The above letter from the B. B. & C. I. Ry. was received by the plaintiff before the institution of his suit. When the railway had taken notice of the plaintiff's claim, made enquiries, and sent him a definite reply repudiating their liability, it would have been futile for the plaintiff to send any separate notice to them. It has not been contended before me that the General Traffic Manager had no authority to enquire into the matter or that the letter referred to above is not binding on the railway. The only contention put forward by the learned counsel for the railway in this respect was that no notice had been sent direct to the B. B. & C. I. Ry. and hence the letter from the General Traffic Manager was of no help to the plaintiff. For reasons given above, I think the letter clearly estops the railway from pleading absence of notice as a bar to the plaintiff's suit as against them.

I accept the application for revision, set aside the order of the learned Senior Subordinate Judge and remand the case to him for decision of the remaining issues. Stamp on application to be refunded. Costs to follow final decree.

S.J. *Revision accepted.*

A. I. R. 1928 Lahore 440

ZAFAR ALI AND DALIP SINGH, JJ.

Manohar Lal and *others*—Plaintiffs—Appellants.

v.

Ratan Lal and *others*—Defendants—Respondents.

First Appeal No. 339 of 1925, Decided on 10th January 1928, from decree of Sr. Sub-Judge, Delhi, D/- 30th January 1925.

Deed — Construction — Award partitioning property between J and S—S to pay certain amount to J and not entitled to alienate his share till such amount is paid—No charge is created on S's share for the amount.

J and *S* had a dispute with each other and finally their property was partitioned by an award given by arbitrators. *S* was to pay Rs. 21,000 with interest at 0-9-6 % per mensem in three instalments of Rs. 7,000 to *J* and if he failed to pay any two instalments, *J* was at liberty to realize the whole sum due with interest by suit or otherwise. The award then proceeded to state as follows: "*S* shall not be competent to sell, mortgage, hypothecate or gift or make waqf in respect of the immovable property allotted to him till the said amount is not paid off by him to the first party." One instalment of Rs. 7,000 was paid and no further instalments were paid at all. It was contended that by the award a charge or a mortgage was created in favour of *J*.

Held: that the words in the award themselves did not create either a mortgage or a charge. So far as the mortgage is concerned the award not being an act of parties it is difficult to see how any mortgage could be created at all. A mere covenant not to alienate does not by itself create a charge on the property. The mere direction by the arbitrators not to alienate would not by itself be sufficient to create any charge in the property.

[P 441 C 2]

Sardha Ram and *Jagan Nath Bhandari*—for Appellants.

Moti Sagar, *Mehr Chand Mahajan*, *Gullu Ram* and *Bishen Narain*—for Respondents.

Dalip Singh, J.—A preliminary objection was taken in this appeal that certain orders which are printed at pp. 42 49 and 50 of the paper book form part of the judgment on which the decree was founded but were not filed along with the appeal and therefore the appeal was incompetent. As we decided to extend time and to dispense with the filing of the orders it became unnecessary to decide the question whether the appeal was or was not incompetent without these orders.

On the merits the facts of the case are as follows :

One Hari Ram had two sons, Jugal Kishore and Shadi Ram. The descendants of Jugal Kishore and the descendants of Shadi Ram had a dispute with each other and finally their property was partitioned by an award given by arbitrators, which is printed at pp. 3 and 8 of the paper book. The relevant clause in that award is at p. 6 and is Cl. 10. By that clause the sons of Shadi Ram were to pay Rs. 21,000 with interest at 0-9-6 % per mensem in three instalments of Rs. 7,000 to the sons of Jugal Kishore and if they failed to pay any two instalments the first party, i.e., the descendant of Jugal Kishore were at liberty to realize the whole sum due with interest by suit or otherwise. The award then proceeded to state as follows :

The second party (the sons of Shadi Ram) shall not be competent to sell, mortgage, hypothecate or gift or make waqf in respect of the immovable property allotted to it till the said amount is not paid off by it to the first party.

It appears that one instalment of Rs. 7,000 was paid and no further instalments were paid at all. Various alienations were made by the descendants of Shadi Ram, one to Niadar Mal-Rangi Lal by which they mortgaged a house and a shop and subsequently one to the firm of Paras Ram-Har Nand Rai. A money decree was also obtained against them by Lakhu Mal-Mittar Sen and this property (house and shop) was attached and sold in execution of their decree. The question now raised between the parties to the present suit is that by the award a charge or a mortgage was created in favour of the descendants of Jugal Kishore and, therefore, the descendants of Jugal Kishore have priority to Niadar Mal-Rangi Lal and Pars Ram-Har Nand Rai qua the sale proceeds of the shop about which alone the suit was brought. It appears that Niadar Mal-Rangi Lal recovered their dues from the sale proceeds of the house and though they were subsequently ordered to refund the money so realized it is admitted that they did not refund it. Their counsel urges that the order to refund was set aside by another order passed by the executing Court. But, be that as it may, it is clear to us that as the suit concerns itself only with the shop and as Niadar Mal-Rangi Lal are no longer contesting the position of the plaintiffs, the descendants of Jugal Kishore, *qua* this shop, there is no force in the appeal against them and it must fail and is dismissed with costs.

As regards the firm of Paras Ram-Har Nand Rai two main points have been argued by counsel for the appellants against the decree dismissing the suit of the plaintiffs. The learned Senior Subordinate Judge had held that there was no charge and no mortgage created by Cl. 10 of the award which has been given in extenso above. Counsel has contended that the question whether there was a charge or not is a question of intention which is to be judged from the words of the document and the surrounding circumstances and he has also referred to a subsequent conduct of the parties. So far as the surrounding circumstances are concerned there is some evidence to show that Sultan Singh and Rattan Lal, the descendants of Shadi Ram, were extravagant and of bad character. The learned Senior Subordinate Judge held that this evidence was not sufficient to show that Sultan Singh and Rattan Lal were extravagant and immoral. But it is unnecessary for us to decide this point as we are quite clear that the words in the award themselves do not create either a mortgage or a charge. So far as the mortgage is concerned the award not being an act of parties it is difficult to see how any mortgage could be created at all. The only question, therefore, is whether the words create a charge. Various rulings were cited to us but the rulings that appear to us to come nearest to the words used in the present case are the rulings cited by counsel for the respondents, that is, *Bhupal* v. *Jag Ram* (1), *Gunoo Singh* v. *Latafat Hossain* (2) and *Najibulla Mulla* v. *Nasir Mistri* (3). It was there held, and with all respect we agree, that a mere covenant not to alienate does not by itself create a charge on the property. Here also the mere direction by the arbitrators not to alienate would not by itself be sufficient to create any charge on the property, and we, therefore, hold that there is nothing to show and it is not proved that the award created any charge on the property.

The next point argued was that so far as Pars Ram-Har Nand Rai were concerned in their mortgage-deed the hypothecation of the property by the award was admitted by their predecessor-in-interest, the mortgagor. It was contended by counsel that this admission of their predecessor-in-interest created an estoppel against the present firm. On the other hand counsel for the respondents pointed out that the mortgagor himself could have raised the objection that this admission was a mistake and that at best being only an admission it could not amount to an estoppel because the plaintiffs had not in any way altered their position on the strength of this representation nor was the representation made to them. We are of opinion that at best this admission would only shift the onus and in this particular case as the matter resolves itself into a construction of the terms of the award the admission hardly makes any difference at all and can in no sense be considered to constitute an estoppel. It was next contended by counsel for the appellants that this admission was a term in the

(1) [1879] 2 All. 449.
(2) [1877] 3 Cal. 336=1 C. L. R. 91.
(3) [1881] 7 Cal. 196=8 C. L. R. 454.

mortgage-deed and, therefore, the mortgage of Pars RamrHar Nand Rai was subject to the prior mortgage to Jugal Kishore's descendants. It is clear to us that this admission was not a term in the contract but was a recital only. Nor is there any force in the argument of counsel for the appellants that by this admission a charge was created at tbe time of the mortgage to Pars Ram-Har Nand Rai even if it had not been created originally by the award. The admission itself says that the hypothecation was created by the award and, therefore, if as we hold the award created no such hypthecation this admission was made under a mistake of fact and cannot in any way be held to estop the firm of Pars Ram-Har Nand Rai.

Counsel for the appellants also faintly urged that at any rate the arbitrators had limited the power of the descendants of Shadi Ram not to alienate the property at all and therefore the alienations were void. But the suit was not so framed, the point was not raised in the grounds of appeal and was only finally taken up by counsel after he had concluded his main arguments. We, therefore, do not think that the point can be raised by him now and we do not express any opinion on it.

The appeal fails and is dismissed with costs.

R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 442

ZAFAR ALI, J.

Saudagar Mal-Lachman Das—Defendants—Appellants.

v.

Bahadur Chand Hari Chand—Plaintiffs—Respondents.

Second Appeal No. 586 of 1927, Decided on 3rd December 1927.

Limitation Act, Art. 115—*Suit to recover damages caused by the breach of contract—Art.* 115 *applies.*

Art. 115 is a general provision applying to all actions ex-contractu not specially provided for otherwise. The word "compensation" in that Article as well as in Art. 116 has the same meaning as it has in S. 73, Contract Act, and denotes a sum of money payable to a person on account of loss or damage caused to him by the breach of a contract: *A. I. R.* 1922 *Lah.* 198, *(F.B.) Foll.*

Plaintiff and defendant acquired a site from government for the purpose of building a shop and entered into a contract between themselves by which the plaintiff undertook to build a shop on the site and the defendant agreed to pay him one-third of the cost of construction thereof. Plaintiff's case was that the defendant had paid him Rs. 400 but refused to pay the balance of the one-third of the cost.

Held: that the case would be governed by Art. 115 and not Art. 61.

Mehr Chand Mahajan—for Appellants.

J. L Kapur—for Respondents.

Judgment.—The question of law involved in this second appeal is one of limitation.

The parties having jointly acquired a site from Government for the purpose of building a shop, entered into a contract beween themselves by which the plaintiff undertook to build a shop on the site and the defendant agreed to pay him one-third of the cost of construction thereof. The plaintiff's case was that the defendant had paid him Rs. 400 but refused to pay the balance of the one-third of the cost. On this alleged unpaid balance he claimed interest at I per cent. per mensem. The defendant pleaded inter alia that the suit was barred by time and that no interest was payable. The Court below ovarruled both these pleas.

As regards the plea of limitation they have held that the rule of limitation applicable to the suit was the one embodied in Art. 61, Sch. 1, Lim. Act of 1908. Under that Article the period of limitation is three years but it is enhanced to six years by the Punjab Limitation Act. It is clear that the plaintiff made no attempt to establish that his suit was within time even if the period of limitation were three years. It is further clear that if the suit should not fall within the purview of Art. 61 the only other Article that applied was Art. 115. Now Art. 61 applies where "money is payable to the plaintiff for money paid for the defendant". In the present case it cannot be said that the plaintiff had paid any money to any person on behalf of or for the defendant. As it was the plaintiff who constructed the building he and nobody else was primarily liable to pay for the labour and materials used. The masons, etc., and the persons who supplied the materials could hold the plaintiff responsible for payment and there being no contract between them and the defendant the latter incurred no liability to them. So he was not liable to pay any money to them which the plaintiff might have paid them for him. Art. 61, was, therefore, not applicable at all. As held in *Mahomed Ghasita* v. *Siraj-ud-din*

(1) the Article that applied was Art. 115. As decided in that case:

Article 115 is a general provision applying to all actions ex contractu not specially provided for otherwise. The word 'compensation' in that Article as well as in Art. 116 has the same meaning as it has in S. 73, Contract Act, and denotes a sum of money payable to a person on account of loss or damage caused to him by the breach of contract.

The defendant was guilty of the breach of the alleged contract, inasmuch as he refused to pay what he had agreed to do and thus caused loss to the plaintiff who had laid out money on the strength of the defendant's promise to re-imburse him. The suit was barred by limitation as it was not instituted within three years from the date of breach. I, therefore, accept the appeal and reversing the judgment of the Courts below, dismiss the plaintiffs' suit with costs throughout.

N.K. *Appeal accepted.*

(1) A.I.R. 1922 Lah. 198=2 Lah. 376 (F.B.).

A. I. R. 1928 Lahore 443

ADDISON, J.

Das Ram—Judgment-debtor—Appellant.

v.

Malik Chhabbar Singh—Decree-holder—Respondent.

Misc. Second Appeal No. 2612 of 1927, Decided on 6th February 1928, from order of Dist. Judge, Jhang, D/- 12th April 1927.

Limitation Act, Art. 182—Execution of a decree—Mere filing of receipts by a decree-holder for costs on account of maintenance of judgment-debtor in jail, does not amount to a step-in-aid.

The mere act of filing receipts for costs incurred in maintaining the judgment debtor in jail and an oral application to put them on record does not amount to a step-in-aid : 23 *Cal.* 196; 22 *Cal.* 827, *Rel on.* [P 443 C 2]

Mohammad Amir Khan—for Appellant.

Brij Lal—for Respondent.

Judgment. — The decree-holder obtained a money decree against the judgment-debtor on 27th June 1917. There were various applications for execution of which I need only mention the application dated 29th March 1923, which was within time. By it the decree-holder applied for the arrest and detention in jail of the judgment-debtor. The executing Court ordered him to be sent to jail on 29th May 1923. The judgment-debtor appealed to the Court of the District Judge. His appeal was accepted on 31st August 1923 and his immediate release was ordered.

On 1st December 1923, the mukhtar of the decree-holder appeared in the executing Court and put in certain receipts of expenditure incurred upon the judgment-debtor when he was in jail. There was no application along with these receipts. The executing Court passed an order as follows :

The decree-holder's mukhtar is present and has put in receipts relating to the expenditure upon the judgment-debtor. They will be attached to the record which will be consigned to the record room.

The present application for execution was put in on 21st October 1926. On 3rd December 1926 a warrant of attachment was ordered to be issued on this application. Thereupon the judgment-debtor instituted an appeal in the Court of the District Judge on the ground that the application for execution was barred by time. The District Judge dismissed the appeal, holding that the oral application of 1st December 1923, by the decree-holder asking for costs of maintenance of the judgment-debtor in jail to be added to his costs in the execution proceedings was an application to take a step-in-aid of execution and saved limitation. Against this decision this second appeal has been preferred. I am unable to hold that the appearance of the mukhtar of the decree-holder in the executing Court on a certain date, the 1st December 1923, and his putting into Court receipts on account of the maintenance of the judgment debtor in jail amounted to a step-in-aid of the execution. Nothing was done towards executing the decree. What was done was that the decree-holder put into Court certain receipts of his costs of maintaining the judgment-debtor in jail. He was safeguarding his own interests but he was not trying to execute the decree in any way, and it cannot, therefore, be said that his act of producing these receipts for the purpose stated amounted to a step-in-aid. For this reason alone the appeal must be accepted. In any case there is no proof of any oral application that the amounts

mentioned in the receipts should be added to the costs of the execution proceedings. Nor did the Court order that these sums should be added to the costs. All that was said was that the receipts should be put on the record. Even if there was an oral application that these receipts should be put on the record that would not amount to a step-in-aid of execution of the decree.

There are no authorities in point, but it was held in *Ananda Mohan* v. *Hira Sundari* (1), that neither an application by a decree-holder to receive a poundage fee from the judgment-debtor in respect of the latter's property purchased by the decree-holder, nor an application by the decree-holder to be allowed to set off the purchase money against the decree, instead of paying it into Court was a step-in-aid of execution. To a similar effect is *Aghore Kali* v. *Prasunno Coomar* (2). These acts are analogous to the act in the present case of the decree-holder who put into Court certain receipts so that later he could add them to his decree.

I accept the appeal with costs throughout and set aside the orders of the Courts below on the ground that the application for execution was time barred and could not proceed.

N.K. *Appeal accepted.*

(1) [1896] 23 Cal. 196.
(2) [1895] 22 Cal. 827.

A. I. R. 1928 Lahore 444

TEK CHAND, J.

Bhagela Shah — Judgment-debtor—Appellant.

v.

Sita Ram and *others* — Decree-holder and Judgment-debtors—Respondents.

Misc. Second Appeal No. 1369 of 1927, Decided on 15th November 1927, from order of Sr. Sub-Judge, Jhelum, D/- 21st December 1926.

(a) *Civil P. C., O. 21, R. 92—Application under R. 92 dismissed—No second appeal lies though first appeal was purported to be filed as one under S. 47.*

Where a first appeal purporting to be one under S. 47 was filed from an order dismissing an application under O. 21, R. 90,

Held; that the first appeal could lie only under O. 43, R. 1 (j), and hence no second appeal was competent: 40 *All.* 122 and *A. I. R.* 1924 *Pat.* 111, *Ref.* [P 444 C 2]

(b) *Punjab Courts Act, S. 42—No second appeal lies in a suit of small cause nature.*

Under the Punjab Courts Act no second appeal lies to the High Court against a decree passed on appeal in a suit of small cause nature. [P 444 C 2]

Shah Nawaz—for Appellant.

Ram Lal Anand—for Respondents.

Judgment.—In execution of a money-decree for Rs. 317-10-0 obtained by Sita Ram, respondent, against Bhagela Shah etc., appellants, a house belonging to the judgment-debtors was sold to the decree-holder. The sale was confirmed on 11th July 1924. More than a year after i. e., on 28th November 1925, one of the judgment-debtors, Sube Shah, applied under O. 21, R. 90, Civil P. C., to have the sale set aside pointing out several irregularities in publishing and conducting the sale. About a year later, i. e., on 16th November 1926, Bhagela Shah also joined in the application pointing out further irregularities in conducting the sale. The application was dismissed by the executing Court and a miscellaneous appeal was preferred to the Senior Subordinate Judge who dismissed it affirming the order of the lower Court. The judgment-debtors have preferred a second appeal to this Court.

I am of opinion that this second appeal is incompetent. The memorandum of appeal to the lower appellate Court against the order dismissing the judgment-debtor's application under O. 21, R. 90, was described as having been filed under S. 47, Civil P. C,, but in reality the appeal was under O. 43, R 1 (j), as that is the only section under which an appeal could lie. S. 104 (2), Civil P. C., lays down that orders passed on appeal under O. 43, are final and no second appeal lies therefrom. Reference may also be made to *Sheo Prasad Singh* v. *Premma Kuar* (1) and *Mahadeo Singh* v. *Dhobi Singh* (2).

Even if it be assumed that the appeal to the lower appellate Court was correctly filed under S. 47, Civil P, C., no second appeal lies to this Court as the execution proceedings in which the application was filed related to a decree which had been passed on a suit of small cause nature valued at Rs. 317. Under the Punjab Courts Act no second appeal lies to this Court against a decree passed

(1) [1918] 40 All. 122=43 I. C. 522=15 A.L.J. 920.
(2) A. I. R. 1924 Pat. 111=2 Pat. 169.

on appeal in such a suit. I, therefore, dismiss the appeal with costs.

Mr. Shah Nawaz has asked me to interfere in revision urging that the lower Courts had erred in holding that the application under O. 21, R. 90 was barred by time and that the sale was vitiated by many irregularities Even if these contentions are correct I am not prepared to interfere on the revision side as the lower Courts have not acted without jurisdiction or with any material irregularity resulting in injustice to the judgment-debtor.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 445 (1)

ZAFAR ALI, J.

S. Jai Dev Singh—Defendant—Appellant.

v.

S. Jai Singh and *another*—Plaintiffs—Respondents.

Misc. First Appeal No. 1698 of 1927, Decided on 18th November 1927, from order of Senior Sub-Judge, Rawalpindi, D/- 18th May 1927.

Civil P. C., O. 38, Rr. 5 and 6—Attachment before judgment — Unconditional order is under R. 6 though purported to be made under R. 5—Appeal from such order is competent.

An unconditional attachment can be ordered under R. 6 only and where attachment is unconditional it may be taken that the order is under R. 6 even though the Judge passing the order purports to have acted under R. 5 and such an order is appealable under O. 43, R. 1 (q), Civil P. C.

An unconditional attachment can only be ordered under R. 6 when the defendant fails to comply with an order made under R. 5.

[P 445 C 2]

Bhagat Govind Das—for Appellant.

Har Gopal—for Respondents.

Judgment.—This is a miscellaneous first appeal against the order for attachment before judgment made by the Senior Subordinate Judge of Rawalpindi. The order runs thus :

. . . . under the circumstances I think that it is necessary to attach the kothi before judgment under O. 38, R. 5, Civil P. C., and I order it accordingly.

Now, an order under the said R. 5 is not appealable while O. 43, R. 1 (q), Civil P. C., gives the right of appeal against an order under R. 6. In the present case, however, though the learned Senior Subordinate Judge purports to have acted under R. 5, that rule has no application. That rule contains three clauses and the Court while calling upon the defendant to furnish security etc., under Cl. (1) may also order conditional attachment of his property. The learned Senior Subordinate Judge having made an order under Cl. (1) could make none under Cl. (3).

Further under Cl. (3)

the Court may also in the order [made under Cl. (1)] direct the conditional attachment . . . . .

But the attachment ordered by the Senior Subordinate Judge was not conditional. An unconditional attachment can only be ordered under R. 6 when the defendant fails to comply with an order made under R. 5.

Counsel for the respondent concedes that the order is irregular but contends that it is not appealable. He further urges that it cannot be revised. He contends that the order should be amended by this Court and should not be set aside. On the other hand, the counsel for the appellant argues that the order is irregular and illegal but all the same it is an order under R. 6 because there is no other provision in the Civil Procedure Code empowering a Court to order attachment before judgment.

As unconditional attachment could be ordered under R. 6 only and as the attachment was unconditional it may be taken that the order was under R. 6. But it was irregular and illegal because the circumstances under which it could be made did not exist. I, therefore, accept the appeal and set aside the order with costs.

S.J. *Appeal accepted.*

A. I. R. 1928 Lahore 445 (2)

ZAFAR ALI, J.

Fateh Muhammad and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 928 of 1927, Decided on 24th November 1927, from order of Addl. Sess. Judge, Shahpur, D/- 18th July 1927.

Penal Code, S. 390—"Restraint" explained—Person when asleep cannot be subjected to any restraint.

"Restraint" implies abridgement of the liberty of a person against his will. Where he is deprived of his will power by sleep or otherwise

he cannot while in that condition be subjected to any restraint. [P 446 C 2]

Mohsin Shah—for Appellants.

Dev Raj Sawhney for *the Government Advocate*—for the Crown.

Judgment.—The four appellants in this case are :—

(1) Fateh Muhammad of village Anga, caste Awan ;

(2) Atta Muhammad of Khushab, caste Mallah (boatman) ;

(3) Ali of village Kund ; and

(4) Hakim of village Kufri, caste barber.

They were tried together—Nos. (1), (2) and (4) on a charge of dacoity and No. (3) for receiving property stolen in the commission of the dacoity and they have been convicted by the learned Sessions Judge of Mianwali and sentenced as below :—

Fateh Muhammad, Atta Muhammad, and Hakim } Rigorous imprisonment for seven years each under S. 395, I. P. C.

Ali. . . . Rigorous imprisonment for three years under S. 412, I. P. C.

It may be noted here that the joint trial of Ali and others was unlawful under Cl. (4), S. 239, Criminal P. C.

The four convicts have appealed jointly through Mr Mohsin Shah.

The convictions are based mainly on the testimony of an accomplice who turned King's evidence and the evidence about the recovery of some stolen articles from each appellant.

Mr. Mohsin Shah contends—

(1) that the offence committed was burglary punishable under S. 458, I. P. C., and not dacoity ;

(2) that the approver did not appear to have taken part in the burglary at all as the details of the occurrence given by him were found false in several respects ;

(3) that no stolen property was found in the possession of Ata Muhammad, Hakim or Ali ; and

(4) that Fateh Muhammad in whose possession some stolen property was found could be convicted under S. 412, and not under S. 395, I. P. C.

The scene of the occurrence was one of the four shops situated in a serai which is half a mile from the town of Khushab. There is a police station in the town which is also about half a mile from the serai. It is in evidence that the owners of the four shops employed four chaukidars or night watchmen to keep watch over the shops at night. It was on the night of the 28th December 1926, that the shop was broken into, and as the culprits were engaged in looting it one of the chaukidars, namely, Nur Muhammad, repaired to the residence of the owner thereof in the town and after informing him of what was happening he then went to the police station and gave information to the Sub-Inspector and the Inspector of Police who were there. These officers with some constables proceeded to the serai and met on the way the complainant Ganda Mal and one Isher Das who were firing guns to scare away the burglars. The latter had, however, decamped with the booty before the arrival of the police officers and others on the spot. It was found that the iron safe that was in the shop had been broken and a large quantity of piece goods was missing. One of the four chaukidars, namely Muhammad Azim, P. W. 11 and a tailor were sleeping in a kothri near there and the Inspector found the door of this room fastened from outside. He opened it and brought out the tailor and the chaukidar. After having done so he wrote a ruqqa to the clerk of the police station giving therein a description of the occurrence but in this ruqqa he did not mention that a chaukidar and a tailor were found locked up in a kothri. The chaukidars gave at the trial a graphic account of their encounter with the burglars and stated that they did not interfere with what they did because they threatened them with large knives and guns that they possessed. The learned Sessions Judge, however, found that they were all asleep when the robbers came and that the chaukidar Muhammad Azim and the tailor were also lying asleep when the door of their room was locked from outside. But he came to the conclusion that the offence committed was dacoity because the culprits had in order to commit the theft caused wrongful restraint to the chaukidar and the tailor by locking up the door of their room. This they cannot be said to have done. "Restraint" implies abridgement of the liberty of a person against his will. Where he is deprived of his will power by sleep or otherwise he cannot while in that condition be subjected to any restraint. In the present case therefore no restraint was caused to the chaukidar and the

tailor when they were lying asleep. The learned Sessions Judge did not refer to any other act of the culprits to bring their offence under S. 391, I. P. C. I, would, therefore, hold that the offence fell under S. 458, I P. C.

Now as regards Fateh Muhammad, there is ample evidence to bring the offence home to him. He was caught on the ensuing morning on the road going from Khushab to the village Kuradi driving away a camel on which a large quantity of stolen goods were found laden. He confessed to his captors and others and mentioned the names of some of his accomplices. Therefore there can be no manner of doubt that he was one of the burglars.

As regards Hakim, Fateh Muhammad did not name him when he was arrested. On the other hand he named one Qaim Din. It was the next day that Fateh Muhammad substituted the name of Hakim for that of Qaim Din, and it was Fattu, brother of Qaim Din, who got Hakim arrested. It was urged that Fattu had to serve an object in implicating Hakim. He wanted to marry a niece of Hakim, but Hakim was opposed to the match. After his arrest Fattu succeeded in marrying the girl.

As regards the production of property by Hakim it was stated that he and the approver had deposited some stolen goods in the house of Yaru. But Yaru stated that he was blind and could not identify Hakim, accused, as the man who had come to him with the approver and given his name as Hakim. Therefore there is no conclusive evidence to show that the approver's campanion was Hakim when the stolen goods were deposited in the house of Yaru. Further it is stated that Hakim dug out from a zakhira or forest some goods that lay buried there underground in a tin box. But the zakhira was neither in his possession nor under his control, and the witnesses made discrepant statements with regard to the spot in the forest where the box lay buried. Further these witnesses deposed that the tin-box when dug out was quite clean and free f om dust. Counsel for the appellant, therefore, argues that the box must have been buried there underground just then in order to have it produced by Hakim because otherwise it must have been by lapse of time soiled by earth. It may be observed here that this recovery was made on 13th March, i. e., two and a half months after the theft. If the tin-box had been there for the whole or even half of this period it would certainly have soiled. The counsel's argument is therefore not devoid of force.

There remains the approver's testimony against Hakim, but with regard to it the learned Sessions Judge has found that history is false in several material particulars. His testimony is, therefore, not only tainted being that of a criminal but is also unreliable for the reason that he has proved himself to be unworthy of credit by making false statements.

I am, therefore, of opinion that as against Hakim there is no satisfactory evidence to justify his conviction Turning now to the case of Ata Muhammad, it may be observed that he was not named either by Fateh Muhammad or the approver. Fateh Muhammad, however, stated that one of his accomplices was a Mallah of Khushab. All the Mallahs of that town were, therefore, collected by the police and Siraj Din approver singled out Ata Muhammad from among them as one of his accomplices. This took place on 2nd January 1927. The same day Ata Muhammad produced a stolen piece of Japan silk and a lungi. The silk piece bore the complainant's signature. One of the culprits named by Fateh Muhammad as well as Siraj Din approver was Mian Muhammad who, however, could not be got hold of. Siraj Din stated that it was Mian Muhammad who introduced him to Ata Muhammad and that he (Siraj Din) had put up with Ata Muhammad in his house at Khushab for two days before the occurrence. After a careful consideration of the evidence against Ata Muhammad I come to the conclusion that he was undoubtedly one of the burglars.

As regards Ali who is the father of Mian Muhammad absconder, there can be no manner of doubt that he produced a heavy bundle of stolen goods—coupled with this fact is the evidence of approver that Ali received these goods from his son Mian Muhammad. He has, therefore, been rightly convicted under S. 412, I. P. C., and his sentence is not excessive. I therefore maintain his conviction as well as sentence.

The result is that I accept the appeal so far as Hakim is concerned and setting aside his conviction and sentence direct that he be released forthwith.

I alter the conviction of Fateh Muhammad as well as that of Ata Muhammad from that under S. 395 to one under S. 458, I. P. C., but maintain their sentences.

N.K. *Appeal partly accepted.*

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* A. I. R. 1928 Lahore 448

FFORDE AND AGA HAIDAR, JJ.

In the matter of F. K. Byrne, Bar-at-Law, Lahore.

Civil Misc. Case No. 601 of 1927, Decided on 22nd December 1927.

* *Legal Practitioners Act* (1879), *S.* 13—(*Aga Haidar, J.*) *Pleader engaged in death appeal if unable to attend Court personally should spend whole fee received by him in procuring his substitute—*(*Fforde, J.*) *His absence can be excused on the ground of physical inability only.*

Aga Haidar, J.—It may sometimes happen that a counsel may find himself in a position of unforeseen difficulty when with all the best intentions in the world it may become impossible for him to appear on behalf of his client in a case and he may be left no alternative except to hand over his brief to another counsel so that his client's interests may not suffer. But in a murder case when a counsel has reason to believe that he would not be available at the time when the case would be called on for hearing, because he has other engagements elsewhere, it is his duty to communicate with the person who had engaged him and to return the fee to him. If it is not possible for him to do so and the pressure of overriding circumstances is beyond his control, then he should try his very best and spend the whole of the fee that he has received in briefing a counsel who would do full justice to his client's case for the remuneration : 3 *Bur. L. T.* 131, *Ref.* [P 450 C 2]

Fforde, J.—It is not practicable or indeed desirable to lay down rigid rules of conduct for the Bar. The independence and sense of responsibility of the legal profession should be encouraged rather than the reverse. But when a practitioner has undertaken the duty of appearing to defend a man for his life, he should give exclusive attention to that case, and nothing should be deemed to exonerate him from that obligation except physical inability to attend at the hearing. [P 452 C 1]

C. H. Carden Noad—for the Crown.

C. Bevan Petman—for Mr. Byrne.

Agha Haidar, J.—The facts of this case are as follows :

Five persons were convicted under S. 302, I. P. C., and sentenced to death. They filed a joint appeal on the 25th May 1927, in this Court through Mr. Byrne, a Barrister-at-law and Advocate of this Court. The case came on the list for the week commencing from Monday, 26th September 1927, and stood sixth on the said list. The days on which criminal appeals and murder references are heard are only the first four days in the week and the last of these four days was Thursday, 29th September, 1927. The case, Criminal Appeal No. 559 of 1927, *Gangi and others* v. *Crown* was not put up on the daily list during that week. On Friday the 30th September, according to the practice of this Court, the list for the following week was prepared and it was open to Mr Byrne to have the list "adjusted", on a reference to the Deputy Registrar. The Court was closed for the Dusehra holidays from the 2nd to the 6th October, 1927, both days inclusive, and, therefore, the case remained on the week's list as heretofore. The Court reopened after the Dusehra holidays on Friday, the 7th October 1927, and, as the list for the following week was being prepared in the office on that day, it was again open to Mr. Byrne to get such an adjustment of the list as would have the effect of putting off the hearing of his appeal until he was able to argue it before the Court.

According to Mr. Byrne's own affidavit, the Punjab Government had engaged him to appear on behalf of the Crown in a certain forgery case at Pakpattan and the dates for the hearing of that case were originally fixed from the 10th to the 15th October 1917, both days inclusive. Inspite of his knowledge of these days, and although he had two Fridays, namely Friday, 30th September, and Friday, the 7th October 1927, on either of which he could have made suitable arrangements for the appeal, still Mr. Byrne took no steps to keep out the case out of the list for the dates on which he was to appear at Pakpattan. On Monday, the 10th October 1927, Mr. Byrne's case stood fifth in the weekly list but did not appear on the daily list. Mr. Byrne says that he was to be engaged in the case at Pakpattan from the 10th October onwards but that he obtained the permission of the Magistrate to leave Lahore a day later, i. e., on the 11th October. His point is that up till the 10th October he was waiting for his appeal to be taken up by the High Court and was anxious to conduct it personally. However, sometime on the 10th October 1927, Mr. Byrne

handed over his brief in the murder appeal (*Gangi and others* v. *Crown*) to Mr. Muhammad Amin, a Barrister-at-law and Advocate of this Court, paying him a sum of Rs. 32. The case stood third on the day's list for the 11th October 1927, and it appears that it was called on for hearing almost at the end of the day, when the counsel who was holding Mr. Byrne's brief, opened the case on behalf of the appellants. Soon after the Court rose for the day. It appears that, as a result of a telegram despatched by Mr. Saunders, who was also representing one of the appellants in the case, the clients reached Lahore on the morning of the 12th and came to know from Mr. Byrne's clerk that, as Mr. Byrne was engaged on Government work, he had engaged another counsel for them and furthermore " that Mr. Byrne had told Sir Shadi Lal that he was sending another man in his place." On the following day the case, which had been left over as part heard on the previous day, was called on for hearing and, as Mr. Muhammad Amin opened the case, one of the clients, namely, Munshi, who had instructed Mr. Byrne and had paid him a sum of Rs. 1,000 as his fee and another Rs. 100 as his clerk's fee, stood up and addressed the Court in the following words :

We engaged Mr. Byrne to conduct our case. But he has not put in an appearance today. Another Barrister (pointing to Mr. Muhammad Amin Advocate) has appeared on his behalf. We do not want Mr. Muhammad Amin to conduct our case. The Court may either direct Mr. Byrne to appear or it may decide the case as it deems proper.

R. O. A. C.

Dated 12th October, 1927.

Sd/- Munshi.
(with his thumb mark).

A notice was issued to Mr. Byrne under the provisions of Cl. 8 of the Letters Patent of the Lahore High Court and S. 41, Legal Practitioners Act (Act 18 of 1879) to show cause why his name should not be removed from the Roll of Advocates of this Court. The charge against him was as follows :

That having accepted a fee of Rs. 1,000 on behalf of accused persons sentenced to death in Criminal Appeal No. 599 of 1927 (Murder Reference No. 85 of 1927) *Crown* versus *Gangi* etc. you wilfully neglected to appear on their behalf on the 12th October 1927, when the case was heard by a Division Bench of the High Court without any overriding pressure of circumstances beyond your control and without the consent of your client. That in acting as above you were guilty of grossly improper conduct in the discharge of your professional duty.

Mr. Byrne put in an affidavit in his defence and was represented by Mr. Bevan Petman at the hearing. The affidavit, which Mr. Byrne has filed, is a crude document, coached in very defective language and originally contained at least seven paragraphs which had to be deleted under the orders of the Court inasmuch as they contained allegations some of which were false and others were of a highly scandalous character. Some of the allegations in the deleted paragraphs did not give the source of Mr. Byrne's information as to the facts that he was swearing to and were apparently hearsay and could not form part of an affidavit which a Court of Justice would look into. I may observe that the paragraphs, which refer to a conversation which Mr. Byrne had with his Lordship the Hon'ble the Chief Justice in his chamber, are in very bad taste and contrary to all the recognized rules of etiquette in that they purport to reproduce part of a private conversation, and a distorted version of that conversation too.

Paragraph No 7 of Mr. Byrne's affidavit runs as follows :

That the Forged Notes Conspiracy case was fixed for hearing at Pakpattan from the 10th to the 15th October, 1927 and that I was ordered to proceed to Pakpattan as Public Prosecutor.

Paragraph No. 18 is to the following effect :

That the murder appeal was fifth on the weekly list and I did not except it to be heard before the 14th, by which time I expected to return from Pakpattan.

These two statements seem to be contradictory of each other, for if Mr. Byrne was to be engaged at Pakpattan from the 10th to the 15th it is not easily intelligible as to what he meant when he said that by the 14th October he expected to return from Pakpattan.

There is another matter in the affidavit which is important. Mr. Byrne in his affidavit says that, when he gave the brief to Mr. Muhammad Amin, he had discussed the case thoroughly with him, thus making out that he had prepared the case and imparted to Mr. Muhammad Amin, his substitute, the result of his preparation. Mr. Muhammad Amin was examined by the Registrar on 12th October 1927. In his statement

before the Registrar, Mr. Muhammad Amin was perfectly clear and definite when he stated :

> He (Mr. Byrne) said he was going on Government work to Pakpattan or somewhere. He recommended that I should thoroughly prepare the case as it was a question of life and death for the accused. He gave me no instructions at all beyond giving me this paper book.

This statement was made on the 12th October 1927, immediately after the incident in the Court when the whole affair must have been fresh in Mr. Muhammad Amin's mind. Mr. Muhammad Amin has filed an affidavit which has been placed before us. In para. 2 of this affidavit he says that Mr. F. K. Byrne handed me the printed paper book relating to the said appeal and that Mr. F. K. Byrne and I discussed the case and decided on the course of argument for the defence. As already stated, Mr. Byrne too in his affidavit says that he had thoroughly discussed the case with Mr. Muhammad Amin. Mr. Muhammad Amin was sent for by the Court at the hearing and the statement which he made before the Registrar was read over to him and he admitted that it was correct. The contradictions in the two sets of his statements are too palpable and cannot possibly be reconciled. When asked by the Court as to how the two statements made by him could be reconciled, Mr. Muhammad Amin tried to explain them away by saying that what he stated before the Registrar merely meant that no written notes of arguments were handed over to him by Mr. Byrne when the brief was passed to him. This explanation does not appeal to me, and I regret to say that it is an afterthought. Nor do I accept the affidavit of Mr Byrne on this point. In my opinion Mr. Byrne simply gave the brief to Mr. Muhammad Amin sometime on the 10th October and a sum of Rs. 32 as his fee or compensation for the time and labour that he was to devote to the case.

At the hearing Sir Muhammad Shafi asked the Court if he could be allowed to raise the general question of the prevailing practice whereby a counsel can hand over his brief to another counsel when he himself is unable to look after a particular case in Court. The issue before the Court was a very narrow one, and I do not think that we are called upon to express any opinion upon the larger question of counsel's general rights and liabilities in the matter of handing over their briefs to others. The question before us for decision is simply this : whether in a murder case it is competent to a counsel, who has received a fee from his client for arguing his appeal, to hand over the case to another counsel at the eleventh hour, giving him a negligible portion of his fee simply because he was engaged elsewhere. As already pointed out, Mr. Byrne knew that the case was on the weekly list as long ago as the 26th September, 1927. He could have made arrangements with the Deputy Registrar e ther on the 30th September, 1927, or the 7th October 1927, but he took no steps. He had accepted the case on behalf of the clients in the murder case on the 5th May 1927, and had received a very substantial fee both for himself and for his clerk. Afterwards he accepted a criminal case from the Government in which he was to appear at Pakpattan sometime in the middle of October. Undoubtedly he could have communicated with the persons who had instructed him on behalf of the appellants and explained to them the situation as it stood. He could either have returned the fee or explained the circumstances to the clients and mentioned to them that it was just possible that he may not be available at the time when the case would come up for hearing.

In that case it would have been open to the persons who had engaged Mr. Byrne either to take back the fee and make their own arrangements or to ask Mr. Byrne to make some suitable arrangement about the case on payment of an adequate fee to a proper *locum tenens*. Anyhow the whole thing should have been done in a fair, frank and straightforward manner. Instead of this we find Mr. Byrne engaging a counsel on 10th and paying him a miserable sum of Rs. 32 which is less than one third of the fee which his clerk got from his unfortunate clients. While handing over the brief to Mr. Muhammad Amin and giving him Rs. 32 Mr. Byrne took care not to mention the total sum which he had received from the clients in the case. Even if it is assumed that Mr. Byrne had no time to communicate with his clients, the least that he could have done

in common fairness in order to safeguard the interests of his clients, was to have engaged a counsel occupying the front rank on the criminal side of the Bar of this Court. This he could have easily managed with the sum of Rs. 1000 which the clients had put into his hand in order to have the appeal properly and thoroughly argued. As an English Barrister he ought to have lived up to the high traditions of the English Bar whose standard of honour is not inferior to that of any other profession or class of men in the world.

It was argued by Mr. Bevan Petman on behalf of Mr. Byrne that he is an inexperienced and junior member of the Bar. This sort of argument does not appeal to me. There might be cases when it is difficult for a man to understand his exact legal position but to act honestly and fairly in our dealings with our fellowmen does not require either experience or familiarity with any abstruse principles of law or rules of practice prevailing at the Bar. The ordinary moral equipment of a gentleman is quite sufficient to meet all contingencies which may arise in the practice of an advocate's profession. It may sometimes happen that a counsel may find himself in a position of unforeseen difficulty when with all the best intentions in the world it may become impossible for him to appear on behalf of his client in a case and he may be left no alternative except to hand over his brief to another counsel so that his client's interests may not suffer. Those cases would stand upon a different footing and would depend upon their special facts and circumstances. As a matter of ordinary practice, it may be laid once and for all that in a murder case when a counsel has reason to believe that he would not be available at the time when the case would be called on for hearing, because he has other engagements elsewhere it is his duty to communicate with the person who had engaged him and to return the fee to him. If it is not possible for him to do so and the pressure of overriding circumstances is beyond his control then he should try his very best and spend the whole of the fee that he has received in briefing a counsel who would do full justice to his client's case for the remuneration. If he finds some friend, who is prepared to do his client's case without any consideration then he must see to it that he is a counsel who would be able to conduct the case with as much thoroughness and industry as any other counsel would do on the receipt of the whole fee. In para. 31 of his affidavit Mr. Byrne says

> that my engagement in the appeal was not made subject to any express condition that I should appear in person and not avail myself of instructing other counsel should the necessity arise.

The proper question that arises out of this allegation is whether his clients would have engaged him for the fee that he received if he had told them that it was possible that he may not appear on behalf of the appellants and that the appeal might be argued on behalf of the appellants by somebody else. The answer is perfectly clear. The clients would never have engaged him on such a condition.

I waited throughout the arguments to see if the counsel, who appeared on behalf of Mr. Byrne, would express regret before the Court on behalf of his client and admit that his client had made a mistake and did not exercise proper judgment in the matter; but I am sorry that this step was not taken, and in my opinion Mr. Byrne was badly advised in not adopting this course which would have been extremely proper. On the contrary Mr. Byrne's counsel up to the end tried to justify Mr. Byrne's conduct and merely said that he followed the prevailing practice. Well, if such a practice prevails as would countenance Mr. Byrne's conduct in the present case then all that I can say is that it is a dishonest practice and that the sooner it is put an end to the better would it be for the honour of the legal profession and the interests of the litigating public whose ignorance and helplessness in most cases is pathetic to a degree. In this connexion I may quote the remarks of a learned Judge who was hearing an appeal in a civil suit which was brought by a client for the refund of fee against his counsel who did not appear for him at the hearing but appointed a substitute for himself. The passage is to be found in a case reported in *Maung Kyaw* v. *Maung Po Thiang* (1), and is as follows:

> Defendant emphasizes that any third pleader could be appointed to conduct the case for him. It might be for the interests of the legal profession if the clients were induced to believe

(1) [1910] 8 Bur. L. T. 181=8 I. C. 958.

this rule was binding on them, but the interests and rights of the client appear to be curiously disregarded. A man is as much at liberty to choose his legal as his medical adviser. Instructions to an advocate often involve the reposing of trust in him and the disclosure of confidential matters. No authority is quoted for holding that either by law or custom the trust may be transferred to another advocate without the client's consent.

Having regard to what I have stated, I have no doubt in my mind, that Mr. Byrne had been guilty of grave dereliction of his professional duties towards his clients and his conduct in the present case did not bear the hallmark of that absolute good faith and rectitude which I expect of every member of the Bar. The question of punishment in a case like this is not an easy one to decide, but it is a case in which I should like to emphasize my strong disapproval of Mr. Byrne's conduct and the most lenient penalty that I can impose upon him is that he should be suspended from practice for a period of one month from today.

Fforde, J.—I have had the advantage of reading the judgment just delivered by my learned brother, and have little to add beyond saying that I find myself in complete agreement with the conclusion arrived at by my learned brother and the reasons which he has given for coming to that conclusion.

It is not practicable or indeed desirable to lay down rigid rules of conduct for the Bar. The independence and sense of responsibility of the legal profession should be encouraged rather than the reverse.

But there is one rule which common fairness and common decency requires that the Bar should observe, and that is that when a practitioner has undertaken the duty of appearing to defend a man for his life he should give exclusive attention to that case, and nothing should be deemed to exonerate him from that obligation except physical inability to attend at the hearing I don't say that there may not be exceptional cases for instance, as Sir Muhammad Shafi has pointed out counsel may find that two murder appeals in which he has been engaged have simultaneously come into the list for hearing. Such cases are infrequent, and counsel faced with a difficulty of this kind can only make the best arrangement possible for his client but he must of course make the best possible arrangement for his client, and not as Mr. Byrne had done, the best possible arrangement for himself only. Mr. Byrne on finding that the murder appeal was to be heard on 11th October should have either tried to postpone the Pakpattan case or transferred his brief in that case. His first overriding duty was to the clients whose lives he had been engaged to defend.

In my judgment Mr. Byrne has acted with grave impropriety in the discharge of his professional obligations towards his clients, and it is both significant and regrettable that he appears to be unable to appreciate that his conduct has been in any way blameworthy.

D.D. *Order accordingly.*

A. I. R. 1928 Lahore 452

JAI LAL, J.

Beli Ram—Insolvent—Appellant.

v.

Mangal Das and *others*—Creditors—Respondents.

Misc. First Appeal No 1902 of 1927, Decided on 9th February 1928, from order of Dist. Judge, Gujranwala, D/- 11th May 1927.

Provincial Insolvency Act, (5 of 1920), S. 10 (2)—Insolvency petition—Creditors not taking steps to receive rateable distribution out of the sale proceeds—Insolvent also not applying for discharge — Order annulling adjudication—Application for leave to present fresh insolvency petition should be granted.

Where a person was adjudicated an insolvent and was ordered to apply for an order of his discharge within six months and his assets were taken charge of by the Official Receiver, which were sold and the amount was deposited with him but none of the creditors appeared to receive the same, and so he suggested that as the insolvent also had not applied for his discharge as directed by the Court, the adjudication should be annulled, whereupon the District Judge, without giving any notice to the insolvent or to the other parties concerned annulled the adjudication and so the applicant presented an application for leave to present a fresh insolvency petition.

Held: that leave to present fresh petition of insolvency should be granted as the estate of the insolvent was still under administration by the Official Receiver and consequently the insolvent might have been under a reasonable impression that he need not apply till the assets held by the Official Receiver had been distributed to the creditors. [P 453 C 1]

Manohar Lal—for Appellant.

S. C. Chatterjee—for Respondents.

Judgment.—Beli Ram, appellant was adjudicated an insolvent on 2nd May 1925 and was ordered to apply for an order of his discharge six months after

the date of his adjudication. His assets were taken charge of by the Official Receiver and it seems that none of the creditors took any steps to receive a rateable distribution out of the sale proceeds of such assets. The consequence was that on 20th March 1926 the Official Receiver reported to the District Judge that the entire assets of the insolvent had been sold and that Rs. 105-14-5 were in deposit with him but that none of the creditors had appeared to receive the same. He also suggested that as the insolvent had not applied for his discharge as directed by the Court the adjudication should be annulled. The District Judge thereupon without giving any notice to the insolvent or to the other parties concerned annulled the adjudication on 25th March 1926.

On 10th May 1927 Beli Ram presented an application under S. 10 (2), Provincial Insolvency Act, for leave to present a fresh insolvency petition. This petition was rejected by the District Judge on 11th May 1927. Beli Ram has consequently presented this appeal with the sanction of the District Judge.

After a careful consideration of the facts of this case I consider that this is a fit case in which the learned District Judge should have granted leave to present a fresh insolvency Petition. As I have stated the estate of the insolvent was still under administration by the Official Receiver and consequently the insolvent might have been under a reasonable impression that he need not apply till the assets held by the Official Receiver had been distributed to the creditors.

It appears, however, that during the pendency of this appeal the amount held by the Official Receiver was paid over to the, insolvent who has offered to refund the same if so ordered by this Court. I consider that under the circumstances the proper order should be that the appellant be allowed to present an insolvency petition provided he deposits the amount received by him from the Official Receiver in Court along with his insolvency petition. Consequently I accept this appeal and grant leave to Beli Ram to present a fresh insolvency petition on the condition specified above. Under the peculiar circumstances of the case I leave the parties to bear their own costs.

S.J. *Appeal accepted.*

A. I. R. 1928 Lahore 453

ADDISON, J.

Bagi Ram and *another*—Defendants—Appellants.

v.

Chanan Mal and *others*—Plaintiffs—Respondents.

First Appeal No. 1669 of 1927, Decided on 3rd February 1928, from order of Dist. Judge, Ferozepore, D/- 8th June 1927.

Provincial Insolvency Act, Ss. 37 and 39—Persons vested with property can sell it.

Persons vested with property under S. 37 or trustees under S. 39, Insolvency Act, have full power to deal with the property vested in them: *A. I. R.* 1925 *Sind* 159, *Foll.* [P 454 C 1]

Anant Ram Khosla—for Appellants.

Fakir Chand—for Respondents.

Judgment.—Two brothers were adjudicated insolvents at the instance of a creditor. They did not apply within the time fixed for their discharge and accordingly the District Judge annulled the adjudications under the provisions of S. 43, Insolvency Act. After he had done so he, on 10th July 1926, acting under the provisions of S. 37, Insolvency Act, ordered the property of Bagi Ram, one of the insolvents which had vested in the Receiver to be restored to him. This decision was appealed against and, on 12th January 1927, I held, following *Roop Narain* v. *King King & Co.* (1), that with a view to protect the creditors the Court should have passed an order under S. 37 vesting the property of the debtor in a person appointed by it for the benefit of the creditors. I, therefore, accepted the appeal and directed that the property of the debtor Bagi Ram should vest in the old Receiver. I further directed that that order would continue for six months within which time the petitioning creditor or creditors should have been able to take further steps to protect their interests in the property.

Accordingly when the case went back the creditors applied to the Insolvency Court for the sale of the property vested in the Receiver and for the distribution of the proceeds amongst the scheduled creditors. The Insolvency Court sanctioned this on 8th June 1927, and the present appeal is from that order.

In the meantime the old Receiver in whom I vested the property under S. 37 of the Act has sold it, and distributed

(1) A. I. R. 1926 Lah. 370.

the proceeds proportionately amongst the scheduled creditors.

It is contended before me that my order was not a complete vesting order but was only one vesting the property to a limited extent so as to allow the creditors to proceed against it by way of suit. No such words as these occur in my order. It is true that in the last sentence I said that the order would only continue for six months which I considered sufficient time for the creditors to take further steps. It might have been the case that they did not wish to have the property sold. The only question, therefore, is whether the person in whom I vested the property had power to sell it at the request of the creditors and to distribute the proceeds amongst the creditors.

It is quite clear that persons so vested with property under S. 37, or trustees under S. 39, Insolvency Act, have full power to deal with the property vested in them. This view was accepted in *Motharam* v *Pahlajrai Gopaldas* (2), a decision of the Court of the Sind Judicial Commissioners. The same view is taken in Rustomji's Insolvency and Bankruptcy, 2nd edn., p. 206.

It seems to me, therefore, that the orders that the property be sold and the proceeds distributed to the creditors is legal and correct and I dismiss this appeal with costs.

N.K. *Appeal dismissed.*

(2) A. I. R. 1925 Sind 159.

A. I. R. 1928 Lahore 454

BROADWAY, J.

Mt. Kirpi and *another*—Applicants—Appellants.

v.

Chuni Lal—Defendant—Respondent.

Misc. First Appeal No. 1930 of 1927, Decided on 13th December 1927, from order of District Judge, Rawalpindi, D/- 18th May 1927.

Civil P. C., O. 9, R 9—Application for cancellation of letters of administration—Dismissal for default—Absence of one of the applicants for fetching counsel and of other due to blindness—Absence can be excused and application can be restored.

Where the applicants were present outside the Court on the date on which the case came for hearing, and when the case was called on, on of the applicants went off to fetch his counsel but by the time he had returned he found that the application had been dismissed, and where the other applicant was unable to go into the Court room when the case was called on for the reason that she was blind.

Held; that restoration might well have been ordered in this case. [P 454 C 2]

Shamair Chand—for Appellants.

Judgment.—This is an appeal from the order of the District Judge, Rawalpindi, refusing to restore an application for cancellation of letters of administration which had been dismissed in default. The facts are these:—Two persons Mt. Kirpi and Bodh Raj filed an application in the Court asking that certain letters of administration that had been issued by the Court should be cancelled on the ground that the said letters had been obtained by fraud. The 3rd March 1927 was fixed for hearing of this application but was dismissed for default.

On the same date an application under O. 9, R. 9, Civil P C, was filed by the applicants, the present appellants, in which it was stated that the applicants were, as a matter of fact, present outside the Court on the date in question and that when the case was called on for hearing one of the applicants, Bodh Raj went off to fetch his counsel but by the time he had returned with his counsel found that the application had been dismissed. It was further stated that Mt. Kirpi, the other applicant, was unable to go into the Court room when the case was called on for the reason that she was blind. A reference to the application shows that it was signed by both the petitioners, the advocate for the petitioners and certain witnesses who were present to give evidence for the petitioners in the application proceedings. From this it may be gathered that the absence of the petitioners in this case was by no means intentional. It certainly would have been better had Mt. Kirpi been able to enter the Court room when the case was called on, but the fact that she was blind and that her co-applicant had gone off to call his counsel is one that, I think, may be regarded as an excuse or reason for her failure to go into the Court room.

After a careful consideration of all the circumstances in this case, it seems to me that restoration might well have been ordered in this case, the applicants being made to pay such costs as the trial Court considered reasonable. I, there-

fore, accept this appeal and, setting aside the order dismissing the application in default direct the restoration of the said application which should now be disposed of in accordance with law. I leave the parties to bear their own costs in this Court.

S.J. *Appeal accepted.*

A. I. R. 1928 Lahore 455

JAI LAL, J.

Ghania and *another*— Plaintiffs— Appellants.

v.

Santa and *others*—Defendants — Respondents.

Second Appeal No. 3126 of 1925, Decided on 25th January 1928, from decree of Sr. Sub-Judge, Hoshiarpur, D/- 26th August 1925.

(a) Landlord and tenant—Abandonment depends upon the intention of the party concerned.

Abandonment depends upon the intention of the party concerned. The mere fact that such party is residing in another village does not by itself amount to abandonment. It must be shown that he migrated to the other village with the intention of not returning to the former village and therefore that he intended to relinquish his rights there. [P 455 C 2]

(b) Landlord and tenant—A non-proprietor is not ordinarily entitled to sell a house built and occupied by him—Lease is not prohibited—Lease by a non-proprietor does not amount to an assertion of title adverse to the proprietors.

Ordinarily a non-proprietor is not entitled to sell a house built and occupied by him but nothing prohibits him from granting a lease of such a house to another person. It is possible that in the case of kamins who are given or permitted to build houses in consideration of their doing service to the proprietors, there is an implied covenant that the grantees shall occupy the houses personally.

Where it was not established that it was an essential condition, express or implied, of the permission granted by the proprietors to a non-proprietor that the latter shall occupy the house personally.

Held: that the act of a non-proprietor in renting the house to another person did not amount to a breach of the condition of his tenure and therefore to an assertion of title adverse to the proprietors, or that the possession of that person was adverse to the proprietors, [P 456 C 1]

Faqir Chand—for Appellants.

Judgment.—It is not without some hesitation that I have decided to accept this appeal, especially as the respondent did not appear before me.

The only question raised by the counsel for the appellant is of limitation. The plaintiffs who are some of the proprietors in the village, instituted the suit out of which this second appeal has arisen to eject defendants 1 to 3 from the house in suit. It was alleged that the land on which the house stands, was originally given to one Shadi, a Rawal, for purposes of residence, that subsequently Shadi built the house and lived therein, but after his death, his son Bhola rented the house to Ganda Ram, father of defendant 1, who resided in it as the tenant of the descendants of Shadi till about ten months before the suit when he sold the house to defendants 2 and 3. The descendants of Shadi were also impleaded as defendants. It appears that the descendants of Shadi have migrated to another village and in 1876 when the lease was granted by Bhola to Ganda Ram, the former was residing in that village.

The learned Senior Subordinate Judge on appeal has held that the plaintiffs' suit is barred by time. He holds that Bhola when he rented the house to Ganda Ram, had no interest in it as he had already abandoned the house which had consequently reverted to the owners of the site and, therefore, possession of Ganda Ram became adverse to the plaintiffs, the proprietors, from the date of his lease.

In the first instance the view of the learned Senior Subordinate Judge that the house was abandoned by Bhola does not appear to me correct. Abandonment depends upon the intention of the party concerned. The mere fact that such party is residing in another village does not by itself amount to abandonment. It must further be shown that he migrated to the other village with the intention of not returning to the former village and, therefore, that he intended to relinquish his rights there. The fact that Bhola rented the property in 1876 to Ganda Ram, shows that he never intended to relinquish it. The facts disclosed, therefore, do not amount to legal proof of abandonment and consequently must be assumed that in 1876 Bhola was owner of the house in its original tenure.

The question then is whether a non-proprietor is entitled to give on rent the house built and occupied by him. There can be no question that ordinarily he is not entitled to sell it (he can sell only

the materials which must be removed by the purchaser), but I have not been able to discover any authority which prohibits him from granting a lease of such a house to another person. It is possible that in the case of kamins who are given or permitted to build houses in consideration of their doing service to the proprietors, there is an implied covenant that the grantees shall occuy the houses personally. But it has not been established in this case that it was an essential condition, express or implied of the permission granted by the proprietors to Shadi that the latter shall occupy the house personally. Under these circumstances I am unable to hold that the act of Bhola in renting the house to Ganda Ram in 1876 amounted to a breach of the condition of his tenure and, therefore, to an assertion of title adverse to the proprietors, or that the possession of Ganda Ram was adverse to the proprietors. That being so Ganda Ram's son, defendant 1, being a mere tenant, and no title in the house which he could sell to defendants 2 and 3, and the sale about ten months before the suit, was the first infringement of the plaintiffs' rights. It follows from this that the plaintiffs' cause of action arose about ten months before the suit and that their suit is not barred by time.

Another test to determine the question of limitation is, whether, in 1876 when Bhola put Ganda Ram in possession of his house as his tenant, the proprietors were entitled to put an end to the rights of Bhola and eject Ganda Ram, as a trespasser. I do not think they were entitled to do so, if my view is correct that Bhola by creating a tenancy in favour of Ganda Ram did not break any of the conditions under which his ancestors were granted the site on which the house stands.

The consequence is that this appeal must be accepted and the plaintiffs' suit decreed with costs throughout.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 456

TEK CHAND, J.

Mt. Sakina Begam—Appellant.

v.

Muhammad Waliullah Khan—Respondent.

Misc. First Appeal No. 1407 of 1927, Decided on 22nd November 1927, from order of Senior Sub-Judge, Kangra, D/- 7th March 1927.

(a) Civil P. C., O. 22, Rr. 1 and 3—Proceedings regarding appointment of guardian—Original applicant dies—Application abates.

A person applied to be appointed as guardian of the property of a minor. During the continuance of the proceedings, applicant died and no application to continue the proceedings was made by any one interested in the minor.

Held: that the proceedings had abated and the Court had no jurisdiction to pass the order appointing a guardian: 135 *P. R.* 1893; 23 *Bom.* 719; 116 *P. L. R.* 1917; *A. I. R.* 1924 *Mad.* 484, *Ref.* [P 458 C 1]

(b) Guardian and Wards Act, Ss. 7 and 8—A person who has not applied cannot be appointed a guardian.

It is not open to the Court acting proprio motu to appoint as guardian of the property of the minor a person who had not applied to be so appointed: 135 *P. R.* 1893; 38 *Cal.* 783, *Foll.*; *A. I. R.* 1924 *Oudh* 126, *Dist.* [P 458 C 1]

(c) Practice — Court should not enter into correspondence with any one in the matter pending judicially before it.

It is objectionable for a Court to enter into correspondence with regard to a matter pending judicially before it, and it is illegal to take notice of the statements made in such correspondence by a person who has not chosen to substantiate them either by himself going into the witness-box or by leading other evidence. [P 458 C 2]

Muhammad Tufail—for Appellant.

Niaz Muhammad—for Respondent.

Judgment.—This is an appeal by Mt. Sakina Begam against the order of the Senior Subordinate Judge of Kangra, appointing the respondent Raja Muhammad Wali Ullah Khan as the guardian of the property of her son Farrakh Muhammad minor, aged nine years The proceedings which led to the appointment of the respondent as guardian are not described in the order under appeal. It is, therefore, necessary to give them in some detail in this judgment.

It appears that one Faiz Muhammad Khan of Rehlu died about eight years ago, leaving him surviving his widow Mt. Sakina Begam. appellant, and a minor son Farrakh Muhammad who was then about one year old. His property consisted of two squares of land in the Lyallpur District and some immovable property in the Kangra District, to which the minor succeeded. On 12th October 1926, Ali Muhammad, who was a first cousin of Faiz Muhammad Khan deceased applied to be appointed as the guardian of the property of the minor. It was alleged that the mother of the minor had not been managing the property satisfactorily. The mother opposed the ap-

plication and contended that she had been managing the property in the best interests of the minor.

An issue was framed as to whether it was necessary to appoint a guardian at all, and, if so, whether the applicant Ali Muhammad was a fit person to be so appointed. Ali Muhammad, however, led no evidence to prove this issue but Mt. Sakina Begam produced two witnesses. On 21st December 1926, the learned Senior Subordinate Judge instead of proceeding to adjudicate upon the application of Ali Muhammad sent a robkar to Raja Muhammad Wali Ullah Khan, respondent, Honorary Magistrate, Rehlu, who is an uncle of the deceased father of the minor, asking him to make suggestions for the protection of the property of the minor. No reply having been received from the Raja a reminder was sent to him. On 21st February, the Raja replied saying that the lands of the minor were not being properly managed, that it was necessary to appoint a guardian for the protection of his property and that he was prepared to assist in the management of the estate if a "paid guardian" was appointed. He suggested that one Munir Ullah Khan was a fit person to be appointed the "paid guardian" on Rs. 15 per mensem. This reply was laid before the Court on 7th March 1927.

In the meantime the original applicant Ali Muhammad had died on 4th February 1927, and no application had been made either by Raja Muhammad Wali Ullah Khan or by any other person to be substituted on the record in his place with a view to continue the proceedings started at his instance. On 7th March, neither Raja Muhammad Wali Ullah Khan nor any agent on his behalf was present but the Court, on reading the reply received from him to the robkar sent by it, proceeded to appoint the Raja as guardian of the property of the minor. In the order it was stated that it was not necessary to take any security from the guardian, and that he could entertain a paid manager on a suitable salary.

Against this order the present appeal has been preferred by Mt. Sakina Begam and various objections have been taken on her behalf against the appointment of the respondent. The first point to be considered is whether the application made by Ali Muhammad for appointment as guardian of the property of the minor had or had not abated on the date that the order under appeal was passed.

As already pointed out, Ali Muhammad had died on 4th February 1927, and no application had been made to substitute any other person in his place. Mr. Muhammad Tufail for the appellant urges that the proceedings under the Guardians and Wards Act are personal to the applicant and on his death the "right to sue" does not survive and the Court has no power to proceed with that application any further, but that it is open to any other person to apply for his own appointment as guardian on a fresh application. Mr. Niaz Muhammad for the respondent contends, on the other hand, that the "right to sue" in such a case survives and that the proceedings can be continued by any person interested in the minor. The rulings on the point as to whether the "right to sue" in such proceedings survives or not are not uniform. In *Badr Bakhsh* v. *Jangbaz Khan* (1) and *Gangatai* v. *Khashabai* (2) it was held that the right to sue does not survive, but a contrary view was taken in a Single Bench judgment of the Chief Court in *Arjan Singh* v. *Gujri* (3) which has been cited with approval by the Madras High Court in *Sami Chetti* v. *Adaikalam Chetti* (4). I do not think it necessary for the purposes of this case to decide which of this rival views is correct for, in my opinion, the procedure adopted by the lower Court is erroneous—according to either view. If the law was correctly laid down in *Arjan Singh* v. *Gurji* (3) and in the Madras case above cited and it be presumed that the "right to sue" survives, it would be necessary under O. 22, Rr. 1 and 3, Civil P. C., for some one to apply to be made a representative of the deceased applicant and the proceedings could be continued only after such application had been granted. In this case no such application was admittedly made. Indeed, as pointed out already, Raja Muhammad Wali Ullah Khan, the respondent, was not even present in Court personally or by agent, and of course, there was no representation on behalf of any of the heirs or legal re-

(1) [1893] 135 P. R. 1893.
(2) [1899] 23 Bom. 719=1 Bom. L. R. 363.
(3) [1917] 116 P. L. R. 1917=42 I. C. 410=160 P. W. R. 1917.
(4) A. I. R. 1924 Mad. 484=47 Mad. 459

presentatives of the original applicant Ali Muhammad. In the absence of such substitution, there being no applicant before the Court, the proceedings had terminated and it had no jurisdiction to proceed further with the case. If, on the other hand, the contrary view be correct, that the "right to sue" was personal to the original applicant and did not survive after his death, the proceedings automatically abated on 4th February 1927, and should have been consigned to the record room. In this view also, it must be held that the proceedings had abated and the learned Senior Subordinate Judge had no jurisdiction to pass the order appealed against.

The appointment of the respondent is irregular for the additional reason that no application had been made on his behalf for his appointment as guardian. Under the leading authority of the Chief Court, *Badr Bakhsh* v. *Jangbaz Khan* (1) which has, so far as I am aware, not been doubted in any subsequent ruling of the Chief Court or of this Court, it was not open to the Senior Subordinate Judge acting proprio motu to appoint as guardian of the property of the minor a person who had not applied to be so appointed. The Calcutta High Court has also taken the same view in *Jaiwanti Kumari* v. *Gajadhar Upadhya* (5). I am not unmindful of the fact that a contrary view has been taken by the Judical Commissioners of Sind and Oudh in *Haji Hirji* v. *Kasim Hirji* (6) and *Islaman* v. *Magbulan* (7). But after giving the matter my fullest consideration, and having regard to the clear wording of Ss. 7 and 8, Guardians Wards Act, I venture to think, with all respect, that the sounder view is that taken in *Badr Bakhsh* v. *Jangbaz Khan* (1) I, therefore, hold that the appointment of the respondent was irregular for this reason also.

There is yet another ground on which the order of the lower Court cannot be sustained. The lower Court had of its own motion sent a robkar to the respondent, but he had not expressed his willingness to be appointed as guardian of the property of the minor and all that he had stated was that he would be prepared to assist the "paid" guardian (whatever that expresssion might mean) if one was appointed by the Court. In his reply the Raja had made allegations of mismanagement against the appellant and the Court seems to have accepted them as proved without even calling upon the mother to meet these allegations, if she could. It seems to me that the entire procedure followed by the learned Subordinate Judge in this matter was misconceived. It is hardly necessary to point out that it is objectionable for a Court to enter into correspondence of this kind, with regard to a matter pending judicially before it, and it is illegal to take notice of the statements made in such correspondence by a person, who has not chosen to substantiate them either by himself going into the witness-box or by leading other evidence. In these circumstances there were no materials on the record to justify the conclusion that the mother was incapable of managing the property and the appointment of a guardian was necessary. It may be noted that similar allegations had been made by the original applicant Ali Muhammad in his application but he had failed to support them by any evidence and had closed the case on 27th December 1926. Therefore, even if the Senior Subordinate Judge had jurisdiction to proceed with the matter after the death of Ali Muhammad and to consider the respondent as eligible for appointment as guardian without any application by him, it was necessary to make a proper enquiry in accordance with law on the issue which arose in the proceedings.

For the foregoing reasons I accept the appeal and set aside the order appointing the respondent as guardian. As the respondent through counsel has strunously opposed this appeal, he must pay the appellant her costs in this Court.

I wish to make it clear that this order is not intended to indicate in any way that Raja Muhammad Ali Ullah Khan, respondent, is not a fit person to be appointed guardian of the property of the minor or to preclude him or any other person from applying to be appointed as such in proceedings instituted and conducted in accordance with law.

N.K. *Appeal accepted.*

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(5) [1911] 38 Cal. 783=14 C. L. J, 226=10 I. C. 334=15 C. W. N. 676.
(6) [1909] 3 S. L. R. 115=4 I. C. 603.
(7) A. I. R. 1924 Oudh 126.

A. I. R. 1928 Lahore 459

TEK CHAND, J.

Jai Ram Singh Bhag Mal—Plaintiffs—Appellants.

v.

Sardari Mal—Defendant—Respondent.

Second Appeal No. 1133 of 1927, Decided on 12th December 1927, from order of Dist. Judge, Ferozepur, D/- 1st February 1927.

Limitation Act, Art. 64—Accounts stated—Partnership—Defendant admitting in writing in plaintiffs' book a debit balance—Suit to recover the balance is governed by Art. 64 and not by Art. 106.

Plaintiffs and defendants were partners in certain transactions and all accounts relating to these transactions were entered either in the books of the commission agents or in those of defendants. After examining the accounts on 3rd August 1920 an entry was made in the books of the plaintiffs in two columns. On the credit side was shown the plaintiff's share of the profits. On the debit side was shown the plaintiff's share of loss incurred. This was followed by a writing in defendant's own hand to the effect that the above mentioned accounts were correct as having been arrived at as the plaintiff's share of the profit after division.

On 15th June 1925 the plaintiffs instituted a suit against the defendants for recovery of the sum due on foot of this entry.

Held: that the suit was within time, the Article applicable being 64 and Art. 106 had no application to the case: *A. I. R. 1924 Lah. 425, Foll.* [P 460 C 2]

Ram Chand Manchanda—for Applts.

Mohsin Shah—for Respondent.

Judgment.—The plaintiffs and defendants were partners in certain grain transactions which they jointly carried on with the firm of Bhaga Ram Sri Ram, commission agents of Jalalabad. The transactions were all conducted by the aforesaid firm of commission agents, and all accounts relating to these transactions were entered either in the books of the commission agents or in those of defendants. The partnership lasted from 5th April 1920 to 31st August 1920 and it appears that it comprised eight transactions in all. On 3rd August 1920 the parties and the commission agents met, accounts were gone into and profits and loss determined. It was discovered that there had been profit in seven transactions but loss in one. Accordingly on that date an entry was made in the books of the plaintiffs in two columns. On the credit side being shown the plaintiff's share of the profits of each of the seven transactions, the total of which was recorded as Rs. 451-15-3. To this Rs. 50 was added as interest at 1 per cent. from 5th April 1920, up-to-date. On the debit side the sum of Rs. 119 was shown as representing the plaintiff's share of loss incurred on 8th transaction. Below these columns it was written that the entire account of the dealings with Bhaga Ram Sri Ram, commission agents, had been examined, according to which the above mentioned items indicated the share of the plaintiffs. This was followed by a writing in Sardari Mal's own hand to the effect that Rs 501-15-3 above-mentioned were correct as having been arrived at as the plaintiff's share of the profit after division (*Nafa wand kar lagaya*). This entry is dated 6th Bhadon 1977 (31st August 1920).

On 15th June 1925 the plaintiffs instituted the present suit against the defendants for recovery of Rs. 600 due on foot of this entry, Rs. 382-15-3 being the principal and Rs. 117-0 9 interest at 1 per cent. The defendants denied the execution of the entry and raised various other defences including limitation. The learned Sub-Judge overruled all these objections and held that the execution was proved and the suit was within time under Art. 64. He accordingly passed a decree for the full sum claimed against the defendants.

On appeal the learned District Judge agreed with the Sub-Judge in holding that the defendants had executed the entry in question but dismissed the suit as barred by time, holding that it was governed by Art. 106 and not by Art. 64, Lim. Act. The learned District Judge also held that there was no proof of any oral agreement by the defendants to pay interest

The plaintiffs have come up in second appeal and it has been urged on their behalf that the entry in question is an account stated and the suit is within time under Art. 64. I have heard the case argued at length by the learned counsels of both parties and am of opinion that this appeal ought to succeed. The learned District Judge has held that the entry in question is not an account stated and that Art. 106 applies to the suit based on it. In coming to this conclusion the learned Judge has expressed the opinion that the account stated within the meaning of Art 64 implies cross demands and it is mutual surrender of those cross demands

that creates a new contract between the parties when an account is stated between them. As in the present case there was no proof of any cross demands or of the creation of a new contract, the aforesaid article was held inapplicable. There is no doubt that conflicting views have been expressed by the various High Courts as to the meaning of the word "account stated," and both counsels have cited a number of rulings in support of their respective contentions. I do not, however, propose to discuss these rulings at length as I am of opinion that so far as this case is concerned the matter is concluded by the leading authority of this Court reported as *Nand Lal* v. *Partap Singh* (1) which was a case very similar to the present one. There, as here, the parties were partners in certain business, had gone into the account of the partnership and as a result of that scrutiny the defendants had admitted in writing in the plaintiffs' book a debit balance. It was held that considering that the parties were partners and consequently there must have been debit and credit entries between them and that the present balance was struck between them in supersession of the detailed debit and credit entries in the earlier account, the entry in question was an account rendered and that it adjusted the relations of the parties and was a promise to pay. The present case is, it seems to me much stronger inasmuch as here the previous accounts were entered either in the books of the commission agents or of the defendants, and the entry in suit was made by the defendants in the plaintiffs' book.

Mr. Mohsin Shah for the respondents argues that the net amount due to the plaintiffs had been stated in the entry in question, and only the credits and the debits are entered in separate columns. I cannot, however, see that this ought to make any difference, as the amount of the items on the credit side is clearly stated to be Rs. 501-15-3, while that on the debit side there is a single item of Rs. 119. The mere fact that Rs. 119 had not been deducted from the former item and that the balance specified does not, in my judgment, make any difference.

Article 106 on which the learned District Judge has relied relates to a suit for account and a share of the profits of a dissolved partnership. The present suit on the plaint or on the findings is not a suit of that kind. Article No. 106 does not, obviously apply and Mr. Moshin Shah has not really sought to support the judgment on that ground.

I must, therefore, hold that the plaintiffs' suit is within time and they are entitled to claim the principal sum Rs. 382-15-3 secured by the entry. I do not, however, see how they are entitled to interest in view of the fact that the entry in question does not state that the defendants had agreed to pay any interest and the plaintiffs had relied on a separate oral agreement which the learned District Judge has held to be unproved. For the foregoing reasons I accept the appeal, set aside the decree of the District Judge and pass a decree in favour of the plaintiffs for Rs. 382-15-3 with proportionate costs throughout.

N.K. *Appeal accepted.*

(1) A. I. R. 1922 Lah. 425=3 Lah. 326.

A. I. R. 1928 Lahore 460

JAI LAL, J.

Amar Nath—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Petition No. 219 of 1926, Decided on 10th February 1927, for transfer of the case from Court of Magistrate, First Class, Lahore.

Criminal P. C., S. 526—Bona fide apprehension by resonable man that accused will not receive fair trial is sufficient ground for transfer—Magistrate convicting other persons on similar evidence is no ground for transfer.

The policy of law is to inspire confidence in the minds of the accused persons in the administration of justice and in the integrity of the Magistracy. The superior Courts are expected to have due regard to the susceptibilities of the accused persons and if they are satisfied that there are reasonable grounds, that is, grounds which a reasonable person placed in the position of an accused person considers to be sufficient for entertaining apprehension that the accused will not have a fair trial in the Court of the Magistrate then an order for transfer should be made.

The mere fact that the Magistrate has on a previous occasion tried other cases against other accused on similar evidence and convicted them is no ground for transfer : *A. I. R.* 1924 *Lah.* 257 and 4 *C. W. N.* 824, *Dist.*; 33 *All.* 583; 31 *Cal.* 715 and 36 *Cal.* 104, *Foll.* [P 461 C 2]

Bhagat Ram Puri—for Petitioner.

Ram Lal—for the Crown.

Order.—This is an application under S. 526, Criminal P. C., for transfer of a case under S. 477-A, I. P. C. pending against the applicant in the Court of Lala Nand Lal Manchanda, Magistrate First Class, and is made on the ground

that in a previous case against others under the same section and almost on identical facts the Magistrate convicted the accused then before him and sentenced them to various terms of imprisonment and, therefore, that the Magistrate having already expressed an opinion on the merits of the case the applicant does not expect an independent and unprejudiced expression of opinion in this case. This was the only ground urged before me, the other grounds of the application having been abandoned.

It appear that the applicant Amar Nath was a Director of the Amritsar National Bank Limited which has gone into liquidation. As a result of investigation held during the liquidation proceedings it was decided to prosecute the Directors and others connected with the management of the Bank under S. 477-A for preparing a false balance sheet and for making wrong entries in the statutory report. The applicant, it is alleged, absconded but the others were tried and convicted. He has now been apprehended and sent up for trial under S. 477-A for preparing a false balance sheet and for making wrong entries in the statutory report before the same Magistrate. The question that I have now to decide is whether by the mere fact that the Magistrate has in the case of other persons held on the evidence then produced before him that the balance sheet was false and that the entries in the statutory report were wrong debars him from trying the present applicant. It is not denied that evidence in this case will mainly be the same that was produced in the previous cases though it may be possible for the present accused to raise pleas in his defence which were not raised by the accused in the previous cases. My attention has not been drawn to any passage in which the Magistrate in his previous judgments directly dealt with the case of the applicant or expressed a definite opinion against him. It was at the same time inevitable that the name of Amar Nath should incidentally be mentioned in connexion with certain entries which were to be discussed in those cases. On the facts, therefore, I hold that the Magistrate has not expressed any definite opinion anywhere in the previous cases against Amar Nath directly, though there is no doubt that the facts of the previous cases and this case are practically identical and that case will have to be decided mainly on the same prosecution evidence. A large number of authorities were cited on both sides. So far as the principles underlying the transfer of criminal cases from the Courts of Magistrates are concerned there appears to be no controversy. The policy of the law is to inspire confidence in the minds of the accused persons in the administation of justice and in the integrity of the Magistracy. The superior Courts are expected to have due regard to the susceptibilites of the accused persons and if they are satisfied that there are reasonable grounds, that is, grounds, which a reasonable person placed in the position of an accused person considers to be sufficient, for entertaining an apprehension that the accused will not have a fair and impartial trial in the Court of Magistrate then an order for transfer should be made. It is the application of this principle that is the subject of controversy in the case before me. Counsel for the applicant cited the case of *Dhanna Lal* v. *Crown* (Criminal Miscellaneous No. 146 of 1925) in which Zafar Ali, J., transferred a case from the Court of a Magistrate under almost identical circumstances. The full facts of that case are not mentioned in the judgment of the learned Judge in view of the fact that the counsel for the Crown was unable to say that the apprehension on the part of the accused person was unreasonable. Moreover, in that case the Magistrate in his former judgment had expressed the opinion that there was ample evidence against the petitioner for transfer of the case. This by no means is the case in the present case. In *Badan Singh* v. *Emperor* (1) a case was transferred from the Court of the Magistrate as he had on a previous occasion expressed his opinion against the accused who was the petitioner for transfer and in *Chandramani Sarma* v. *Kunja Rendi* (2) the Magistrate had expressed an opinion on the defence evidence in another case and such evidence was prosecution evidence in the subsequent case between the same parties which was sought to be transferred from his Court. Order for transfer was made in this case also. The facts in both these cases are distinguishable from the present case.

(1) A. I. R. 1924 Lah. 257.
(2) [1900] 4 C. W. N. 824.

On the other hand *Emperor* v. *Harigobind* (3), *Johoruddin Sarkar* v. *Emperor* (4) and *Rajani Kanta Dutta* v. *Emperor* (5), appear to be authorities against the applicant. The first of these judgments related to two cross cases of riot, in which the Magistrate having disposed of one of the cases commenced the trial of the second. An application for transfer was made on the ground that in the first case the Magistrate having expressed an opinion unfavourable to the accused in the second case was not competent to try the latter case. The application for transfer was dismissed. In the second of the cases cited above the facts were identical with those of this case. It appears that some of the accused had already been convicted on the same evidence by the Sessions Judge before the remaining accused were placed before him for trial and convicted by him. An objection was taken before the appellate Court that the Judge having expressed an opinion on the evidence in a previous case was not competent to try the second case. The objection was overruled. The only distinction that it may be possible to draw between that case and the case now before me is that in that case there was no application for transfer made to the High Court but an objection to the competency of the Sessions Judge to take cognizance of the case was taken on appeal On p. 719 [*of* 31 *Cal.*] of the report, however, the learned Judges held that an application for transfer under the circumstances mentioned would have been rejected. In the last of the cases cited above it was held that the mere expression of opinion against the accused on other evidence in another case does not debar a Magistrate from trying a criminal case against the same accused. In my opinion I would not be exercising a sound discretion, if I were to transfer the present case merely because the Magistrate has an a previous occasion tried other cases against other accused on similar evidence and convicted them.

I must, therefore, dismiss this application.

A.L./R.K. *Application dismissed.*

(3) [1911] 33 All. 583=12 I. C. 652=12 Cr. L. J. 564.
(4) [1904] 31 Cal. 715=8 C. W. N. 910.
(5) [1909] 36 Cal. 904=3 I. C. 88=10 Cr. L.J. 244.

** A. I. R. 1928 Lahore 462

FFORDE AND AGHA HAIDAR, JJ.

Raju and *another*—Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 147 of 1927, Decided on 3rd April 1928, for review of order of Agha Haidar, J., D/- 8th February 1927.

* (*a*) *Criminal P. C., Ss.* 561-*A and* 369—*There is no conflict between the two sections.*

Section 561-A does not confer any new powers but merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. There is no conflict between that section and S. 369. [P 463 C 2]

** (*b*) *Criminal P. C., S.* 561-*A* — *High Court has no inherent powers to alter or review its own judgment except in cases of default or want of jurisdiction.*

There has never been an inherent power in the High Court to alter or review its own judgment once it has been pronounced or signed except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on merits. [P 463 C 2]

A petitioner was convicted by the trial Magistrate under S. 457, Penal Code. His appeal was rejected by the District Judge. He applied to the High Court in revision against the conviction. The application was rejected. He again made an application to the High Court to reconsider the case.

Held: that the previous order could not be reviewed: *A. I. R.* 1927 *Lah.* 139, *Diss. from*; 34 *Cal.* 860 and *Stephenson* v. *Garnett*, (1889) 1 *Q. B.* 677, *Ref.* [P 464 C 1]

* (*c*) *Criminal P. C., S.* 561-*A*—*Meaning of the words "or otherwise to secure the ends of justice" mean such other inherent power as High Court possesses is preserved.*

The words "or otherwise to secure the ends of justice" can only mean that such other inherent power as the Court possesses is likewise preserved. The High Court is not given, nor did it ever possess, an unrestricted and undefined power to make any order which, it might please to consider, was in the interests of justice. Its inherent powers are as much controlled by principle and precedent as are its express powers by statute. [P 464 C 1]

Mahtab Singh—for Petitioners.

C. H. Carden Noad—for the Crown.

Fforde, J.—This is a petition purporting to be brought under the provisions of S. 561-A, Criminal P. C., for revision of an order of my brother Agha Haidar made on 8th February 1927, rejecting an application in revision presented by the petitioners in which they asked to have their convictions altered and their sentences reduced. The facts of the case are shortly these :

The petitioners, Raju and Sadan, and three other persons, Waryami, Taju and Mohammad Bakhsh, were convicted by the trial Magistrate under the provisions of S. 457, I. P. C., and were sentenced to various terms of imprisonment and fines. They appealed to the Sessions Judge and their appeals were rejected on 15th January 1927. Two of the convicts, namely, the present petitioners, Raju and Sadan, then applied to the High Court in revision against their convictions and sentences. The application was rejected by my brother Agha Haidar, J., by the abovementioned order of 8th February 1927.

Two of the other convicts, Waryami and Taju, likewise applied at a later date to the High Court in revision. Their applications came before Zafar Ali, J., on 10th June 1927, and their petitions were accepted to the extent that their fines were reduced. The remaining convict, Mohammad Bakhsh, has not moved this Court. The petitioners Raju and Sadan, again came up to this Court asking my brother Agha Haidar, J., to reconsider his decision of 8th February, and the first question which my learned brother had to decide was whether he had power to reconsider a decision in which judgment has been pronounced and signed. As my brother Agha Haidar, J., was not satisfied that he had power to entertain the application he admitted it for the purpose of having that question argued. The case having come up for argument the attention of my brother was drawn to a case reported in one of the unauthorized reports, *Mathra Das* v. *Emperor* (1), in which Broadway, J., held that S. 561-A, Criminal P. C., was not in any way limited or governed by S. 369 of that Code, and that he had power to reconsider the question of sentence after he had already rejected an application in revision in that behalf.

It is urged on behalf of the petitioners that the High Court has inherent power to make any order it may think fit to secure the ends of justice, and that this power was expressly conferred by S.561-A, Criminal P. C. This section was added to the Code by the Code of Criminal Procedure (Amendment) Act (18 of 1923), and reads as follows :

> Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

It seems to me clear that all that this section does is to declare that such inherent powers as the High Court may possess have not been taken away or abridged by any of the provisions of the Code of Criminal Procedure. It does not confer any new powers, but merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. There is no conflict between that section and S. 369. The latter section provides that :

> Save as otherwise provided by the Code of Criminal Procedure or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court when it has signed its judgment shall alter or review the same, except to correct a clerical error.

This does not affect any powers inherent in the Court, as there never has been an inherent power in the High Court to alter or review its own judgment in a criminal case once it has been pronounced and signed except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits. With this view all the Courts in India are in accord, and it is not disputed that this was the law prior to the addition of S. 561-A to the Criminal Procedure Code by the Act of 1923. Mr. Mehtab Singh contends that the introduction of this section has altered the law and given to the High Court power to do something which it could not do before. As I have already pointed out this is not the case. The instances of inherent powers possessed by the High Court given in S. 561-A, namely, to make such orders as may be necessary to give effect to its decisions, or to prevent an abuse of the process of any Court, have always been assumed by Courts of record.

The first class of cases comes under the well-established principle that whenever anything is required to be done by law, and it is found impossible to do that thing unless something not authorized in express terms be also done, then that something else will be supplied by necessary intendment. This is a principle of the common law embodied in the maxim *quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non*

(1) A. I. R. 1927 Lah. 189.

potest. An example of the application of this principle is to be found in *Jagendra Chandra Sen* v. *Wazidunnissa Khatun* (2) in which it was held that when a Court has made an order which it has jurisdiction to make, and there is no provision in the Civil Procedure Code which applies directly to the case, there is inherent power in the Court to have that order carried into effect.

As an instance of the exercise of the inherent power of the Court to prevent an abuse of its process, I may refer to *Stephenson* v. *Garnett* (3), where the Court of appeal stayed as frivolous and vexatious and an abuse of the process of the Court an action in the High Court which raised a question already decided by a Court of competent jurisdiction. The Lords Justices took care to observe that they did not rest their decision upon the ground that the matter was res judicata, but upon the principle that it would be an abuse of the process of the Court to allow a suitor to litigate over again the same question which has been already decided against him. The principle is, by S. 561-A, Criminal P. C., deemed to apply in criminal matters, and as an example of the application of this rule, I have no doubt that the High Court would, in the exercise of its inherent jurisdiction, reject an application for the transfer of a criminal case, where such an application based upon the same facts had already been refused.

The concluding words of the section "or otherwise to secure the ends of justice", can only mean that such other inherent power as the Court possesses is likewise preserved. The High Court is not given nor did it ever possess, an unrestricted and undefined power to make any order which, it might please to consider, was in the interests of justice. Its inherent powers are as much controlled by principle and precedent as are its express powers by statute.

For these reasons I think that the order passed by my learned brother in revision cannot now be reviewed and I would accordingly dismiss the petition. I may add that I have consulted my brother Broadway, J., who has considered the matter further since his decision in *Mathra Das* v. *Emperor* (1), and he has authorized me to say that he is not satisfied with his judgment in that case and is inclined to the view which I have just expressed.

Agha Haidar, J.—I entirely agree.

A.L /G.B. *Petition dismissed.*

(2) [1907] 34 Cal. 860=11 C. W. N. 856.
(3) [1889] 1 Q. B. 677=67 L. J. Q. B. 447=46 W. R. 410=78 L. T. 371.

A. I. R. 1928 Lahore 464

ADDISON, J.

Baldev Singh—Plaintiff—Appellant.

v.

Rasilla and *another* — Defendants—Respondents.

Second Appeal No. 2309 of 1926, Decided on 14th February 1928, from decree of Dist. Judge, Hoshiarpur, D/- 1st July 1926.

(a) Custom (Punjab)—An ala malik has by custom no right of challenging an alienation by a sonless male adna malik.

An ala malik has by custom no right of challenging an alienation by a sonless male adna malik though he is entitled to succeed to the land left by such a person in the absence of heirs, near or remote; a male adna malik has full power of alienation which is not subject to the control of the ala malik: 9 *P. R.* 1898; 129 *P. L. R.* 1912; *A. I. R.* 1925 *Lah.* 34; *A. I. R.* 1923 *Lah.* 626; *A. I. R.* 1927 *Lah.* 11; 72 *P. R.* 1907; and *A. I. R.* 1932 *Lah.* 217, *Ref.* [P 467 C 2]

(b) Custom (Punjab)—Ala malik having right of reversion has a right to challenge an alienation made by the widow of an adna malik in order to protect his interest.

An ala malik, if he has the right of reversion in the absence of heirs, is entitled to challenge an alienation made by the widow of an adna malik in order to protect his interests, as the widow only holds a limited estate, while the fact that she has no heirs in the proper sense of that word, does not extend in any way her powers over her limited estate: *A.I.R.* 1922 *Lah.* 217 and 8 *M. I. A.* 529 (*P. C.*), *Foll.* [P 468 C 1]

Judgment.—There are four connected appeals in which a question of custom is involved. The Raja of Guler in the Dehra tahsil of Kangra District is the plaintiff in the four suits. He is the ala malik of the land while the defendants are either the adna maliks or the widows of adna maliks. In Appeal No. 2309 of 1926 the defendants are Rasilla, son of Jahla, and Kalu. The original adna malik was Piru. He mortgaged the land to Jahla and Kalu in 1897. He then sold it to Kalu and Rasilla, Jahla's son, in 1914. Piru died later. In January 1925, the Raja claiming as ala malik sued Rassilla and Kalu for possession of the

land on the ground that Piru died without heirs and that the land for that reason reverted to him, i. e., that he was entitled to succeed and to ignore the alienation made by Piru. It was further alleged that adna maliks had no power to alienate in derogation of the ala malik's rights. The trial Court decreed possession of the land in favour of the Raja, holding (1) that the suit was within time, (2) that there was estoppel as mere receipts of the rent by the Raja from the defendants was not enough for this purpose, (3) that the ala malik had a locus standi to sue, (4) that the defendants had failed to prove that they were collaterals of Piru, and (5) that there was no necessity for the sale which appeared to be for a small amount.

The second appeal is No. 2310 of 1926. In it the defendants were Sohnu and two widows of deceased adna maliks who sold the land to the other defendants in 1922. The Raja in this case sued for a declaration that the sale should not affect his rights to succeed to the lane in suit on the death of defendants 1 to 3 who had no heirs. It was established that there were six previous unchallenged alienations of bits of the holding in which the land in suit was comprised. These took place in 1893, 1899, 1919, and 1920. I mention this to show that there have been many alienations by adna maliks which were never challenged by the ala maliks. The history of the land involved in the first appeal also shows the same. The trial Judge held: (1) that the Raja had a locus standi to sue, (2) that no collaterals were proved to be in existence and (3) that there had been acquiescence on the part of the ala malik, in that he had not challenged the previous alienations of part of the holding. It was also held that full consideration had passed but that there was no necessity for the sale. On the finding as to acquiescence the suit was dismissed.

The third appeal is No. 2311 of 1926. In this case Mt. Gulabi, the widow of an adna malik, was in possession. She gifted the land in 1922 to the other defendants who are the sons of her daughter and of her husband's sister. This was also a suit for a declaration The land was actually purchased without objection on the part of the Raja by the widow's husband in 1905, while before that he held the mortgage rights from 1894. These are again two instances of previous alienations not challenged by the ala malik. The trial Judge held: (1) that the plaintiff was estopped from suing as he did not object to the purchase of the land by the husband of defendant 1, (2) that the gift was valid as it was made to obtain the services of the donees and was thus for legal necessity, (3) that the sister's son and daughter's son were not heirs in jagir village, but that there were collaterals of the husband in existence and (4) that the Raja had still a right of suit though he had not impleaded these collaterals. He, however, dismissed this suit on his findings as to estoppel and the validity of the gift.

The fourth appeal is No. 2312 of 1926. In this case Mt. Lahasanun, widow of Suba, an adna malik, gifted the land to her daughter's son. Suba had himself purchased the land from other adna maliks in 1892, a fact which should again be noted. This also was a suit for a declaration. The trial Judge held: (1) that the daughter's son was not the legal heir, (2) that there were no collaterals of Suba and (3) that the plaintiff had a locus standi to sue, but he dismissed the suit on the fourth finding that the land was gifted so that the donee should provide for the widow and that this was a necessary purpose.

On appeal the District Judge held that adna maliks could alienate without control of the ala maliks as the Raja was a mere taluqdar and not the real owner of the soil. Towards the end of his judgment he fortified himself in his conclusion in the case of the third and fourth appeals by stating that daughter and daughter's son were certainly within the line of heirs, this being the general rule under custom. This, however, is not a finding of the District Judge who in fact did not discuss this question and neglected to see that the trial Judge had quoted the riwaj i-am of the district which is to the effect that in jagir villages daughters and daughter's sons are not heirs. On his finding that adna maliks could alienate without the control of the ala malik, he dismissed the appeals from the declaratory suits which had been dismissed and accepted the appeal in the suit for possession which had been decreed in favour of the Raja. He granted certificates for second appeal on the question whether an adna malik or a sonless adna malik

had a right of alienation in the presence of ala malik. On the certificates granted these four second appeals have been admitted.

In 9 *P. R.* 1898 two classes of ala maliks were defined. In some parts they are the real proprietors and the adna malik is little more than a tenant with a right of occupancy. In other parts, the adna maliks are the real proprietors and the ala malik is merely a taluqdar receiving a certain percentage on the revenue. In the case then before the Chief Court it was held that the ala malik was a mere taluqdar and that the estate did not revert to the ala malik on the death of an adna malik without issue but to the collaterals of the deceased and where there were no collaterals to the pattidars of his patti.

The same distinction was noted in *Hira* v. *Changa* (1), in which it was held that where the ala maliks were the original proprietors of the soil and called in outsiders and settled them on the land they were entitled to succeed on the death of an adna malik without issue, the collaterals of the adna malik having no right of succession when the land was not held by the common ancestor of the deceased. It must be noted, however, that in that case the wajib-ul-arz was against the collaterals so that the case was decided on its own special facts. *Khurshid Alam* v. *Phangu* (2) was a case where the ala malik was held to be merely a taluqdar and it was held that he did not succeed to the adna malkiat when the line of the adna malik became extinct in the absence of a provision to that effect in the wajib-ul-arz or other evidence in proof of such a custom. *Dal Singh* v. *Pluiman* (3) and *Labh Singh* v. *Ahmad Shah* (4) are cases of a similar nature. In *Gurditta* v. *Jaisingh* (5), where the Jagirdar of Dada Siba in the Kangra District was the plaintiff, it was held that the defendant had failed to establish a custom whereby a sister's son inherited in preference to the ala malik. This was in accordance with the general rule of custom that a sister or her son does not come within the category of heirs and this authority does not help in the decision of the present appeal.

The trial Judge and the District Judge have discussed at length certain remarks of various Settlement Officers when dealing with the settlement of ordinary jagirs of the Kangra District. Most of these remarks seem to me to be beside the point as they with one exception do not concern the jagir in question which was not settled till 1891-92. They are also mere expressions of opinion.

The first wajib-ul-arz dealing with this jagir was drawn up in 1891-92, and the second wajib-ul-arz, which is practically to the same effect as the first, was prepared in 1911-12. Para. 12 of the wajib-ul-arz is as follows :

> The Raja Sahib is the ala malik and the other owners are the adna maliks of their holdings. The Raja Sahib realizes taluqdar dues on the whole of the land included in the ownership of the adna maliks at the rate of 25 per cent upon the land revenue (in addition to the land revenue which he gets as jagirdar). In this percentage all the rights of the Raja Sahib whatsoever have been included, such as ban waziri, gadiana etc., and the Raja Sahib has received full compensation with regard to these rights. The adna maliks have full power of sale and mortgage of their lands.

Again, according to para. 16 of both the wajib-ul-arzes it is said that should any owner of land (the reference is to the adna malik) die without heirs, either near or distant, then the ala malik will succeed.

It is clear from these provisions of the wajab-ul-arz that it has been recognised for a long time that adna maliks have full power to sell or mortgage their lands, while the ala malik has the right to succed an adna malik who dies without leaving an heir, either near or distant. The ala malik is, therefore, entitled to a right of reversion in certain circumstances and is not a mere taluqdar. This is in accordance with the customary law of the Kangra District (riwaj-i-am) prepared by the Settlement Officer in 1914—18. According to question 54 of this riwaj-i-am, which is applicable to the whole of the Kangra District, if a man dies without male lineal descendants and leaving no widow, daughter or descendants through a daughter, then the following persons are entitled to succeed :

(1) Donees by will.
(2) Collaterals.
(3) Persons from whom the deceased received the land in gift.

(1) [1912] 129 P. L. R. 1912=16 I. C. 116=99 P. W. R. 1912.
(2) A. I. R. 1925 Lah. 34=5 Lah. 382.
(3) A. I. R. 1923 Lah. 626.
(4) A. I. R. 1927 Lah. 11.
(5) [1907] 72 P. R. 1907.

(4) Ala maliks
(5) Descendants of the founders of the tika.

This rule, however, is subject to the reply given in question 49, according to which daughters and their sons are given the right of succession in certain circumstances, but the last sentence of this answer is as follows: "In jagir villages daughters are not allowed to succeed at all." It was on account of this statement of custom in the riwaj-i-am which the District Judge neglected to notice, that the Subordinate Judge held that daughters' sons were not heirs.

It follows from what has been said above that the Raja is entitled to succeed a sonless adna malik dying without heirs, near or remote, but that widows and collaterals certainly succeed before him. Whether daughters or their sons succeed before him has not yet been decided by the District Judge, while the rights of the other persons mentioned in question 54 of the riwaj-i-am do not arise in these appeals. It does not however, follow (and this has been frequently held) that he has the right to challenge or control the alienations of a male adna malik who has no sons, heirs or collaterals. This was pointed out, inter alia, at the end of para. 1 on p. 453 in *Gobinda* v. *Nandu* (6). It was, therefore, necessary for the plaintiff ala malik to establish that he had a right to control the alienations of a heirless male adna malik who, according to the wajib-ul-arz has full powers of sale and mortgage. In this connexion the only evidence he produced was to summon three judicial cases. Two were from his own jagir of Goler. Both were decided in 1919. The first was a case of mortgage and the Raja's rights were admitted by the mortgagee who stated that as the debt due was very small he had no wish to contest the suit. The other was also decided upon an admission. These two cases, therefore, are of little value. The third case was from the Dada Siba jagir and it was decided in 1916. There a widow gifted the land to a person who set up a claim that he was the son of the widow's husband. It was held that he was not the son and that the ala malik had the right to contest the alienation in question. It must be noted that the alienor was the widow of an adna malik and not the adna malik proper. The case came to the Chief Court where it was pointed out that the wajib-ul-arz allowed a alienation by sale or mortgage by an adna malik but, if he died lawaris, the estate reverted to the ala malik. The case of a widow was distinguished as she was only in possession of the estate for life. This instance, therefore, is not in favour of the view that the Raja has any control over an alienation by a male adna malik but does seem to be an authority for the view that he can challenge an alienation made by a widow, at least, in the absence of heirs.

On the evidence I have no hesitation in holding that the ala malik, the Raja of Goler, has not been able to prove that he has by custom the right of challenging an alienation by a sonless male adna malik though he is entitled to succeed to the land left by such a person in the absence of heirs, near or remote, and that a male adna malik has full power of alienation, which is not subject to the control of the ala malik. This disposes of appeal No. 2309 of 1926 which is dismissed with costs.

As regards appeal No. 2310 of 1926, Sohnu, the near collateral of Mt. Nazko and Mt. Devko's husbands, jointly owned the land with the widows; this may, therefore, be looked upon as a sale by a male adna malik. In these circumstances this case is not distinguishable from the first and I dismiss this appeal also with costs.

There remain appeals 2311 and 2312 in which widows made gifts to their daughters' sons and in one of the cases also to a husband's sister's son along with a daughter's son. It has now to be decided whether the Raja has power to challenge these alienations. An authority very much in point as regards this question is *Gobinda* v. *Nandu* (6) where it was held that a daughter's son was competent to challenge an alienation made by a female, holding the estate of his maternal grandfather. In that case no custom was proved enabling the plaintiffs to challenge alienations by their maternal grandfather's mother, and their mother's sister, there being no instance either way, and they were allowed to fall back upon their personal law, i. e., upon Hindu law. This was so held on the ground that the estate of a widow under customary law was subject to the same restrictions as that of a widow under Hindu law. The

(6) 5 Lah. 450=A. I. R. 1922-Lah. 217.

decision of the Privy Council in *Collector of Masulipatam* v. *Venkata Narainappa* (7) was relied upon, especially the following remarks :

> The restrictions on a Hindu widow's power of alienation are inseparable from her estate, and their existence does not depend on that of heirs capable of taking on her death. It follows that if, for want of heirs, the right to the property so far as it has not been lawfully disposed of by her, passes to the Crown, the Crown must have the same power which an heir would have of protecting its interests by impeaching any unauthorized alienation by the widow.

It is also noted in Rattigan's Customary Law, tenth edition, remark 6, at p. 167, that the next reversioner, however remote, is generally entitled to object to an alienation by a female and numerous rulings are given of this power. On a proper construction of the wajib-ul-arz and the riwaj-i-am the plaintiff would be the person entitled to succeed in these appeals provided there are no heirs, near or remote, in existence. Following the above authorities I hold that, though the present case is governed by customary Law, the ala malik if he has the right of reversion in the absence of heirs, is certainly entitled to challenge an alienation made by the widow of an adna malik in order to protect his interests, as the widow only holds a limited estate, while the fact that she has no heirs in the proper sense of that word, does not extend in any way her powers over her limited estate. It still remains to be decided if he has this right of challenge in the presence of heirs. It follows that the general finding of the learned District Judge that the plaintiff cannot challenge in any circumstances alienations of the widows of adna maliks is wrong and appeals 2311 and 2312 must be partly accepted.

In the case of appeal 2311 there is finding by the trial Judge that two branches of collaterals are in existence, while the e is another question not yet decided by the District Judge, namely, whether the daughter's son is an heir, one of the donees being a daughter's son. These questions have not been gone into by the District Judge in appeal. Appeal 2311 must, therefore, be accepted and the case remanded to the District Judge under O. 41, R. 23, Civil P. C., to decide whether there are two branches of collaterals in existence and whether the daughter's son who is one of the donees, is an heir and, if so, whether the Raja has the right to challenge the alienation in question as there are heirs in existence who would be entitled to succeed and who have not objected or been impleaded. Of course, if this point is decided in favour of the Raja the other points which arise in the appeal and which have been mentioned by me at the commencement of this judgment must also be decided by the District Judge. Court-fee in this Court will be refunded and other costs will abide the event.

Appeal 2312 is also accepted on the same ground and the case remanded under O. 41, R. 23, Civil P. C., to the District Judge to deal with the other points necessary to be decided. In this case the trial Judge held that there was no collateral in existence, but that finding can be challenged before the District Judge. If collaterals are found to be in existence, or if it is held that the daughter's son, who is the donee, is the heir, it will also have to be decided in this case whether the ala malik can sue in their presence, seeing that they are heirs entitled to succeed to the land and his right of succession or escheat has not opened out. If, however, it is held that there are no collaterals in existence and that the daughter's son is not an heir, the plaintiff Raja has certainly a right of suit in this and the preceding appeal on the strength of *Collector of Masulipatam* v. *Venkata Narainappa* (7) and *Gobinda* v. *Nandu* (6). I have already mentioned at the commencement of this judgment the other points which arise if it is decided that the plaintiff can challenge the alienation. Court fee on appeal will be refunded ; other costs will abide the event.

I desire to note that the learned counsel who appeared on behalf of the appellant before me conceded that the Raja would have no power of challenging an alienation made by an adna malik with male lineal descendants and that he only contended that he had this power in the case of a sonless adna malik or in the case of the widow of an adna malik.

N.K. *Appeals Nos.* 2309 *and* 2310 *dismissed.*
Appeals Nos. 2311 *and* 2312 *partly accepted.*

(7) [1860] 8 M.I.A. 529=2 W.R. 1.

A. I. R. 1928 Lahore 469

DALIP SINGH, J.

Sundar Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1771 of 1927, Decided on 22nd February 1928, from order of Dist. Judge, Amritsar, D/- 1st August 1927.

**(a) Civil P. C., O. 16, O, 12—No attachment or proclamation—Fine can still be imposed.*

A was summoned as a witness on 7th March 1927 for 7th April 1927. He was duly served and reported that he could not attend for some reason. The case was adjourned to 4th May 1927, and fresh summonses were issued. An intermediate date for report of service of summons was fixed, namely, 22nd April 1927. On 15th April 1927 the process-server reported that *A* had refused to accept the service of summons. Bailable warrants were issued against him and he appeared on 4th May 1927, the date fixed, in obedience to them. Notice was issued to him to show cause why he should not be dealt with under O. 16, R. 12, for wilfully refusing to accept summons and he was fined Rs. 50.

Held: that though the Court had issued no proclamation and made no attachment of property, still the order imposing a fine under O. 16, R. 12, was within jurisdiction: *A. I. R.* 1925 *Mad.* 1247 *Appr.*; 31 *C. L. J.* 363 and 57 *I. C.* 302, *Diss from* [*cf. Rev. No.* 701/27=*A. I. R.* 1928 *Lah.* 473—*Ed.*] [P 469 C 2]

**(b) Civil P. C., O. 16, R. 12—Witness refusing to accept summons but attending Court on the date fixed—Fine cannot be imposed.*

Order 16, R. 10 only comes into play where a person has failed to attend to give evidence or to produce a document which has been summoned from him. If a person refuses to accept a summons, but attends the Court on the date fixed, R. 10 does not apply. [P 469 C 2]

Durga Das—for Petitioner.

Judgment.—The petitioner in this case has been sentenced to pay a fine of Rs. 50 under O. 16, R. 12, Civil P. C. The facts are that the petitioner was summoned as a witness on 7th March 1927, for 7th April 1927. He was duly served and reported that he had a civil case at Lahore and could not attend The case was adjourned to 4th May 1927 and fresh summonses were issued. An intermediate date for report of service of summonses was fixed, namely, 22nd April 1927. On 15th April 1927 the process-server reported that Sunder Singh had refused to accept the service of summons. Bailable warrants were issued against Sunder Singh and Sunder Singh appeared on 4th May 1927, the date fixed in obedience to them. Notice was issued to him to show cause why he should not be dealt with under O. 16, R. 12 for wilfully refusing to accept summons. Sunder Singh raised various pleas, but it is sufficient for me to say that I agree with the judgments of the Courts below that his pleas are false and that the story of the process-server is correct. The Court therefore fined him Rs. 50. On appeal *Ram Gopal* v *Secretary of State* (1) and *Ashutosh Mullick* v. *Secretary of State* (2) which are single Bench rulinges of the Calcutta High Court were cited on behalf of the appellant to show that as the Court had issued no proclamation and made no attachment of property the order was without jurisdiction. These rulings have been dissented from in *Nagayya Peta, In re* (3) as pointed out by the learned District Judge, and with all respect I agree with the interpretation given in the Madras ruling and disagree with the interpretation given in the Calcutta rulings. It has, however, been contended before me by counsel that O. 16, R. 10 only comes into play where a person has failed to attend to give evidence or to produce a document which has been summoned from him and as the date fixed for the hearing and for the evidence of the petitioner was 4th May 1927 and on that date the petitioner did appear, therefore, the order of the Court under O. 16, R. 12 was without jurisdiction. This contention seems, to me to have force and, however reluctant I may be to allow the petitioner to take advantage of this technical defect, the section seems to me to be too clear to allow of any other interpretation I, therefore, accept the revision and set aside the sentence of fine. The fine, if paid, will be refunded.

N.K. *Application accepted.*

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(1) [1920] 31 C. L. J. 363=55 I. C. 425.
(2) [1920] 57 I. C. 302.
(3) A. I. R. 1925 Mad 1247=48 Mad. 941.

* A. I. R. 1928 Lahore 470

JAI LAL, J.

Raghbar Dial—Appellant.

v.

L. N. Gadodia—Respondent.

Misc. First Appeal No. 3176 of 1927, Decided on 30th March 1928, from order of Dist. Judge, Delhi, D/- 29th November 1927.

(a) *Succession Act* (1925), *S.* 229—*Citation issued—Absence of executor does not amount to renunciation—English law is different.*

Mere failure of an executor to appear in Court in pursuance of the citation issued to him does not amount to his renunciation of the executorship. If he fails to appear, his conduct may amount to renunciation in England, but not in India. [P 471 C 2]

(b) *Succession Act* (1925), *S.* 230—*Intermeddling with estate by an executor does not amount to acceptance of office.*

The liability to account for interference with the estate stands on a different footing to the right to obtain probate when the application for grant is opposed on the ground of renunciation. The English practice of allowing retraction of renouncement by an executor need not be followed in India and renunciation by a person who has intermeddled with the estate of the deceased is not invalid in law : *A. I. R.* 1924 *Lah.* 543 ; 32 *Bom.* 364; 35 *Cal.* 156 ; and *A. I. R.* 1926 *Mad.* 605, *Dist.*: *A.I.R.* 1924 *Cal.* 864, *Foll.* [P 472 C 1]

* (c) *Succession Act* (1925), *S.* 230—*The meanino of "Judge" explained.*

The "Judge" referred to in S. 230 means the Judge of the probate Court who is seised of probate or administration proceedings. It does not mean any other Judge. [P 471 C 2]

* (d) *Succession Act, S.* 230—*"By a writing signed by the person"—Statement written by Court and signed by executor is covered.*

The expression "by a writing signed by the person renouncing" used in S. 230 does not mean that the writing should be in the handwriting of such person or that it should be addressed to any particular person. No form of such writing is provided by law and consequently a statement written by the Court and signed by the executor comes within the purview of S. 230. [P 471 C 2]

Moti Sagar and *Bishen Narain*—for Appellant.

Badri Das and *Lok Nath* — for Respondent.

Judgment.—This is an appeal against the order, dated 29th November 1927, of the District Judge of Delhi, granting probate of the will of the late Seth Radha Kishen of Delhi to the respondent, Lachhmi Narain Gadodia. The appellant is Raghbar Dial who also is an executor of the will and has already obtained probate thereof.

Radha Kishen died on 2nd December 1924, leaving a will dated 23rd June 1924, whereby he appointed four men including the appellant and the respondent as his executors. The deceased used to carry on business, and under the will he left it to the discretion of the executors either to continue it or to wind it up. The legatees were his widow, Mt. Inchi, and a daughter and two minor sons. It appears that no application for grant of probate was made by any of the executors mentioned in the will during the lifetime of Mt Inchi, who, on 28th January 1926, made an application for her being appointed guardian of the person and the property of the minors, and alleged that the respondent had misappropriated certain funds which formed part of the estate of her deceased husband. Lachhmi Narain Gadodia was duly notified of these proceedings and, having appeared in Court, made a statement on 6th August 1926 in which he definitely stated that he was not prepared to act as a "trustee," presumably he meant as an "executor," and alleged that whatever money belonging to the estate was in his possession had been deposited with him in trust by the appellant Raghbar Dial who had actually realized the same. He ascribed his unwillingness to act as an executor to his inability to work with Raghbar Dial. In this statement he was supported by another executor Lachhmi Narain of Bhawani.

Thereupon Mt. Inchi presented an application on 16th August 1926, for grant of letters of administration of the estate of her deceased husband to her and on an application being made by her the respondent was directed to deposit in Court all the monys in his possession which belonged to the estate of the deceased. This he did on 20th October.

Mt. Inchi died on 22nd October and thereupon an application was made by Raghbar Dial on 4th November 1926 for grant of probate of the will of the deceased Radha Kishen to him. In pursuance of this application a citation was issued to the respondent on 20th January 1927, but he did not appear in Court though he was served, and consequently the probate of the will was granted to Raghbar Dial on 22nd March 1927. On 10th May 1927, Lachhmi Narain Gadodia applied for grant of

probate to him. This application was opposed by Raghbar Dial on various grounds, the principal of which is that he had disabled himself from obtaining the grant because he had already renounced his executorship. The District Judge, however, granted the probate to the respondent and consequently this appeal has been presented by Raghbar Dial.

Before me it is contended by Mr. Moti Sagar on behalf of the appellant that the failure of the respondent to appear in Court in pursuance of the citation issued to him on the application for probate made by Raghbar Dial amounted to renunciation of the executorship, and secondly that he expressly renounced the executorship by virtue of the statement made by him on 6th August 1926. With regard to the first contention reliance was placed on S. 283, Succession Act, That section merely confers on the District Judge the power to issue citations calling on all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration. It does not provide for any penalty against the person so interested if he does not attend the Court in pursuance of the citation Reliance was also placed on paras. 262 and 301 of Halsburys Laws of England, Vol. 14, and also on Williams on Executors, Vol. 1, p. 222. In my opinion no support can properly be sought by the learned counsel from the English authorities on this point, because the manner of renunciation of the executorship is expressly provided for in S. 230, Succession Act, which lays down a law which appears to be different to the English law and provides that the renunciation may be made orally in the presence of the Judge or by a writing signed by the person renouncing and when made shall preclude him ever thereafter from applying for probate of the will appointing him an executor. The provisions of English law that the absence of a person entitled to probate to whom citation has been issued to attend the Court in pursuance of an application for grant of probate or letters of administration made by another person amounts to renunciation is not, therefore, applicable to this country. The object of citation is to give a chance to the executor to appear in Court and either to obtain probate or to renounce his executorship. If he fails to appear his conduct may amount to renunciation in England, but not in India by virtue of the express provisions of S, 230, Succession Act. I am, therefore unable to hold that the mere failure of the respondent to appear in Court in pursuance of the citation issued to him on 20th January 1927 amounted to renunciation.

The next question is whether the statement made by the respondent on 6th August 1926, amounted to renunciation. The appellant's counsel contended that this statement having been made before a Judge though made orally was a sufficient compliance with the terms of S. 230. In my opinion, however, the Judge referred to in that section means the Judge of the probate Court who is seised of probate or administration proceedings. It does not mean any Judge as contended by the learned counsel. I, however, agree that the statement dated 6th August 1926, made by the respondent amounted to renunciation because that statement was signed by him. The expression "by a writing signed by the person renouncing" used in S 230 does not mean that the writing should be in the handwriting of such person or that it should be addressed to any particular person. No form of such writing is provided by the law of this country and consequently a statement written by the Court and signed by the executor comes within the purview of S. 230 I hold, therefore, that the respondent did renounce his executorship on 6th August 1926. It is, however, contended by Mr. Badri Das, counsel for the respondent, that his client having intermeddled with the estate before he made his statement of 6th August 1926, was not entitled to renounce the executorship. In support of this contention the learned counsel relied on *A. I. R.* 1924 *Lah.* p. 543, *Ayeshabai* v. *Ibrahim Haji* (1), and para 261 of Halsbury's Laws of England. In the Lahore case the question was whether a decree obtained against the heir of the deceased testator without impleading the executor was binding on the estate. It was found that the executor had actually intermeddled with the estate and had thereby accepted the executorship, and was therefore held accountable as such ;

(1) [1908] 32 Bom. 364=10 Bom. L.R. 117.

and with reference to a further plea that he had renounced it was held that he could not renounce his executorship so as to escape liability and must, therefore, be deemed to be the proper person to represent the estate and therefore the decree obtained in his absence was not binding on the estate. In *Ayeshabai* v. *Ibrahim Haji* (1) also the question was of the liability of the executor to account to the heirs of the deceased, it having been found that he had actually intermeddled with the estate, a conduct which amounted to acceptance of the office. In my opinion both these cases do not help the learned counsel. The liability to account for interference with the estate stands on a different footing to the right to obtain probate when the application for grant is opposed on the ground of renunciation. There is no provision of law in this country under which the Court can compel an executor who has once accepted office, to take out probate whatever may be the effect of such acceptance with regard to his liability to account. With regard to the quotation from para 261 of Halsbury's Laws of England it is again to be observed that there is no analogy between the English law and the Indian law on this subject. It may be that the Court has the power to allow an executor to withdraw his renunciation in England, but that is not so in India because S. 230 expressly provides that

> the renunciation when made shall preclude the person renouncing from ever thereafter applying for probate of the will appointing him executor.

Manick Lal Seal, In re (2), also cited by the respondent's learned counsel, does not help him. In that case it was held that an intention to renounce is not the same thing as actual renunciation. In the present case there is no question of a mere intention, as in my opinion the statement already referred to amounted to absolute renunciation by the respondent. Similarly *A I.R* 1923 *Mad.* p 605, has no bearing on the present case. There it was held that the Court must respect the choice of the testator and cannot refuse to grant probate to an executor appointed by the testator on any such ground as the unsuitability of the person concerned for the office of an executor. Here the question is whether the respondent has precluded himself from obtaining grant by virtue of renunciation.

I may here mention that the learned District Judge has not held that the respondent had actually accepted office during the lifetime of Mt. Inchi and with that finding I agree. There is no allegation that he intermeddled with the estate after her death. Only three instances of the respondent's interference with the estate during her lifetime have been given by his counsel. It is alleged: (a) that he signed a compromise in a dispute between Mt Inchi and certain debtors of the estate but a reference to the compromise shows that he signed as a witness and not as an executor; (b) that he invested a large amount of money belonging to the estate in the form of a fixed deposit in the bank. It is, however, explained that the respondent himself was a banker and the money was given to him not as an executor but as a banker; it is no doubt true that Mt. Inchi at one time made allegations against him that he had misappropriated the funds of the estate but then the respondent when examined cleared his position by stating that he had not acted as an executor but as a banker and (c) that some difficulties arose as to the manner in which this money should be invested in the bank and the respondent consulted a counsel in the matter. The matter has not been made clear but it seems that this act of the respondent also was connected with his functions as a banker. I am unable to hold that the above acts of the respondent amount to intermeddling with the estate as an executor signifying an intention to accept the office. On the other hand it appears to me that so long as Mt. Inchi was alive it was decided by all the executors mentioned in the will not to interfere with the administration of the estate and to let her do the needful. They as friends of the family assisted her by advice and actual co-operation in several ways but they never asserted their rights as executors, but by common consent refrained from acting as such. The statement dated 6th August 1926 and the conduct of the respondent in not appearing in pursuance of the citation issued to him and his signing the compromise as a witness are all indications of this.

I hold, therefore, that there has been no intermeddling with the estate by the respondent and that he was not in any

(2) [1908] 35 Cal. 156.

way precluded from renouncing the executorship.

In *Brojo Lal Banerjee* v. *Sarajubala Debi* (3), it was held that an executor having once renounced the executorship cannot thereafter apply for probate the retraction of such renunciation being precluded under the provisions of the Probate and Administration Act. It was also held that the English practice of allowing retraction of renouncement by an executor need not be followed in India and further that renunciation by a person who has intermeddled with the estate of the deceased is not invalid in law. This authority practically covers all the legal points involved in the case and I feel no hesitation in following it. I find that there had been an effective renunciation by the respondent of his executorship in this case and consequently he was precluded from applying for grant of the probate. In view of the above findings it is not really necessary to decide whether the respondent was by virtue of his conduct an undesirable person to be appointed an executor but I do not think that any case has been made out for refusal of the application on that ground and the observations made in *A. I. R.* 1926 *Mad.* 605 apply to this part of the appellant's contention.

The result is that I accept this appeal and setting aside the order of the District Judge dismiss the application of Lachmi Narain Gadodia for grant of probate of the will of the deceased Radha Kishen to him. I leave the parties to bear their own costs throughout.

A.I./G.B. *Appeal accepted.*

(3) A.I.R. 1924 Cal. 864=51 Cal. 745.

A. I. R. 1928 Lahore 473

HARRISON, J.

Amir Chand—Accused—Petitioner.

v.

Jowahar Singh Harbhajan Singh and *another*—Defendants—Respondents.

Petition No. 704 of 1927, Decided on 2nd March 1928, from order of Dist. Judge, Amritsar, D/- 1st August 1927.

Civil P. C., O. 16, *R.* 12—"*Such person*" *is the person referred to throughout the preceding rules—Such person cannot be fined unless and until there has been proclamation which he has disobeyed.*

"Such person" described in O. 16, R. 12, is the person referred to throughout the two preceding rules and that person cannot be fined unless and until there has been proclamation which he has disobeyed: 31 *C. L. J.* 363 and 57 *I. C.* 302, *Ref*: *A. I. R.* 1925 *Mad.* 1247, *Dissented from* [*cf. Cri. Revn.* 1771/27=*A. I. R.* 1928, *Lah.* 469—*Ed*]. [P 474 C 2]

L. C. Mehra—for Petitioner.

Judgment.—This case has been unsatisfactorily dealt with by all concerned. The necessary facts are that in a civil case one Amir Chand was named as a witness and an application was made for him to be summoned with his books for 7th April 1927. On 6th April 1927, he refused to accept service for 7th, he being a resident of the place, in which the case was to be heard. On 7th a warrant for his arrest was issued and an order was passed, but never carried out, that a proclamation under O. 16, R. 10, should be issued along with a notice to him to show cause why he should not be fined. On 4th May 1927, Amir Chand appeared, but he did not bring any books. An order was first written in English to the effect that he stated that the books were not in his possession, but that the Subordinate Judge held this to be prevarication and gave him three hours in which to produce them from his shop. Three hours later the proceedings continued Under S 175, I. P. C., Amir Chand was sentenced to pay a fine of Rs. 20 or in default to suffer simple imprisonment for two days. He is then shown as having stated that he would produce his partner Kesho Das, who had the books, the following day. The sentence was suspended by the Subordinate Judge. On the following day Kesho Das appeared with some but not all the books and the Subordinate Judge revived the sentence, and said that it would be enforced. He then proceeded to take action under O. 16, R, 12, on account of the failure of Amir Chand to appear on 7th April and fined him Rs. 30 From both orders he appealed to the Sessions and District Judge respectively. Both appeals were dismissed and revisions have been admitted in this Court.

I first take the conviction under S. 175. The trouble with this conviction is that, neither in the record of the trial Court nor in that of the Sessions Court, can I discover a finding or a reason of any sort or kind for finding as a positive fact that Amir Chand was in possession of any of books. He is convicted of refusing to produce the books and the Sessions

Judge, who has complicated the case still further by signing as "District Judge," says that the conviction is under S. 175 read with S. 480, Criminal P. C. S. 480, deals with contempts of Court committed in the view or presence of the Court. Even if there were a finding, which there is not, that Amir Chand was in possession of the books the offence would not have been committed in the view of the Court. What happened was that Amir Chand, when he did appear, said that he had not got the books, but that he would produce Kesho Das who had. Next day Kesho Das appeared and did not produce the books. There would, therefore, have been this much evidence against Kesho Das, had he been on his trial, that his partner Amir Chand said that he had the books. Against Amir Chand there was nothing beyond the fact that he is a partner, and both the Subordinate Judge and the Sessions Judge have argued that, because he was in close touch—to use the expression of the Sessions Judge—with Kesho Das, they do not believe that Kesho Das refused to let him have them, i. e., that Kesho Das had them and not Amir Chand. Therefore, by a process of reasoning, which I cannot follow, and without an express finding that Amir Chand had the books he has been punished for Kesho Das's contumacy. No sort of case has been established against him. I accept the application for revision and acquit him.

I next take up the case under O. 16, R. 12. The process-server states that he tried to serve Amir Chand, who refused to accept the summons. This statement has been held to be true and Amir Chand has been convicted and fined under O. 16, R. 12. The question which has to be decided is whether on these facts the order can stand or whether the words "such person" used in the rule refer to the person regarding whom Rr. 10 and 11 are framed Three authorities have been quoted: *Ram Gopal* v. *Secy of State* (1), *Ashutosh Mullick* v. *Secy. of State* (2), and *Nagayya Peta, In re* (3). In the last a Division Bench of the Madras High Court took a different view from that taken in the two Single Bench Calcutta cases. It cannot be said to "overrule" the decision of the other Court as stated by the District Judge. Now, it appears to me that the words "such person" can only mean the person described immedately above. O. 16, R. 10, lays down the procedure where a witness fails to comply with the summons: "Where a person to whom a summons has been issued etc." That person is described during the whole of the rule and during the whole of the next two rules as "such person," and the consequences are explained and the procedure given for punishing him. If he fails to obey the order a proclamation, and, in lieu of proclamation or in addition to it, a warrant of attachment, may be issued. The attachment may be withdrawn and if, in addition to disobeying the first summons, he also fails to obey the proclamation, he will be fined unless he shows that he did not receive notice. There are, therefore two alternative methods of proceeding. A proclamation or a warrant or both may issue. In addition there may, but need not, be an order for attachment. If a proclamation issues and the witness fails to obey it and fails to show, the burden being on him, that he did not receive notice, a fine may be imposed. But as I read the rule the fine may not be imposed in the first instance under this order for failure to obey the original summons. This is the view taken by the Calcutta High Court, though at the conclusion of *Ram Gopal* v. *Secy. of State* (1) it is stated that there can be no fine, except where there has been an attachment. This, in my opinion, goes beyond the rules and would have the effect of making it impossible to punish a recalcitrant witness who has no property to attach. With all respect to the decision of the Madras High Court, for the reasons given above, I hold that "such person," described in O. 16, R. 12, is the person referred to throughout the two preceding rules and that person cannot be fined unless and until there has been proclamation which he has disobeyed.

This being my view on the legal aspect I accept the application for revision and remit the fine.

N.K. *Application accepted.*

(1) [1920] 31 C. L. J. 363=55 I. C. 425.
(2) [1920] 57 I. C. 302.
(3) A. I. R. 1925 Mad. 1247=48 Mad. 941.

A. I. R. 1928 Lahore 475

JAI LAL, J.

Chanan Ram — Judgment-debtor — Petitioner.

v.

Devi Dayal and *another* — Decree-holder and Vendee—Respondents.

Civil Revn. Petn. No. 584 of 1927, Decided on 27th February 1928, from order of 1st Cl. Sub-Judge, Shahpur, D/- 15th June 1927.

(a) *Punjab Tenancy Act, S. 141—Collector is merely a ministerial officer.*

The Collector, in pursuance of an order of a civil Court under S. 141, Land Revenue Act, is merely a ministerial officer of the Court and does not perform any judicial functions. Objections with regard to proceedings connected with the sale of land under the section must be made to the Court and not to the Collector. [P 475 C 2]

(b) *Civil P. C., Ss. 72 and 71(2)—Collector is deemed to be acting judicially.*

Paragraph 74 of the Punjab High Court, Vol. 1, of the Rules and Orders, applies to cases which are governed by S. 72, Civil P. C. Under sub-S. (2), S. 72, read with S. 71, Civil P. C the Collector is to be deemed to be acting judicially, and all objections relating to the proceedings before him must be disposed of by him. [P 476 C 1]

(c) *Civil P. C., Ss. 68 to 71—Sections do not apply to the Punjab.*

Sections 68 to 71, Civil P. C., have no application in the Punjab as no notification by the Local Government has been issued as is contemplated under S. 68. [P 476 C 1]

Ram Lal Anand—for Petitioner.

J. L. Kapur—for Respondents.

Judgment.—In execution of a decree the decree-holder applied for the attachment and sale of the judgment-debtor's land. The Court, acting apparently under S. 141, Land Revenue Act, asked the Collector to sell the land, the attachment thereof having been effected by the Court itself. The Collector thereupon directed the Tahsildar to sell the land. In the meantime an application was made to the Collector by the judgment-debtor, on 2nd November 1926, stating that no notice had been issued to him of the intended sale and that he should be given time to arrange for the deposit of the decretal amount in Court. The sale, it may be mentioned, was fixed for 3rd November 1926. The Collector sent this application to the Tahsildar for report, but apparently it was received by him after the sale had taken place. Therefore, on 4th November 1926, this application was returned by the Tahsildar to the Collector with the report that the sale had already taken place. On 13th November 1926, the Collector passed an order that proceedings be returned to the Court; but, on 10th December 1926, an objection was filed before the Collector by the judgment-debtor objecting to the sale on the ground of irregularity in publishing and conducting it and consequent loss to the applicant. This application was sent by the Collector to the Tahsildar for report and the latter submitted a report on 21st January 1927, stating that there was no ground for objection. Thereupon the Collector passed an order on 19th February 1927, to the effect that he had already disposed of the case and that the judgment debtor could file an application setting forth his objections in the Court concerned and that, therefore, it would be better to send back the record to the Court concerned. He directed that the objector be informed that if he had any objection he should present the same in the Court concerned. The sale was confirmed by the executing Court, on 28th February 1927, and in the order of that date the following sentence appears:

> No objections regarding irregularity of auction sale form part of the present objections.

It seems to me that if the executing Court was referring to the objections sent to it by the Collector on 19th February 1927, then the learned Judge was wrong, because there is an objection to the sale on the ground of irregularity of auction proceedings. On the other hand it is quite possible that the objection presented by the judgment-debtor to the Collector had not been received by the Court when the order confirming the sale was passed by it. I have no material before me to ascertain this fact.

It is quite clear that objections with regard to proceedings connected with the sale of land, which have taken place in pursuance of an order of a civil Court under S. 141, Land Revenue Act, must be made to the Court and not to the Collector, because the Collector in such cases is acting merely as a ministerial officer of the Court and does not perform any judicial functions. This is apparent from the wording of S. 141, which lays down that orders by any civil Court for the attachment, sale or delivery of land shall be addressed to the

Collector and be executed by him in accordance with the provisions of the law applicable to the Court issuing the orders and with any rules consistent therewith made by the Financial Commissioner with the concurrence of the High Court and the previous sanction of the Local Government.

Paragraph 64 of the instructions of this Court, Vol. 1, also is to the same effect. This will be found at p. 111 of the Rules and Orders, Vol. 1, published in 1927. That rule provided that in such cases the decree-holder or any person whose property has been sold may apply to the executing Court to set aside the sale on the ground of a material irregularity in publishing or conducting it.

Counsel for the respondent contends that it is para. 74 printed at p. 113 which is applicable to this case. But that paragraph applies to cases, which are governed by S 72, Civil P. C., and that section applies to cases where the Collector represents to the Court that the public sale of the land attached is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land and the Court agrees with the representation of the Collector and authorizes him to provide for such satisfaction in the manner recommended by him. It is to such cases that para. 74 applies. No doubt, under sub-S. (2) of S. 72, read with S. 71, the Collector is to be deemed to be acting judicially in such cases and, therefore all objections relating to the proceedings before him must be disposed of by him.

The learned counsel then contended that the sale could take place only under Ss. 68 to 71, Civil P. C. But these sections have no application to this province as no notification by the Local Government has been issued such as is contemplated by S. 68. That section provides that the Local Government may declare, by notification in the local official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immovable property to be sold, or the execution of any particular kind of such decree, or the execution of decrees ordering the sale of any particular kind of, or interest in, immovable property, shall be transferred to the Collector. No notification having been issued by the Local Government, no question of transferring the application for execution arises in this case. Therefore, as I have already stated, the proceedings by the Collector were under S. 141, Land Revenue Act, and to such proceedings paras. 58 to 69 of the instructions of this Court relating to the execution of decrees as contained in the Rules and Orders above referred to apply.

In the present case an application was made by the judgment-debtor on 10th December 1927, but it was presented to the Collector and presumably forwarded by him to the executing Court. This application was on the face of it barred by time, but it is alleged on behalf of the petitioner that he had no notice of the proceedings before the Collector or of the fact that his property was being sold by that officer. In view of the above allegations it will be best under the cirumstances to remand the case to the executing Court to determine the following issues:

1. Whether there was any reasonable cause for the judgment-debtor for not presenting his application to set aside the sale till 10th December 1926 and whether such application was forwarded by the Collector to the Court.
2. Whether there was any irregularity in publishing and conducting the sale and, if so, whether it has resulted in loss to the judgment debtor.

Accepting this appeal I remand the case accordingly. The Court below will hear evidence of the parties and then decide the issues remanded to it. The costs of these proceedings will abide the result.

A.L./G.B. *Case remanded.*

A. I. R. 1928 Lahore 476

ADDISON AND COLDSTREAM, JJ.

Bulaqi—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 830 of 1927, Decided on 22nd March 1928, from order of Sess-Judge, Multan, D/- 21st July 1927.

(a) *Evidence Act, S. 27—S. 27 qualifies S. 24 as well as Ss. 25 and 26.*

The broad ground for not admitting confessions made under inducement or to a police officer is the danger of admitting false confessions, but the necessity for the exclusion disappears in a case provided by S. 27 when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. [P 478 C 2]

(b) *Evidence Act, S. 24—'Proceeding from a person in authority'—Meaning explained.*

Where a third person was sent by police to make the accused confess by an inducement that he would be dealt with leniently if he confessed,

Held : that the inducement proceeded from a person in authority. [P 479 C 1]

(c) *Penal Code, Ss. 302 and 201.*

B and *S* were charged under S. 302, Penal Code, for the murder of *R*, who, according to the village rumour, was in intrigue with *G*'s wife, *M*, sister to *B*. *S* was the brother of *G*. *A* tracker followed the tracks with directions from villagers to the Ahata of *S* and *G*. Shoes of *R* were recovered at the instance of *B*. The tracker found tracks of *B* and *S*, leading to the place where the body was later found buried. Dead body of *R* was found at the instance of the confession made by *S*.

Held : that the evidence was not sufficient to establish charge under S. 302 but was ample to establish an offence under S. 201, Penal Code. [P 479 C 1]

M. Sleem and *Obedulla* — for Appellant.

Abdul Rashid—for the Crown.

Addison, J.—Bulaqi and Sultan have been sentenced to transportation for life under S. 302, I. P C., for the murder of Ramzan on the night of 21st/22nd April 1927, and have appealed.

Sultan is the brother of Ghulam, and it is said that it was rumoured in the village that the deceased had an intrigue with Ghulam's wife, Mt. Malkani. Ghulam was absent from the village that night according to the evidence of the lambardar Sajawal. Mt Malkani is the sister of Bulaqi. The deceased went out in the evening and had not returned when his wife awoke at midnight. Search was made for him The lambardar was told next day. He called in Gahna, tracker, on the afternoon of the 22nd. This tracker did not know Ramzan's tracks before but he picked them up near the tobacco field in Ramzan's square. He was able to follow the tracks, with some directions from certain villagers who had seen Ramzan the evening before, to the ahata of the brothers, Sultan and Ghulam, to which they led after making a detour. Later when certain shoes were recovered from the canal at the instance of Bulaqi, the tracker was able to say that the tracks must have been those of the owner of the shoes which have been identified by the deceased's wife to be his. Ramzan's tracks leaving the ahata could not be discovered but where his tracks had entered the tracker found the tracks of the two appellants, which he knew before, leaving. He thought that they must have been carrying something heavy and they stopped twice on the way to the square of Bulaqi and Massu to which they were traced. In fact the tracker had definitely said that they led up to the place where the body was later found buried. The tracker and the lambardar further stated that they heard another relative, Rahman, telling Ghulam's wife to sweep away the tracks in the ahata when they reached there.

Next morning, i. e., on 23rd April 1927, Sajawal, lambardar, went to the police station and reported the above story including the rumour as to the alleged intimacy which the witness however, had not heard about till the disappearance of the deceased. The Sub-Inspector was not at the police station and the information reached him on 24th when he went to the village. Apparently he discovered nothing on 24th and 25th. One Baqra told the Sub-Inspector at about 10 p. m on 25th that the appellants had confessed. This witness belongs to another village and has had a somewhat chequered career. He is the sort of person likely to be made use of by the police for their own purposes. He said that he was called by both parties but this cannot be believed. It is clear that he was called by the Sub-Inspector and this has been found also by the learned Sessions Judge. His evidence is that immediately after he joined the panchayat of villagers, which was sitting to help the police in the investigation of the crime, the two appellants told him that they were the culprits and that he should ask the Sub-Inspector to deal lightly with them. No one also was present when this confession was made to Baqra. Baqra then went to the Sub-Inspector who said that if they pointed outthe corpse he would see what he could do for the appellants later. Sultan then took the witness and another person to the spot where the body was buried and later Bulaqi did the same. The whole party then went to the spot which had been pointed out, some time in the early morning of 26th when the corpse was dug up from where it was buried near the entrance of the bhaini in the square of Bulaqi and Massu. Baqra admitted that he knew at the time that Bulaqi, Sultan and Rahman were then suspected by the police and had been sent for by them.

They were not under formal arrest then, but they were, it is clear, shamil taftish i. e, to all intents and purposes, under detention The witness further admitted that the Sub-Inspector was only 40 or 50 karams away when the appellants made their admission to him. It is, therefore, difficult to escape from the conclusion that this witness was in reality an agent of the police and professing to act as such. Besides, a lambardar Lal Khan throws grave doubts on the independence of Baqra. He stated that Baqra arrived at 10 a. m. on 25th to join the panchayat which was helping the police. The lambardar then left and on his return at 5 p. m. did not see Baqra there. He next saw Baqra when the corpse was being dug up. This witness further stated that the Sub-Inspector told Baqra to join the panchayat and recover the corpse.

When the body was dug up it had reached an advanced stage of decomposition and the evidence of the doctor is that death could have been due to natural causes. Death in his opinion might have been due to strangulation as the tongue was protruding—a result which follows from decomposition as well. Death might also have been due to snakebite. This evidence, therefore, is not conclusive as to the cause of death. The body was naked except for a shirt. The other clothes have not been discovered, but Bulaqi told the police that he had thrown the shoes of the deceased into the canal and they were found near the place indicated by him in the canal. This part of the evidence has already been touched upon by me.

I have mentioned before that the tracker, who appears to be a good witness, stated that the tracks of the appellants led up to the spot where the body was ultimately found buried. It is curious that no attempt was made to dig there. If this had been done in time the cause of death might have been discovered at the post-mortem examination with certainty. It is quite possible, however, that this was not thought of at the time, and in any case the police arrived late. There seems to me to be no reason to doubt that Sultan did show the place where the body was found buried and that he had been told before that the Sub-Inspector would attempt to do something for him if he did so. If there had been no such inducement it is clear that this circumstance would have been relevant under S. 27, Evidence Act, but it is urged that it is excluded by S 24 because of the inducement. This subject is discussed at length at pp. 279 and 280 of Amir Ali and Woodroffe's Evidence Act, 8th edition, where numerous authorities are given to the effect that S. 27 qualifies S. 24 as well as Ss. 25 and 26. The broad ground for not admitting confessions made under inducement or to a police officer is the danger of admitting false confessions, but the necessity for the exclusion disappears in a case provided for by S. 27 when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. I would, therefore, hold that the discovery of the buried body at the instance of Sultan is admissible against him. It is clear, however, that the pointing out of the same spot by Bulaqi is inadmissible in evidence as the place was already known before he did so and was not discovered as a result of his pointing it out.

I would accept the tracker's evidence and that of the lambardar as to the tracks being traced at once a circumstance mentioned by the lambardar in the first information report which he made to the police. Bulaqi did show where the shoes were in the canal and Sultan showed the place where the corpse was buried, both these discoveries being relevant and admissible in evidence. The tracks of both appellants went to the square where the body was buried. It has been proved that Ramzan's tracks went to Ghulam and Sultan's ahata, while no tracks of his leaving it were discovered. It has been established that the rumour about the intimacy with Mt. Malkani, Ghulam's wife, was, at any rate, in common circulation immediately after he disappeared. The fact that he was buried only in his shirt is also not without significance.

I would, however, reject the confession alleged to have been made to Baqra by the appellants as being irrelevant under S. 24, Evidence Act. It appears to me from the circumstances that it was caused by Baqra holding out an inducement as from the Sub-Inspector whose man he undoubtedly was. It is true that the direct evidence as to the inducement being offered by the Sub-Inspector is subsequent to the confession and prior to the discovery of the corpse, but the circumstances all point to the fact that the

inducement was offered prior to the confession. I would hold that Baqra was sent in order to make the appellants confess by an inducement than the Sub-Inspector would treat them leniently if they confessed. That is an inducement proceeding from a person in authority and the confession is, therefore, irrelevant.

Without the confession the evidence is not sufficient to establish that the two appellants murdered the deceased. Without the confession, however, the evidence appears to me to be ample to establish an offence under S. 201, I. P. C. The medical evidence, though not conclusive as to the cause of death, is to the effect that it might have been by strangulation. Had the deceased not been murdered he would not have been buried secretly in the field of Bulaqi and Massu. It is the only possible inference that he was murdered by somebody in the ahata but it cannot be said that he was murdered by the two appellants as other relatives reside there. I would hold that the two appellants are guilty under S. 201, I. P. C., i. e., of causing the disappearance of evidence of the offence of murder of the deceased.

I would, therefore, accept the appeals so as to set aside the convictions of the appellants under S. 302, I. P. C., but I would confirm their convictions under S. 201, I. P. C.

I would sentence them under that section to five years' rigorous imprisonment which in my opinion, is sufficient in the circumstances of this case.

Coldstream, J.—I agree.

A.L./G.B. *Conviction modified.*

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* A. I. R. 1928 Lahore 479

ADDISON, J.

Jawala Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 129 of 1928, Decided on 16th April 1928, from order of Sess. Judge, Jullundur, D/- 4th January 1928.

* *Criminal P. C., S. 539-B—Local inspection by trying Magistrate—Memorandum of relevant facts observed not recorded—Reference to such facts in judgment cannot be allowed.*

It is very desirable that a judicial officer conducting a local investigation should place upon record the result of his inspection at once so that the parties may have an opportunity of seeing what the facts are which the judicial officer considered to be established by the local investigation and he should never deliver his judg nent relying upon that investigation without giving an opportunity to the parties to rebut his opinion: 37 *Cal.* 340, *Foll.* [P 483 C 2]

Bhagat Ram Puri—for Petitioner.

Judgment.—Jawala Singh has petitioned on the revision side for the setting aside of his conviction under S. 61 (1) (c), Punjab Excise Act, and sentence of two years' rigorous imprisonment together with a fine of Rs. 500. One Mehr Singh, an admitted enemy of the petitioner, stated that he saw the petitioner go at night to his sugarcane field in order to work a still. He went and informed the Excise Sub-Inspector, but when the excise party reached the spot they found nobody present though there was a still working in the sugarcane field of the petitioner. Lahan and some illicit liquor were also found there. The learned Sessions Judge recognized that the evidence of Mehr Singh had to be received with caution, but he considered that it could not be entirely ignored as Mehr Singh told the Excise Sub-Inspector before the party went to the spot that Jawala Singh was in his fields. It seems to me that this does not amount to corroboration of Mehr Singh's statement as nobody else saw Jawala Singh in the field. I must, therefore, reject completely the evidence of Mehr Singh who is undoubtedly inimical to the petitioner. This leaves us with the solitary fact that an excise raiding party found a still working at night in the sugarcane field of Jawala Singh. Obviously this in itself is not sufficient for the conviction of the petitioner as any enemy can set up such a still without difficulty.

The learned Sessions Judge, however, has relied upon the inspection of the spot made by the Magistrate. The still was discovered on the night of 19th September 1927. The Magistrate went to the spot after recording the prosecution evidence on 11th November 1927. He did not, however, record any memorandum of the relevant facts observed by him at his inspection as he was bound to do in accordance with the provisions of S. 539-B, Criminal P. C., which states that a Magistrate can view the place for the purpose of properly appreciating the evidence given at the enquiry or trial, but that if he does so he shall without unnecessary delay record the memorandum referred

to. This memorandum shall form part of the record and the accused is entitled to be furnished with a copy free of cost.

More than that, the petitioner applied to the Magistrate that he should record the memorandum in question so that he could see how the visit of the spot had affected the mind of the Magistrate and so that he might be in a position to rebut any impression caused in the mind of the Magistrate by his inspection. The Magistrate refused to record any memorandum. In his judgment dated 12th December 1927 the Magistrate, however, used a circumstance observed by him on 11th November when inspecting the spot against the petitioner. He noted in his judgment that the still appeared to him to have been in operation for a considerable time as the clay of chulah, etc., had turned red with use. The learned Sessions Judge appears to have principally relied on this circumstance in coming to the conclusion that the petitioner was guilty. It certainly is a most important circumstance; for if the still had been in operation for a long time there would be a presumption of the guilt of the petitioner to whom the field belonged. Not one witness mentions this circumstance and there is no evidence on the record to the effect.

It is argued before me that the failure of the Magistrate to record a memorandum of his local inspection and to supply the petitioner with a copy was an illegality vitiating the proceeding and, in any case, an irregularity by which the defence was prejudiced. It is the case that the appellant has been convicted upon the result of the local inspection which was kept from his knowledge. That certainly is an irregularity by which the petitioner was prejudiced in his defence and it may be even an illegality. In *Forbes* v. *Ali Haider Khan* (1) an admission of this nature was held to be an irregularity but in *Hriday Govinda* v. *Emperor* (2) it was held to be an illegality. In the present case it is not important to decide whether it is an irregularity or illegality as clearly the petitioner has been prejudiced in his defence by the memorandum not having been recorded by the Magistrate. The Magistrate only went to the spot two months after the still was found there, and the chulah may have been used for other purposes in the interval. In any case, there is no evidence that the clay of the chulah was red from use on 19th September. It has frequently been held that it is very desirable that a judicial officer conducting a local investigation should place upon record the result of his inspection at once so that the parties may have an opportunity of seeing what the facts are which the judicial officer considered to be established by the local investigation. It was laid down in *Babbon Sheik* v. *Emperor* (3) that a Magistrate should not after making a local investigation deliver his judgment relying upon that investigation without giving an opportunity to the parties to rebut his opinion. S. 539-B, Criminal P C., shows that the object of a local inspection is to allow the Magistrate properly to appreciate the evidence given at the enquiry or trial and not for the purpose of the Magistrate becoming the principal witness in the case on a question of fact. It may be the case that the Evidence Act does not prohibit the use of facts observed by the Judge, but it is clearly illegal for the Judge to become the principal witness in the case, to keep all knowledge of the facts that he had noted to himself and then to convict the accused upon such knowledge.

For the reasons given I have no hesitation in rejecting the result of the Magistrate's local inspection in the present case. This means that against the petitioner the only evidence is that in the middle of the night in September an illicit still was found working in his sugarcane field. That is not enough for his conviction. I accept the petition, set aside the conviction of the petitioner and direct that he be released forthwith.

S.J. *Petition accepted.*

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(1) A.I.R. 1925 Cal. 1246=53 Cal. 46.
(2) A.I.R. 1924 Cal. 1035=52 Cal. 148.
(3) (1910) 37 Cal. 340=11 C.L.J. 335=5 I.C. 365=14 C.W.N. 422.

* A. I. R. 1928 Lahore 481

SHADI LAL, C. J., AND BROADWAY, J.

N. S. Billimoria — Defendant — Appellant.

v.

Gauri Mal-Narain Das — Plaintiff — Respondent.

Letters Patent Appeal No. 285 of 1925, Decided on 5th April 1928, from decree of Jai Lal, J., D/- 20th July 1925, in Civil Appeal No. 717 of 1924.

* *Contract Act, S. 86—Theft of goods from railway goods shed before its delivery to buyer—Buyer is not responsible for the loss.*

The plaintiff agreed to purchase and the defendant to sell ten bales of cloth, of which nine bales were delivered and paid for at Amritsar, and on 15th November 1920 the Berar Manufacturing Company at Badnera consigned one bale from that place to Amritsar and the railway receipt, which was in favour of the consignors, was endorsed by them to the Chartered Bank of India at Amritsar who were to deliver the receipt to the purchaser on payment of the price by him. It appeared that the bale arrived at Amritsar on 7th January 1921 and was stolen from the goods shed at Amritsar on 10th January, and on 13th January the plaintiff paid the money to the bank and obtained the railway receipt, but when he went to the railway station he found that the bale had been stolen. It was then contended that by a special agreement the buyer became responsible for the risk as soon as the goods left the premises of the mills at Badnera.

Held: that, on 10th January 1921, when the goods were lost, they had not become the property of the buyer and he could not, therefore, bear the loss. [P 481 C 2]

Held: further, that though the parties are at perfect liberty to agree, if they please, that the risk shall pass to the buyer before the passing of the property, still it is necessary that the property must first be appropriated to the contract. [P 481 C 2]

Fakir Chand—for Appellant.

Badri Das—for Respondent.

Shadi Lal, C. J.—The facts of this case are simple and do not admit of any dispute. On 2nd October 1920, the plaintiff agreed to purchase, and the defendant Billimoria agreed to sell, ten bales of cloth at a certain specified price. The terms of the contract, which was made at Amritsar, were embodied in a document which is called an "indent." It is common ground that nine bales of cloth were delivered and paid for at Amritsar; and the dispute now is confined to the tenth bale. On 15th November 1920, the Berar Manufacturing Company at Badnera consigned one bale from that place to Amritsar; and the railway receipt which was in favour of the consignors, was endorsed by them to the Chartered Bank of India at Amritsar who were to deliver the receipt to the purchaser on payment of the price by him. It appears that the bale arrived at Amritsar on 7th January 1921, and that it was stolen from the goods shed at Amritsar on 10th January. On 13th January the plaintiff paid the money to the bank and obtained the railway receipt; but when he went to the railway station he found that the goods had been stolen.

The question for determination is whether the loss arising from the theft of the goods should be borne by the seller or the buyer. Now S. 86, Contract Act, lays down that when goods have become the property of the buyer he must bear any loss arising from their destruction or injury. It is, however, clear that, on 10th January 1921, when the goods were lost, they had not become the property of the buyer; and he could not, therefore, bear the loss.

Our attention has, however, been invited to Cl. 10 of the contract by which the buyer promised not to hold the seller responsible for loss or damage to goods in transit or otherwise after they have left the Mills' premises.

It is contended that, in view of this special agreement the buyer became responsible for the risk as soon as the goods left the premises of the Mills at Badnera. There is no doubt that the parties are at perfect liberty to agree, if they please, that the risk shall pass to the buyer before the passing of the property; but it is necessary that the property must be appropriated to the contract. There is not a scintilla of evidence on the record to show that this bale was appropriated to the contract of the plaintiff when it left the premises of the Mills. As pointed out above, the Berar Manufacturing Company, who sent the goods in pursuance of the instructions from the seller, were not only the consignors of the goods, but also the consignees, and until the 13th January 1921, there was nothing to show that the goods in question were meant for the plaintiff or any other trader. I accordingly affirm the judgment of the single Judge and dismiss the appeal with costs.

Broadway, J.—I concur.

S.J. *Appeal dismissed.*

A. I. R. 1928 Lahore 482

TEK CHAND AND BHIDE, JJ.

Khan Beg and *others*—Plaintiffs—Appellants.

v.

Mt. Fateh Khatun and *another*—Defendants—Respondents.

First Appeal No. 2310 of 1923, Decided on 25th January 1928, from decree of Sr. Sub-Judge, Shahpur D/- 1st May 1923.

Custom (Punjab)—Entries in Riwaj-i-am—Initiative presumption in favour of, should be made—Custom recorded opposed to rules generally prevailing — Presumption becomes weak—Custom recorded affecting adversely the right of females—Presumption becomes still weaker.

The Courts in the Punjab are bound to make an initial presumption in favour of the entries of the Riwaj-i-am, irrespective of the fact whether the custom, as recorded, is in accord with the general custom or not. Where the Riwaj-i-am lays down a custom, which is in consonance with the agricultural custom of the Punjab, very strong proof will have to be produced to displace this presumption, but where this is not the case and the custom recorded in the Riwaj-i-am is opposed to the rules generally prevailing, the presumption will be considerably weak. Where the Riwaj-i-am affects adversely the rights of females who have had no opportunity whatever of appearing before the revenue authorities, the presumption will be weaker still and only a few instances might suffice to rebut it : *A. I. R.* 1916 *P. C.* 129 and *Other Cases Referred.*

[P 483 C 2]

Badri Das, J. L. Kapur and *Muhammad Alam*—for Appellants.

Nanak Chand—for Respondents.

Tek Chand, J.—One Jahan Khan, an Awan of Mauza Mardwal in the Khushab tahsil of the Shahpur District, died sonless many years ago, leaving him surviving two widows, Mt. Fateh Khatun and Mt. Jawai, and daughters from each of them. On his death his property was taken possession of by Mt. Fateh Khatun and Mt. Jawai jointly. Subsequently they partitioned it among themselves and effect was given to this partition in the revenue papers.

On 9th November 1921, Mt. Fateh Khatun gifted her entire estate to her married daughter Mt. Bhag Bhari by a registered deed. The plaintiffs, who are the collaterals of Jahan Khan in the sixth degree, instituted a suit alleging that the land was ancestral and claiming a declaration that the gift shall not affect their reversionary rights after the death of Mt. Fateh Khatun. The defendants denied that the land was ancestral and contended that the gift by the widow to the daughter was in the nature of acceleration of succession and that the plaintiffs had no locus standi to maintain the suit. The trial Court dismissed the suit and the plaintiffs have appealed (C. A. No. 2310 of 1923).

On 6th June 1923 the other widow Mt. Jawai also gifted the entire land held by her to her married daughters, Mt. Nek Bakht, Mt. Mughlani and Mt. Bakht Bhari. The collaterals instituted another suit to contest this gift, which was resisted by Mt. Jawai and the donees on pleas similar to those which had been put forward by the defendants in the first case. This suit was also dismissed by the same Subordinate Judge and the plaintiffs have preferred a first appeal to this Court (C. A. No. 902 of 1924). As the points involved in both the appeals are the same, they have been heard together.

The first question to be decided is, whether the land in dispute was ancestral of Jahan Khan deceased and the plaintiffs. In support of his contention Mr. Badri Das has largely relied on the remarks in the pedigree table of the village prepared in the settlement of 1865, where it is stated that 16 or 17 generations back one Murdo Awan founded a village on a hillock in the jungle to the north of the present village Abadi, but that it was afterwards abandoned. Subsequently the ancestors of the present proprietors founded the present village and gave it its old name Mardwal, after the name of the original founder, and that since then it had remained *abad* and had never been deserted. Counsel suggests that Shah Alam was among the persons who refounded the village and that it must be presumed that the land in dispute has descended from him. But there is nothing on the record to show when Shah Alam lived. It is conceded that only a small part of the land in dispute descended to Jahan Khan from his father Nawab and the remainder was acquired subsequently. We, therefore, agree with the learned Subordinate Judge's finding on this point and hold that the land has not been proved to be ancestral of the plaintiffs and Jahan Khan.

The next question for decision is whether the plaintiffs have a locus standi to contest the gifts. As the donees in each case are the daughters of the donors,

the decision of this question will be determined by the rule of succession to non-ancestral property prevailing in the tribe. The onus of issue 3 which covered this point was placed on the plaintiffs. In the case relating to the gift by Mt. Fateh Khatun no oral evidence was led by the parties at all and the only documentary evidence produced by the plaintiffs consisted of an extract from the Wajib-ul-arz of 1865, while the defendants relied on a decision of Lala Sakhir Chand, Munsif Frst Class, dated 11th October 1920, in a suit instituted by these very collaterals against the two widows of Jahan Khan, who had sold a portion of his property to one Mir Abdulla. The Munsif had decided against the collaterals and the decision was upheld on appeal by Mr. Tapp, District Judge.

In the suit relating to the gift by Mt. Jawai, the plaintiffs produced 16 witnesses, who made bald statements that according to the custom prevailing among the Mahomedans of the Sun tract generally married daughters were excluded by collaterals irrespective of the fact whether the property was ancestral or not. The testimony of these witnesses was rejected by the Subordinate Judge as worthless as none of them was able to cite a single instance in which the collaterals had succeeded in preference to daughters in respect of non-ancestral property. The plaintiffs, however, mainly relied on answers to questions 16 and 17 printed at pp. 48 and 49 of the General Code of the Tribal Custom in the Shahpur District compiled by Mr. (afterwards Sir) James Wilson in 1896 and argued that, having regard to the decision of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1), these entries were presumptive proof of the custom being in their favour. The defendants, on the other hand, urged that the entries in the riwaj-i-am were unsupported by any instances and being opposed to the general custom of the province, according to which daughters are preferential heirs to collaterals in respect of non-ancestral property, no presumption of correctness attached to them. The learned Subordinate Judge accepted the defendants' contention and relying upon the interpretation of the aforesaid decision of the Privy Council as given in *Wazira* v. *Maryam* (2), he decided the issue against the plaintiffs.

On appeal it has been strenuously argued that in view of the statement of the tribal custom in the riwaj-i-am, the onus of issue 3 was wrongly placed on the plaintiffs and it has been urged that the view taken in *Wazira* v. *Maryam* (2) is no longer regarded as sound in this Court. Reliance has been placed on two recent Division Bench decisions in *Labh Singh* v. *Mt. Mango* (3) and *Kahan Singh* v. *Gopal Singh* (4) in the former of which the question has been discussed at great length. The respondents on the other hand have strongly relied on *Wazira* v. *Maryam* (2), *Mangal Singh* v. *Budho* (5), *Budha* v. *Fatima Bibi* (6), *Gurdit Singh* v. *Malan* (7) and *Pohlo* v. *Naurdhan* (8), and contend that the remarks of their Lordships in *Beg* v. *Allah Ditta* (1) must be confined to the facts of that particular case. There can be no doubt that there exists a serious conflict of judicial opinion on the point and the question shall have some day to be decided by a larger Bench. As at present advised, I am inclined to the view that the Courts in this province are bound to make an initial presumption in favour of the entries in the riwaj-i-am, irrespective of the fact whether the custom, as recorded, is in accord with the general custom or not. The quantum of evidence necessary to rebut this presumption will, however, vary with the facts and circumstances of each case. Where the riwaj-i-am lays down a custom, which is in consonance with the general agricultural custom of the province, very strong proof will have to be produced to displace this presumption, but where this is not the case and the custom recorded in the riwaj-i-am is opposed to the rules generally prevailing, the presumption will be considerably weak. Again where the Riwaj-i-am affects adversely the rights of females who have had no opportunity whatever of appearing before the revenue authorities, the presumption

(1) A. I. R. 1916 P. C. 129=44 Cal. 749=44 I. A. 89 (P. C.).

(2) [1917] 84 P. R. 1917=3 P. L. R. 1918=42 I. C. 358=151 P. W. R. 1917.
(3) A. I. R. 1927 Lah. 241=8 Lah. 281.
(4) A. I. R. 1927 Lah. 677=8 Lah. 527.
(5) [1918] 4 P. R. 1918=46 I. C. 798.
(6) A. I. R. 1923 Lah. 401=4 Lah. 99.
(7) A. I. R. 1925 Lah. 35=5 Lah. 364.
(8) A. I. R. 1925 Lah. 206=5 Lah. 409.

will be weaker still and only a few instances might suffice to rebut it.

In the present case we find that a general answer is given to questions 16 and 17 as governing all the Mussalman tribes of a predominantly Mussalman district like Shahpur and yet it is significant that not a single instance has been cited either in the riwaj-i-am or proved at the trial where married daughters have been excluded from succession to non-ancestral property. The respondents, on the other hand, had referred us to at least three instances in which the riwaj-i-am was not followed :

(1) In *Ghulam Mahomed* v. *Guahar Bibi* (9), which was a case among Sipras of Tahsil Bhera, a Division Bench of this Court held that daughters excluded nephews in succession to non-ancestral property.

(2) In that case reference was made to C. A. No. 665 of 1905, which was a case among majokas of this district. We sent for the record of that case and found that the Wajib-ul-arz entry of 1865 (which was relied upon in the present case also) was held to be applicable to succession to ancestral property only and the daughters, though married, were allowed to succeed to non-ancestral property.

(3) The judgment of Mr. Sakhir Chand Munsif, affirmed on appeal by Mr. Tapp, District Judge, printed in the supplementary paper-book in respect of the estate of Jahan Khan deceased, where the decision was contrary to the entry in the Riwaj-i-am.

It is contended that these instances sufficiently rebut the initial presumption arising from the riwaji-i-am. I am, however, of opinion that in view of the fact that the issue as framed had placed the onus on the plaintiffs and at the time when the judgment of the Subordinate Judge was delivered, the trend of rulings in this Court was in favour of limiting the effect of the Privy Council decision in *Beg* v. *Allah Ditta* (1) to those cases only, in which the Riwaj-i-am was in consonance with the general agricultural custom, it is fair to the parties that the issue be re-framed and they be given further opportunity to lead fresh evidence. I would accordingly re-frame the issue in the following terms and under O. 41, R. 25, Civil P. C., remit it to the lower Court for enquiry and report:

Whether according to custom, collaterals of the last male holder have no locus standi to contest the gift of non-ancestral property by his widow to her daughter ?

An effort should be made to place on the record the relevant entries in the Riwaj-i-am of this particular village and tribe and to place copies of as many decided cases and mutations, which might throw light on the question, as may be possible.

The return will be made in three months.

Bhide, J.—I concur.

N.K. *Case remanded.*

(9) [1920] 1 Lah. 284=10 P. L. R. 1920=54 I. C. 419=18 P. W. R. 1920.

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* A. I. R. 1928 Lahore 484

HARRISON AND DALIP SINGH, JJ.

Sharam Singh—Plaintiff—Appellant.

v.

Sadhu Singh—Defendant—Respondent.

First Appeal No. 2230 of 1922, Decided on 29th February 1928, from decree of 1st Class Sub-Judge, Amritsar, D/- 8th July 1922.

(a) *Punjab Courts Act, S. 34—Judge receiving plaints for distribution is acting not as Court but ministerially—His discretion overrides the provisions of Civil P. C., S. 15.*

Where a Judge receives plaints for distributing to proper Courts, he is acting not in the capacity of a Court but ministerially for the convenience of the litigants. His discretion overrides the provisions of S. 15, Civil P. C., in so far as he can direct a suit which might be tried by a Court of lower jurisdiction to be tried by a Court of higher jurisdiction, but no such discretion is conferred on the suitor who remains bound by the provisions of the Code. [P 486 C 1]

(b) *Punjab Courts Act, S. 34—Presentation for purposes of limitation and kindred matters is the date on which plaint is presented to distributing officer—But presentation is not the same as institution.*

When the plaint distributed under S. 34 has reached the Court of the Judge who will dispose of it, the date of presentation for purposes of limitation and kindred matters is taken to be that on which it was presented to the distributing officer in the first instance. But this is not the same as saying that it is instituted in the Court of such distributing officer, for once he or any other Court takes cognizance of a plaint and makes the necessary entries in the register he remains seized with that plaint and cannot send it elsewhere unless and until it is transferred by competent authority. [P 486 C 1]

(c) *Civil P. C., O. 7, R. 10—R. 10 has not been overridden by Punjab Courts Act.*

There is nothing in the Punjab Courts Act to show that O. 7, R. 10, Civil P. C., has been overridden or made of no effect in the Punjab. [P 486 C 1]

* (d) *Civil P. C., O. 7, R. 10—Plaint presented—Valuation amended—Plaint returned—Plaintiff cannot be considered agent of Court while presenting it to the proper Court.*

Where the plaint was presented and on objection by defendant, the plaintiff amended the valuation of the plaint and the plaint was then returned to plaintiff for presentation to proper Court:

Held: that the plaintiff was not acting as agent of the Court: 18 *P. W. R.* 1916, *Dist.* [P 486 C 2]

(e) *Civil P. C., O. 7, R. 10—Court having jurisdiction originally discovering at the time of passing decree that it has no jurisdiction to pass it—R. 10 does not apply.*

Order 7, R. 10 does not apply to cases where a Court originally had jurisdiction to try the suit but discovers at the time of passing a decree that it is incompetent to pass the decree because of the pecuniary valuation: 18 *P. W. R.* 1916, *Dist.* [P 486 C 2]

* (f) *Hindu Law—Joint family—Father, joint with minor son—Father major at the time adverse possession began against him—Time runs even against minor son—Limitation Act, S. 7.*

There is no valid reason for drawing a distinction between the powers of a manager to sue on behalf of the joint Hindu family for a debt due to the family in his own name alone without impleading the other members and to sue for possession of immovable property belonging to the joint Hindu family without impleading the other coparceners. At any rate, especially in the case of a father of a joint Hindu family, the consideration is even a stronger in favour of holding that he could sue both on behalf of himself and his minor sons without impleading the minor sons. The position will be different where coparceners other than the father or the manager are suing, and, therefore, limitation runs even against a minor member of a joint Hindu family as regards adverse possession if his father who was joint with him was a major at the time that the adverse possession began: *A. I. R.* 1926 *P. C.* 16, *Dist.* [P 487 C 1, 2]

Moti Sagar and *Faqir Chand*—for Appellant.

Badri Das, Jagan Nath Aggarwal, Mehr Chand Mahajan and *Hem Raj*—for Respondent.

Dalip Singh, J.—The plaintiff in this case sued his brother for possession of a shop No. 1253 situate at Amritsar Katra Nimak Mandi on the ground that the defendant had given up his right in the shop under a registered deed of lease dated 11th July 1907 and had become separate thereafter. Various pleas were raised by the defendant in which it is quite unnecessary to enter because the learned Subordinate Judge who tried the case states in his judgment that the counsel for the plaintiff has admitted that the adverse possession of the defendant began on the date he executed the deed of release, namely, the 11th July 1907. There is no affidavit against the statement, and not even a ground of appeal that no such admission was made. The plaintiff had sued alleging possession and dispossession. The only question, therefore, to be decided is whether the suit is within time, having regard to the admission of the counsel for the plaintiff that the defendant had been in exclusive possession of the property since the 11th July 1907.

The plaint was presented in the Court of the senior Subordinate Judge on 11th July 1919. The valuation of the suit as originally brought made it triable by a Subordinate Judge of the Second Class, and the senior Subordinate Judge accordingly sent it to the Subordinate Judge, Second Class for disposal who proceeded to register the suit in his Court. On objection taken by the defendant that the suit was improperly valued a local commissioner was appointed and he valued the property at Rs. 12,000 odd. The plaintiff himself admitted that it was worth over Rs. 5,000. Upon this the Second Class Subordinate Judge returned the plaint to the plaintiff for the presentation to the competent Court, presumably acting under O. 7, R. 10. The order of the Subordinate Judge is dated 6th January 1920. The plaintiff made up the deficiency in the Court-fee and altered the valuation of the plaint, and represented it in the Court of the senior Subordinate Judge on 5th February 1920. It is obvious that if the suit is taken to have been instituted in the Court of the senior Subordinate Judge at the time when the plaint was first presented to him, namely, on 11th July 1919, then the first plaintiff's suit is within time, and equally if the plaintiff's suit is taken to be instituted in the Court of the Senior Subordinate Judge on 5th February 1920, the suit would not be within time unless the plaintiff could establish any plea of disability.

Now, it seems to us perfectly clear on reading the provisions of S. 15, Civil P. C. and Rr. 1 and 2, O. 4 of that Code together with the provisions of Ss. 34 and 37, Punjab Courts Act, that plaints are

presented to the senior Subordinate Judge as he is the person appointed to receive plaints because he distributes plaints to the proper Courts. His discretion overrides the provisions of S. 15, Civil P. C. in so far as he can direct a suit which might be tried by a Court of lower jurisdiction to be tried by a Court of higher jurisdiction, but no such discretion is conferred on the suitor who remains bound by the provisions of the Code.

The senior Subordinate Judge in receiving plaint is, therefore, acting not in the capacity of a Court but ministerially for the convenience of the litigants, who otherwise would be put to the trouble of first presenting a plaint in a competent Court, then finding that that Court had sent it to the senior Subordinate Judge for distribution, and then discovering to what Court the senior Subordinate Judge had sent that case for disposal. From all this, however, it does not follow that all suits can be said to be instituted in the Court of the senior Subordinate Judge. It is true that when the plaint has reached the Court of the Judge who will dispose of it the date of presentation for purposes of limitation and kindred matters is taken to be that on which it was presented to the distributing officer in the first instance. But this is not the same as saying that it is instituted in the Court of such distributing officer, for once he or any other Court takes cognizance of a plaint and makes the necessary entries in the register he remains seised with that plaint and cannot send it elsewhere unless and until it is transferred by competent authority. The argument, therefore, of counsel for the appellant that the suit must be taken to have been instituted in the Court of the senior Subordinate Judge on 11th July 1919 and that, therefore, the Court of the Subordinate Judge Second Class, erred in handing the plaint back to the plaintiff for presentation to a competent Court whereas he should have sent it himself to the Court of the senior Subordinate Judge has no force whatsoever. There is nothing in the Punjab Courts Act to show that O. 7, R. 10, Civil P. C., has been overridden or made of no effect in the Punjab, and we do not consider that this was ever the intention of that Act. We, therefore, consider that the Subordinate Judge was correct in handing back the plaint to the plaintiff for presentation and the date of the institution of the suit must be taken to be the 5th February 1920.

Further in this particular case the plaintiff proceeded to alter the Court-fee and to amend the valuation of the plaint. The argument, therefore, that the plaintiff was acting as the agent of the Court of the Subordinate Judge, which is based on *Azam Ali* v. *Akhtar Hussain* (1) would not apply in the circumstances of the present case, the plaintiff having by his own act terminated the agency if ever there was one. Moreover *Azam Ali* v. *Akhtar Husain* (1) relates to a different class of cases to which O. 7, R. 10 does not apply, namely where a Court originally has jurisdiction to try the suit but discovers at the time of passing a decree that it is incompetent to pass the decree because of the pecuniary valuation. To such class of suits O. 7, R. 10 on its wording does not apply. Therefore, *Azam Ali* v. *Akhtar Husain* (1) has no application to this case for this reason also.

The next point urged by counsel for the appellant is that no limitation can run against a minor member of a joint Hindu family as regards adverse possession even though his father who was joint with him was a major at the time that the adverse possession began. For this argument counsel relies on *Jawahir Singh* v. *Udai Parkash* (2), a Privy Council ruling, in which it was held that in order to set aside an alienation of joint family property by the father of two minor sons it was immaterial for the purposes of limitation that the elder son had not sued within three years of attaining majority. This case seems to us to be altogether on a different footing from the present class of case. The right to set aside an alienation made by a member of a joint Hindu family is a right personal to all the members of the family and it cannot affect the rights of any one member of that family that some other member of the family has chosen to acquiesce in that alienation. Totally different considerations arise where the question is of adverse possession against the joint Hindu family treated as a legal persona. If the argument of counsel for the appellant is

(1) [1916] 18 P. W. R. 1916=33 I. C. 808.
(2) A. I. R. 1926 P. C. 16=48 All. 152=53 I. A. 36 (P. C.).

correct then, provided a joint Hindu family kept on having fresh members added within an interval of thirty years or thereabouts, whether by birth or by adoption, there never could be adverse possession of immovable property against such joint Hindu family. The proposition so stated is so startling that it would need considerable authority to compel this Court to come to that conclusion. On the contrary, however, no authority has been cited in support of such a proposition. Assuming, therefore, for the purposes of argument that the plaintiff and his father were joint, the adverse possession against the joint Hindu family commenced on 11th July 1907 and as the father was a major at the time, time ran against the whole joint Hindu family from that date and the minority of the plaintiff could not prevent the running of time. Of course the case might be different if the so-called adverse possession was really a disguised form of a gift or an alienation by the adult members of the joint Hindu family in which case the principles of *Jawahir Singh* v. *Udai Parkash* (2) might apply. But even at its best, if *Jawahir Singh* v. *Udai Parkash* (2) were taken to apply to this case then, on the reasoning which was approved by their Lordships of the Privy Council contained in *Ganga Dayal* v. *Mani Ram* (3), the test as to whether time ran or did not run would be whether the managing member of the family could or could not sue on behalf of the whole family without joining all the members of the family. There is a conflict of rulings on this point as noted by Mulla in his book on Hindu law. It seems to us that the better opinion is that contained in the rulings reported in *Mahomed Sadiq* v. *Khedan Lal* (4) and *Ammachal* v. *Vythialinga* (5), which was approved by the Privy Council in *Kishen Prasad* v. *Har Narain Singh* (6). There seems to be no valid reason for drawing a distinction between the powers of a manager to sue on behalf of the joint Hindu family for a debt due to the family in his own name alone without impleading the other members and to sue for possession of immovable property belonging to the joint Hindu family without impleading the other coparceners. At any rate especially in the case of a father of a joint Hindu family it seems that the consideration is even stronger in favour of holding that he could sue both on behalf of himself and his minor sons without impleading the minor sons. The position, of course, will be different where coparceners other than the father or the manager were suing, but into that point we need not enter. We, therefore, consider that time ran against the plaintiff from 11th July 1907 and the suit is, therefore, barred by limitation.

It is next contended by counsel for the appellant that it should be held that the father of the plaintiff and the plaintiff were no longer members of a joint Hindu family after the defendant had been separated by the deed of release on 11th July 1907. Various rulings have been cited on the question as to what the presumption is in the absence of any evidence as to the separation of all the members of a joint Hindu family when admittedly one has been separated. It is unnecessary to consider all the rulings in detail because the plaintiff is out of Court on the short ground that he never pleaded that he was separate from his father. On the contrary his suit was based on the assumption that he was joint with his father and, therefore, was entitled to the whole of the property as against the defendant. In the trial Court, it was distinctly so stated as found by the trial Court at p. 58 of the paper book, and there was no ground of appeal in this Court challenging that finding or admission before him. We, therefore, do not consider that the plaintiff is entitled to raise this point now before us. The plaintiff's appeal, therefore, fails and is dismissed with costs.

The connected appeal (C. A. 1044 of 1924) is really disposed of by the findings of fact arrived at above. The plaintiff in this case sued certain persons who had executed a mortgage in favour of his father. The plaintiff's brother, alleging that he also was an heir of his father applied to be impleaded as a party also. The case was compromised by the plaintiff, and his brother, who had been impleaded as a defendant, urged that the compromise could not bind him.

(3) [1909] 31 All. 156=1 I. C. 824=6 A. L. J. 62.
(4) [1916] 1 Pat. L. J. 154=36 I. C. 197=2 Pat. L. W. 365.
(5) [1883] 6 Mad. 27.
(6) [1911] 33 All. 272=9 I. C. 739=38 I. A. 45 (P. C.).

The trial Court held that the brother had been separated from the family by the deed of release dated 11th July 1907. This is correct and cannot seriously be contested. The only question, therefore, that remains is whether the plaintiff was also separated at the same time from his father.

Now, bearing in mind the fact that the plaintiff was a minor of some six or seven years of age, at the most, at the time, and bearing in mind that the deed of release specifies no shares of the parties and obviously was drawn up only with the object of getting rid of one member of the family who was having disputes with the others, it seems to us fairly clear that the inference in the circumstances of this case should be that the plaintiff remained joint with his father even after the disruption of his brother. We must not be taken as laying down any proposition or any general rule on this point. What we hold is that under the peculiar circumstances of this case the only reasonable inference from the fact is that the plaintiff remained joined with his father.

The appeal, therefore, fails and is dismissed with costs.

Harrison, J.—I agree.

R.D. *Appeal dismissed.*

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BHIDE, J.

Mt. Pana Bibi — Applicant—Appellant.

v.

Mahla and *others*—Defendants—Respondents.

Misc. First Appeal No. 2815 of 1927, Decided on 2nd April 1928, from order of Senior Sub-Judge, Montgomery, D/- 27th July 1927.

* (*a*) *Guardian and Wards Act* (8 *of* 1890), *S.* 47—*Appeal under—Limitation Act, Art.* 156 *applies.*

Though it is true that in an appeal filed under S. 47, Guardians and Wards Act, the Act appears to be silent both as regards the procedure to be followed in respect of appeals and the period of limitation for the same, still as the general provisions of the Civil Procedure Code as regards procedure are applicable to cases under the Guardians and Wards Act, the procedure in respect of appeals under S. 47, Guardians and Wards Act must be taken to be governed by the provisions of the Civil Procedure Code, and the period of limitation in respect of the appeal under S. 47, Guardians and Wards Act, would therefore seem to be 90 days from the date of the order under appeal: 7 *P. R.* 1898 and 43 *Mad.* 51, *Foll,* [P 489 C 1]

(*b*) *Civil P. C., S.* 141—"*Suit*" *includes appeal,*

The word "suit" in S. 141, Civil P. C., is used in a comprehensive sense, so as to include appeals, which are only continuations of suit: 39 *Mad.* 195, *Ref. to.* [P 489 C 1]

(*c*) *Limitation Act* (9 *of* 1908), *S.* 5—*Mistake of counsel's clerk is not sufficient ground for extension of time.*

Mistake on the part of counsel's clerk cannot be considered a sufficient ground for extension of time under S. 5, Lim. Act: *A. I. R.* 1924 *Lah.* 401, *Foll.* [P 489 C 2]

Muhammad Amin—for Appellant.

Deo Raj Sawhney for *J. G. Sethi*—for Respondents.

Judgment.—This is an appeal from an order of the Senior Subordinate Judge Montgomery, appointing the respondent a guardian of the property of two minors. The order of the senior Subordinate Judge is dated 27th July 1927. The appeal was filed on 28th October 1927. The learned counsel made a note under the grounds of appeal that, excluding the time spent in obtaining the copies, the appeal was within the time, as 27th October 1927 was a holiday. It appears, however, that only one day was admissible for the copy and the last day for filing the appeal was 26th October 1927. The learned counsel for the appellant conceded that his note referred to above was wrong and that the appeal would be time barred if the period of limitation were 90 days. He, however, raised a new point, viz, that there is no period of limitation prescribed by the law for an appeal under the Guardians and Wards Act. His contention was that the present appeal is filed under S. 47, Guardians and Wards Act, and that there is no period of limitation prescribed for it either in that Act or in the Indian Limitation Act. As regards Art. 156, Sch. 1, Lim. Act, on which the learned counsel for the respondent relied, he urged that that article applied only to appeals under the Civil Procedure Code, and secondly even if the later expression were to be interpreted to mean appeals, the procedure with respect to which is governed by the Civil Procedure Code, there is nothing in the Guardians and Wards Act or the Civil Procedure Code to show that the procedure in the case of the present appeal is governed by the latter Code

There seems prima facie some force in the above contentions, but I do not think they are sound. It is true the present appeal is filed under S. 47, Guardians and Wards Act, and the Act appears to be silent both as regards the procedure to be followed in respect of appeals and the period of limitation for the same. There are, however, various allusions to the Civil Procedure Code in the Guardians and Wards Act, which suggest that the procedure laid down in that Code was intended to be followed: see e, g., S. 43 and 48). It was held by Sir Charles Roe, Chief Judge of the Punjab Chief Court in *Muhammad* v. *Muhammad* (1), that the general provisions of the Civil Procedure Code as regards procedure are applicable to cases under the Guardians and Wards Act.

Moreover S. 141, Civil P.C., lays down that the procedure provided by the code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction. It has been held by their Lordships of the Privy Council in *Thakur Prasad* v. *Fakirullah* (2) (at p. 3), that the proceedings to which this section applies are " matters " in the nature of suits such as proceedings in probates, guardianship and so forth, etc. It seems thus clear that the procedure with respect to suits will apply to the proceedings in guardianship cases. It was urged that S. 141, Civil P. C., only refers to the procedure in respect of suits. But it seems to me that the word " suit " is used here in a comprehensive sense, so as to include appeals, which are only continuations of suits: cf. *V. Atchayya* v. *Venkata Seetarama Chandra* (3), and the procedure in respect of appeals in the Code must be taken to govern appeals arising out of any proceedings in a Court of civil jurisdiction, in the absence of any statutory provision to the contrary,

I hold, therefore, that the procedure in respect of appeals under S. 47, Guardians and Wards Act, must be taken to be governed by the provisions of the Civil Procedure Code. It has been held in *Ramaswami Pillai* v. *Tahsildar of Madura* (4), that Art. 156, Sch. 1, Lim. Act, applies to appeals under special Acts the procedure in respect of which is governed by the Civil Procedure Code. The period of limitation in respect of the appeal under S. 47, Guardians and Wards Act, would, therefore, seem to be 90 days from the date of the order under appeal.

The learned counsel for the appellant has filed an affidavit of his clerk owing to whose mistake the counsel is said to have been misled. But mistake on the part of counsel's clerk cannot be considered a sufficient ground for extension of time under S. 5, Lim. Act: vide *Shahadat* v. *Hukum Singh* (5), and the learned counsel also did not press this point. He, however, urged in the end that extension may be granted on the ground that the interests of a minor are concerned. The present dispute is, however, between two persons who want to be appointed guardians. In every appeal under the Guardians and Wards Act, the interests of a minor will usually be involved and I do not think this fact by itself can be considered to be an adequate ground for extension of time. I am unable to see that there are any other special circumstances justifying extension of time in this case. I dismiss the appeal, but leave the parties to bear their costs.

S.J. *Appeal dismissed.*

(1) [1898] 7 P. R. 1898.
(2) [1895] 17 All. 106=22 I. A. 44=6 Sar. 526 (P. C.).
(3) [1918] 39 Mad. 195=18 I. C. 555=24 M. L. J. 112 (F. B.).
(4) [1920] 43 Mad. 51=37 M. L. J. 110=10 M.L.W. 226=53 I. C. 405=(1919) M.W.N. 565.
(5) A. I. R. 1924 Lah. 401.

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* A. I. R. 1928 Lahore 489

ADDISON, J.

Fazal Khan—Plaintiff—Appellant.

v.

Anwar—Defendant—Respondent.

Second Appeal No. 1571 of 1926, Decided on 14th March 1928, from decree of Dist. Judge, Jhelum, D/- 8th March 1926.

(a) Civil P. C., S. 11 (4)—Daughter's minor son inheriting property bequeathed to his mother Testator's brother suing for possession on the ground of invalidity of will—Minor's guardian compromising the suit by giving up property in the brother's favour—Minor successfully suing to set aside the compromise—Brother instituting suit for the land left by the testator on the same allegations as in his first suit—The last suit was held not barred on the principle of res judicata.

A sonless Gakkhar of Jhelum tahsil made a will bequeathing his land in favour of his

daughter. She was succeeded by her son. The testator's brother instituted a suit against his minor grandson for possession of the land on the ground that the will was not executed when the testator was of a disposing mind and that he had no power to make a will under custom. The guardian ad litem of the minor compromised the suit and gave up the land in favour of the brother. The brother accordingly obtained a compromise decree for possession of the land in question. Later, the minor's suit to set aside this compromise was decreed in his favour. Thereupon, the brother instituted a suit for the land left by the brother on the same allegation as in his first suit :

Held : that the suit by the brother for the land was not barred on the principle of res judicata. [P 491 C 1]

✲ (*b*) *Custom (Punjab)—Gift—Power of alienation and power of testation go together—Will.*

It is a well recognized principle of law that the power of alienation inter vivos and the power of testation go together, and that if the former is proved to be governed by custom the latter is presumed to follow the same rule. [P 491 C 1]

(*c*) *Custom (Punjab)—Sonless Ghakkar of Jhelum can will away ancestral property in favour of his daughter in presence of his brother.*

Under customary law of the Jhelum District a sonless Ghakkar of tahsil Jhelum can make a will disposing of his ancestral property in favour of his daughter in the presence of his brother: 48 *P.R.* 1903; *A.I.R.* 1924 *Lah.* 452; 122 *P.R.* 1916; 22 *P. R.* 1904; 107 *P.R.* 1887; 85 *P.R.* 1904; 71 *P.R.* 1904; 56 *P.R.* 1881; 53 *P.R.* 1884; 122 *P.R.* 1884; 93 *P.R.* 1885; 108 *P.R.* 1891; 53 *P.R.* 1902; *A.I.R.* 1921 *Lah.* 221; and *A.I.R.* 1923 *Lah.* 125; *Rel.on*: 57 *P.R.* 1896 and 23 *P.R.* 1896; *Dist.* [P 493 C 1]

Anant Ram—for Appellant.

Zafrullah Khan—for Respondent.

Judgment.—Allah Ditta, a sonless Gakkhar of Badlot, Jhelum tahsil, made a will bequeathing his land in favour of his daughter Mt. Daulat Begam on 17th August 1921. He died shortly afterwards and the land was mutated in favour of his daughter. She died and was succeeded by her son Anwar, mutation being effected in his favour on 15th June 1922. On 5th July 1922, Fazal Khan, the brother of Allah Ditta, instituted a suit against Anwar through his father Bahadur Khan, as his guardian ad litem for possession of the land on the ground that the will was not executed when Allah Ditta was of a disposing mind and that he had no power to make a will under custom. On 18th July 1922, the guardian ad litem of the minor Anwar compromised the suit and gave up the land in favour of Fazal Khan. Fazal Khan accordingly obtained a compromise decree for possession of the land in question. On 8th December 1922, Anwar, by his next friend Dasaundhi Khan, instituted a suit against Fazal Khan for a declaration to the effect that the compromise decree for possession against Fazal Khan was not binding upon the minor and had no effect on his rights as it was obtained by the collusion of his father and Fazal Khan. It would appear that the minor's father, who was his guardian ad litem, obtained a daughter of Fazal Khan in marriage, and on appeal to the Court of the District Judge the minor's suit was decreed.

Fazal Khan thereupon, on 22nd October 1924, instituted the present suit for the land left by Allah Ditta, his brother, on the same allegations as in his first suit. Both the Courts below held that the will by Allah Ditta was duly made in favour of his daughter and that he had power to make it under custom. The learned District Judge, however, granted a certificate under S. 41, Punjab Courts Act, on the question as to whether a sonless Gakkhar of Baldot, Tahsil Jhelum, could make a will of his ancestral property in favour of his daughter in the presence of his brother. On this certificate Fazal Khan has preferred this second appeal.

A preliminary objection was taken that the suit was barred on the principle of res judicata. What was argued was that, in the minor's suit for a declaration that the compromise decree was not binding on him by reason of his father's collusion, the defendant Fazal Khan could have pleaded that in any case the will was not duly made and that it was invalid by custom and in this way have resisted the suit. As he did not do so, it was claimed that under Expln. 4, S. 11, Civil P. C., the matter had become res judicata as these matters might and ought to have been made grounds of defence in the former suit. It seems to me, however, that the objection must fail. The minor's suit was only to the effect that the decree in Fazal Khan's first suit should be set aside because it was obtained against him through the collusion of his father. If collusion was proved he was entitled to his decree. It might have been better if it had been ordered that the first suit by Fazal Khan should be reopened when the minor obtained his decree, and that the first suit should then have been proceeded with and decided on the merits. This

has sometimes been done. As it was not done in the present case, Fazal Khan was certainly entitled to bring the present suit which is in effect the same as his first suit. I am unable to hold that the merits should have been fought out in the minority suit.

It was held by a Full Bench in *Mt. Bano* v. *Fateh Khan* (1), that the distinction under Punjab customary law between the power of gift inter vivos and the power of testation is a matter of degree and form only, and where the power to gift is shown to exist an initial presumption arises that there is a co-extensive power of testation. This Court, in *Mt. Rakhi* v. *Baza* (2), accepted this principle, but allowed the presumption which arose to be rebutted by an express entry in the riwaj-i-am. It was also stated in *Taj Muhammad* v. *Sayad Muhammad* (3) that it is a well-recognized principle of law that the power of alienation inter vivos and the power of testation go together, and that if the former is proved to be governed by custom the latter is presumed to follow the same rule. This principle is embodied in para. 56 (b) of the tenth edition of Rattigan's Digest of Customary Law. For this reason, if there is proof of the power to gift, it can be relied upon to prove the power of testation.

The learned counsel for the appellant relied on *Muhammad Khan* v. *Dulla* (4), in which it was held that a sonless Gakkhar of the Jhelum District could not make a gift of the whole of his ancestral land in favour of his sister's son in the presence of his near collateral. He also referred to *Muhammad Beg* v. *Bahadur* (5), where it was held that a sonless Mughal of the Jhelum tahsil could not gift the whole of his ancestral property under custom to his daughter's son in the presence of a nephew. A more recent ruling which requires examination is *Sher Jang* v. *Ghulam Mohi-ud-din* (6). It was held in it that a sonless Mahomedan Mair Rajput of the Chakwal tahsil of the Jhelum District could gift half of his ancestral land in favour of his daughter's son in presence of his collaterals. It was laid down that, although the initial presumption throughout the province is against the power of alienation in respect of ancestral land and the burden of proof at the outset rests on the person asserting such a power, yet in cases of Mahomedan tribes of the Jhelum District the presumption against the validity of a gift by a sonless proprietor to a daughter or daughter's son is not of great weight and may be easily shifted. In my opinion this is the correct view. It was held by a Full Bench in *Gujar* v. *Sham Das* (7) that the onus probandi generally lies on the person asserting the existence of the power of a sonless proprietor to alienate ancestral land. By reason, however, of the principle laid down in 22 *P. R.* 1904 the onus is very light upon Mahomedans in the tract I am dealing with, especially when the gift is in favour of a daughter or her son. I shall quote what was said at p. 92 of the 1904 judgment :

> Our conclusion, therefore, is that the power of gift in favour of a daughter's son is one very commonly exercised among the Mussalman tribes of the Jhelum District, and is rarely successfully contested except in some cases in which the entire ancestral holding has been so gifted, and that the burden laid upon the person setting up the validity of such a gift by the Full Bench ruling is of the lightest and one which may be very easily shifted.

The principle laid down in *Sher Jang* v. *Ghulam Mohi-ud-din* (6) was approved in *Fazal* v. *Khan Muhammad* (8) : see para. 1 at p. 313 of the Report). The case of Mughals of *got* Phaprah of Chakwal and Pind Dadan Khan tahsils arose in *Hassan* v. *Jahana* (9) and it was held that among them a gift by a sonless proprietor of the whole of his ancestral immovable property to his relations in the female line is valid in the presence and without the consent of his male agnates. The same view was taken in this case also. The case *Muhammad Beg* v. *Bahadur* (5) was distinguished.

There are numerous authorities to the effect that the Mahomedan tribes of this tract have power to make wills or gifts, disposing of their ancestral property in favour of daughters or their sons. In *Allah Bakhsh* v. *Muhammad Bakhsh* (10) it was held that Mughals.

(1) [1903] 48 P. R. 1903=111 P. L. R. 1903 (F. B.).
(2) A. I. R. 1924 Lah. 452=5 Lah. 34.
(3) [1917] 122 P.R. (1916)=48 P.L.R. (1917) =34 I.C. 126=94 P.W.R. 1916.
(4) [1896] 57 P.R. 1896.
(5) [1896] 23 P.R. 1896.
(6) [1904] 22 P.R. 1904=40 P.L.R. 1904.
(7) [1887] 107 P.R. 1887.
(8) [1904] 85 P. R. 1904=172 P. L. R. 1905.
(9) [1904] 71 P. R. 1904=96 P. L. R. 1904.
(10) [1881] 56 P. R. 1881.

got Phapra of the Pind Dadan Khan tahsil of the Jhelum District could bequeath all their ancestral property in favour of a daughter's son in the absence of male issue.

In *Charagh* v. *Chamman* (11) it was held that a sonless Mahomedan Rajput of Jhelum could make a gift of his ancestral land in favour of his son's daughter. In *Sabalam* v. *Surfaraz* (12), it was held that a sonless proprietor amongst Janjuas of Jhelum tahsil could bequeath ancestral land in favour of his daughter. In *Fazal* v. *Mt. Bhagbari* (13) it was held that a sonless Mahomedan Rajput of the Chakwal tahsil could make a will in favour of his daughter and in *Karm Baksh* v. *Fatta* (14) it was held that Chuhan Rajputs of Jhelum could make gifts of ancestral land in favour of sons-in-law in the presence of nephews. *Feroze Khan* v. *Amir Muhammad* (15) is an important decision. It was held by a Division Bench that a gift by a sonless proprietor of his ancestral land to his daughters and their husbands in the presence of first cousins was valid by the custom of Gakkhars in village Domeli in the district of Jhelum. This case is on all fours with the present except that the village is different. *Muhammad Khan* v. *Dulla* (4) which I have already referred to was distinguished. It was held in the 1896 cases that the power to gift to a sister's son did not obtain among Gakkhars in Jhelum and it was said in the 1902 case that the matter was not very fully discussed in the judgment of that case, which was also not on all fours with the case being decided. Another instance among Mahomedan tribes of this tract is afforded by *Muhammad Khan* v. *Mt. Kesran* (16), where it was held that by custom among Kahuts of tahsil Chakwal of the Jhelum District a sonless proprietor could make a free disposition of his ancestral land to a daughter in the presence of brothers. The case of Gakkhars in the adjoining district of Rawalpindi is discussed in *Sardar Khanam* v. *Amir Zaman* (17) and it was held that a sonless Gakkhar could gift the whole of his ancestral property without the consent of his near male kindred.

I have discussed the authorities nearest to the present case. According to the answer to question 78 of the customary law of Jhelum District Gakkhars said that there was a difference of opinion as to whether a proprietor could dispose of his property by will. The right to make wills, it is stated, was not generally recognized, but a large minority said that it might be done even in the presence of sons who could not, however, be excluded altogether. The cases cited were chiefly gifts and not wills.

In fact wills were practically unknown everywhere in the Punjab until after the Sikh times. In view, however, of the authorities that I have discussed instances of gifts are effective in establishing the power to make wills. Janjuas gave practically the same reply as Gakkhars. The Jhelum Janjuas went further and said that there was no custom empowering a proprietor to make a will. Yet it was held by the Punjab Chief Court in *Sabalam* v. *Mt. Sarfaraz* (11) that they had power to make a will in favour of daughters. As regards gifts the Gakkhar's reply to question 89 shows that there was no dispute as to self-acquired and moveable property being gifted. That was recognized by all, but it was added that the decisions were conflicting as regards their power to make gifts of ancestral property. The riwaj-i-am, therefore, leaves the matter doubtful, but it shows that a large minority of Gakkhars was in favour of the power of gifting ancestral property and of making wills. The burden is, therefore, very light upon the minor defendant to establish the custom.

The first witness for the defendant gave an instance where his maternal uncle Fateh Ali Khan made a gift of his ancestral land in favour of his daughter. The suit of the reversioners failed. He also cited an instance of the plaintiff's own family. The father and paternal uncle of the plaintiff gifted some land in favour of their sister and the plaintiff was unsuccessful in recovering the land though the suit ultimately came to the High Court. The fourth witness for the defendant, a lambardar, cited an instance of a gift of 64 kanals of land in

(11) [1884] 53 P. R. 1884.
(12) [1884] 122 P. R. 1884.
(13) [1885] 93 P. R. 1885.
(14) [1891] 108 P. R. 1801.
(15) [1902] 53 P. R. 1902=74 P. L. R. 1902.
(16) A. I. R. 1921 Lah. 221=2 Lah. 170.
(17) A. I. R. 1923 Lah. 125=3 Lah. 392.

favour of his own wife by her father. A suit was brought to set aside the gift and was contested up to the Chief Court, but it failed. The other case given by him was that of his paternal uncles Nur Khan and Amir Khan. They made a will bequeathing their land in favour of Mt. Muhammad Bi, daughter of Nur Khan. A civil suit was brought by one of the reversioners and failed. He also gave an instance of Khuda Dad Khan having made a will in favour of his daughter Mt. Nawab Begum. Another instance given by him was that of Pir Bakhsh who made a will in favour of his daughters. No suits were brought in the case of the last two instances.

The sixth witness for the defendant gave another instance. His father married a Gakkhar woman and her father, who was a Gakkhar, made a gift of land in her favour. That land was still with the witness though the heirs brought a suit to contest the gift. All the witnesses examined on behalf of the defendant stated that there was a custom among Gakkhars by which they could make wills, in the absence of male issue, in favour of daughters.

As against the above evidence the plaintiff only examined three witnesses, one of whom is nearly related to him. They do not belong to the parties' village but to the village of the plaintiff's wife. They stated that there was no custom amongst Gakkhars to make wills disposing of ancestral property, but could give no instances where wills or gifts were set aside. The evidence, therefore, is entirely in favour of the defendant and against the plaintiff's contention that a sonless Gakkhar has no power to make a will in favour of his daughter.

After a careful consideration of the authorities, the customary law of the Jhelum District, and of the evidence, I am of opinion that a sonless Gakkhar of tahsil Jhelum can make a will disposing of his ancestral property in favour of his daughter in the presence of his brother. I, therefore, dismiss the appeal with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 493

BHIDE, J.

Dogar Singh and *others*—Plaintiffs—Appellants.

v.

Mt. Dhanti—Defendant—Respondent.

Second Appeal No. 3099 of 1927, Decided on 2nd April 1928, from decree of Addl. Dist. Judge, Hoshiarpur, D/- 12th July 1927.

Civil P. C., S. 11—A finding against a pro forma defendant against whom no relief is claimed does not operate as res judicata.

A finding against a defendant who was joined only as a pro forma party ann against whom no relief was claimed cannot operate as res judicata. [P 494 C 2]

One *R* sold some of his land to one *G*. *S* as *R's* reversioner sued for possession of the land after the death of *R* on the allegation that the sale was without necessity and consideration. *S* also claimed possession on the ground that *D*, widow of *R's* son, had remarried. *D* was joined as a pro forma defendant. The Court held that as a matter of fact no remarriage had taken place. Later *D*, in whose name *R's* lands were mutated, got notices of ejectment issued to *S*. *S*, failing in suits to contest the notices, instituted a suit for possession of property left by *R* against *D* who, it was alleged, had remarried and thereafter executed deed of relinquishment in *S's* favour with respect to property left by *R*. *D* contended that question of remarriage in the previous suit was decided against *S* and could not therefore be reopened.

Held : that the decision in the previous suit on the question of the marriage did not operate as res judicata, as the matter was not directly and substantially in issue between the same parties : 12 *Cal.* 580 ; 27 *All.* 59; and 25 *Bom.* 589; *Rel. on.*: *A. I. R.* 1925 *Mad.* 1025; *A. I. R.* 1926 *Cal.* 80; *A.I.R.* 1921 *Mad.* 694; and *A.I.R.* 1923 *All.* 613 ; *Dist.* [P 494 C 2]

Fakir Chand—for Appellants.

Duni Chand—for Respondents.

Judgment.—Civil Appeals Nos. 3099 and 3100 of 1927 are connected and will be disposed of together. The plaintiffs in both the suits are reversioners of one Ram Singh. On the death of Ram Singh his lands were mutated in the name of his son's widow, Mt. Dhanti. According to the plaintiffs' allegations Mt. Dhanti remarried and thereafter executed a deed of relinquishment in their favour with respect to the property left by Ram Singh. The plaintiffs were put in possession of the property accordingly. The entries in the revenue records with respect to the lands remained unchanged. The defendant taking advantage of those entries got notices of ejectment issued to the plaintiffs. Plaintiffs instituted suits to

contest the notices but failed. Thereafter they instituted the present suits in a civil Court for possession of the lands left by Ram Singh.

The defendant denied the plaintiffs' allegations and pleaded inter alia that the question of remarriage raised in a previous suit between the parties was decided against the plaintiffs and could not, therefore, be reopened. The trial Court held that the decision of the question as regards remarriage was not barred by the rule of res judicata but dismissed the suits on merits. On appeal the learned District Judge was of opinion that the decision in the previous suit on the question of remarriage operated as res judicata and without going into any other issue dismissed the appeals on that point. The plaintiffs have filed second appeals and the sole point for decision in both the appeals is whether the lower appellate Court's decision that the issue as to remarriage is barred by the rule of res judicata is correct.

The facts as regards the previous litigation in which the question of remarriage arose were briefly as follows : Ram Singh had sold some of his land to one Gurdit Singh and the plaintiffs as his reversioners sued for possession of the land after the death of Ram Singh on the allegation that the sale was without necessity and consideration. The plaintiffs claimed possession on the ground that Mt. Dhanti, widow of Ram Singh's son, had remarried. Mt. Dhanti was joined as a pro forma defendant. She first stated that no remarriage had taken place but subsequently, when examined as a witness, deposed that remarriage had taken place as alleged by the plaintiffs. The Court, however, held that, her statement was collusive and that as a matter of of fact no remarriage and taken place. The finding was also affirmed by the District Judge on appeal in that case. The learned District Judge has held that this decision in the previous case operates as res judicata for the purposes of the present suits.

On behalf of the appellants it is urged that the decisions in the previous case cannot operate as res judicata because Mt. Dhanti was only a pro forma defendant in that case and no relief was claimed against her and the matter cannot be said to have been directly and substantially in issue as between the plaintiffs and Mt. Dhanti. *Brojo Behari* v. *Kedar Nath* (1), *Malhi Kunvar* v. *Immuddin* (2) and *Ramdas* v. *Wajir Sahib* (3) are cited as authorities and appear to support the contention. On behalf of the respondent reliance is placed on *Cheria Kottavan Karan* v. *Korath Ammalu* (4), *Rajendra Nath* v. *Bhabini Dasi* (5), *P. K. V. Kalandar* v. *K. V. P. Kalendar* (6) and *Kedar Nath* v. *Sheo Shankar* (7). None of these latter rulings seem to be in point, as the question whether a finding can operate as res judicata against a defendant, who was only a pro forma party and against whom no relief was claimed, does not seem to have been raised in any of the cases. In the present instance the question as to remarriage of Mt. Dhanti arose in the previous suit only because the plaintiffs were asking for immediate possession. The land had been sold by Ram Singh in his lifetime and Mt. Dhanti, as the widow of his predeceased son, had no right to challenge the sale. She was joined only as a pro forma defendant and had no right to appeal in respect of the finding arrived at by the Court on the question of remarriage. In such circumstances it seems clear that she could not be held to be bound by the decision in the previous case: cf. *Malhi Kumdar* v. *Imamuddin* (2).

It was urged an behalf of the respondent that the question of remarriage was important in the previous suit, but this fact by itself is not sufficient. It is clear from the wording of S. 11 that in order that a finding may operate as res judicata the matter must be directly and substantially in issue between the same parties. This condition was, I think, not fulfilled in the present instance.

I, therefore, accept these appeals and, setting aside the order of the learned District Judge, remand the cases to him for redecision of the appeals on merits. Stamps on appeals to be refunded. Costs to follow final decision.

N.K. *Appeal accepted.*

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(1) [1886] 12 Cal. 580.
(2) [1905] 27 All. 59=1 A. L. J. 363.
(3) [1901] 25 Bom 589.
(4) A. I. R. 1925 Mad. 1025.
(5) A. I. R. 1926 Cal. 80.
(6) A. I. R. 1921 Mad. 694.
(7) A. I. R. 1923 All. 613=45 All. 515.

A. I. R. 1928 Lahore 495

SHADI LAL, C. J., AND BROADWAY, J.

Shiv Charan Lal—Appellant.

v.

Bhawani Shankar and *another* — Respondents.

Letters Patent Appeal No. 114 of 1925, Decided on 13th April 1928, from order of Campbell, J., D/- 18th March 1925, in Civil Appeal No. 2153 of 1924.

(a) *Guardian and Wards Act*, (8 *of* 1890), *Ss.* 34 *and* 41—*Death of ward puts an end to guardianship—Summary jurisdiction of Court can be invoked for recovery of money belonging to deceased ward from the guardian.*

The words "any cause" in S. 41 (3), Guardians and Wards Act are not restricted to the causes mentioned in sub-Ss. (1) and (2) of S. 41. [P 496 C 2]

Just as the death of the guardian puts an end to his guardianship, so does the death of the ward himself. The death of tho ward does not put an end to the jurisdiction of the Court over the guardian, and the property can be recovered from the latter without having recourse to a regular suit : (1918) *M. W. N.* 440 ; *A. I. R.* 1925 *Sind* 269 and 33 *Bom.* 419 ; *Foll.* ; 42 *All.* 1, *not Foll.* [P 495 C 2]

(b) *Interpretation of statutes—Words.*

Words in a statute should be taken to have been used in their ordinary sense. [P 495 C 2]

Badri Das and *Jiwan Lal Kapur*—for Appellant.

Jagan Nath Aggarwal — for Respondents.

Shadi Lal, C. J.—The facts relevant to the question of law debated before us may be shortly stated : One Thakur Das was appointed a guardian of the property of the minor Barkat Ram. The minor suspected the guardian of having misappropriated his property, and, in October 1920, he applied to the Court that the guardian be called upon to render accounts. The minor died in August 1921, and after his death Thakur Das rendered accounts to the Court which found him liable to pay a large sum of money to the minor's estate. He was accordingly directed to deposit in Court the amount due from him ; and, as he did not deposit the money, the Court imposed upon him a fine for non-compliance with its order.

The question arises whether the summary jurisdiction of the Court could be invoked against Thakur Das for the recovery of the money belonging to the deceased ward, or whether a regular suit was the only remedy available against him.

Now, S. 41, sub-S. (3), Guardians and Wards Act, 8 of 1890, lays down that when for any cause the powers of a guardian cease, the Court may require him or, if he is dead, his representative, to deliver, as it directs, any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward.

It is beyond dispute that when the powers of a guardian of the property cease in the manner contemplated by the sub-section, the Court is entitled to call upon him to render an account of his stewardship and to deliver the property or money belonging to the ward to such person as the Court directs. There can be no doubt that, just as the death of the guardian puts an end to his guardianship so does the death of the ward himself. The death of the ward is one of the causes for which the powers of a guardian cease, and I consider that it comes within the ambit of the phrase "for any cause" mentioned in the aforesaid sub-section.

It is, however, argued that the scope of the phrase is limited by sub-Ss. (1) and (2) of S. 41, which enumerate the causes that determine the powers of a guardian of the person or the property of a minor and, as the death of the ward is not one of the causes mentioned in those sub-sections, the remedy prescribed by sub-S. (3) cannot be used against the quondam guardian after the death of the ward. I am not prepared to place this narrow construction upon the words "for any cause" used by the legislature. The words when used in their ordinary dictionary meaning are wide enough to include all causes which terminate the guardianship, and it is an established canon of the interpretation of statutes that words should be taken to have been used in their ordinary sense.

There is no valid ground for holding that the scope of the phrase "for any cause" should be curtained by a reference to the provisions of sub-Ss. (1) and (2) of S. 41. The adoption of such construction would imply that we should read, in the sub-section, words "for any of the foregoing causes," or some other words to that effect, instead of the phrase actually used by the legislature.

It will be observed that S. 34 of the Act invests the Court with certain summary powers for the protection of the property of the minor during the period of

guardianship and authorizes it to require the guardian of the property to exhibit accounts and to pay money due on those accounts in the manner directed by it. It is also conceded that these powers can be exercised when the guardianship of the property is determined by any of the causes specified in S. 41 (2). Why should the Court become functus officio, if the cause determining the guardianship is the death of the ward? Is there any reason for making this differentiation? Surely, the Court, which has appointed the guardian and is acquainted with his dealings with the property is in a much better position than any other Court to settle various matters relating to his stewardship of the property. This method of deciding disputes about the nature and the extent of the property and the liability of the guardian with respect to that property provides not only an efficacious but a cheap and expeditious remedy. There is no reason why the Court should be deprived of this jurisdiction when the guardianship is determined by the death of the ward.

Neither the language of the statute nor general principles furnish any convincing argument to sustain the contention that the death of the ward puts an end to the jurisdiction of the Court over the guardian, and that the property cannot be recovered from the latter without having recourse to a regular suit. It was no doubt laid down by the Allahabad High Court in *Chandra Bhukhan Singh* v. *Sujan Kuar* (1), that on the death of the minor the Court has no power to call upon the guardian to deliver up the minor's property; but the contrary view was taken by the Madras High Court in *Nataraja Pillai* v. *Subaraya Pillai* (2), in which the decision of a single Judge was confirmed on appeal by a Division Bench. The same view has been adopted by the Court of the Judicial Commissioner of Sind in *Fateh Chand* v. *Parbatibai* (3). The judgment of the Bombay High Court in *Murlidhar Nathu* v. *Vallabh Das Murlidhar* (4) also proceeds upon the assumption that the Court has jurisdiction to pass orders against a guardian whose powers have ceased by reason of the minor's death.

Apart from the judicial authorities, I am of opinion that the words "any cause" are not restricted to the causes mentioned in sub-Ss. (1) and (2) of S. 41; and that the death of the ward, which ex concesso puts an end to the powers of the guardian of the property, is a cause within the meaning of that expression. The appeal is, therefore, dismissed with costs,

Broadway, J.—I concur.

S.J. *Appeal dismissed.*

(1) [1920] 42 All. 1=52 I. C. 167=17 A. L. J. 861.
(2) [1918] M. W. N. 440=51 I. C. 529.
(3) A. I. R. 1925 Sind 269=18 S. L. R. 85.
(4) [1909] 33 Bom. 419=3 I. C. 172=11 Bom. L. R. 512.

A. I. R. 1928 Lahore 496

DALIP SINGH, J.

Valina Rama—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1079 of 1927, Decided on 14th December 1927, from order of Addl. Dist. Magistrate, Delhi, D/- 1st December 1927.

Punjab Borstal Act (11 *of* 1926)—*Accused, a minor, associating with habitual criminals—Benefit of the Act can still be given to him.*

A minor boy cannot be denied the benefit of the provisions of the Punjab Borstal Act simply because he associated with habitual criminals. [P 497 C 2]

Judgment.—These four appeals will be disposed of in one judgment. Bhoja, accused, has been convicted by the learned Magistrate under S. 243, I. P. C. and sentenced to three years' rigorous imprisonment. Mt. Kalli has been convicted under S. 243, I. P. C., and sentenced to five years' rigorous imprisonment. Vaina Ram has been sentenced to seven years' rigorous imprisonment under Ss. 232/235 and 243, I. P. C. Mt. Sonhi has been sentenced under S. 232 to two years' rigorous imprisonment.

The facts as shown by the prosecution evidence are as follows; Bhairo Singh alias Baina (P. W. No. 8) is a boy of eight years who lives with the four accused above named who are related as follows: Vaina Ram is the husband of Mt. Sonhi, Mt. Kalli is his paternal aunt and Bhoja is the son of Mt. Kalli. Bhairo has given evidence showing that all the four accused used to take part in counterfeiting King's coin. He further informed the police that the day before the arrest, which took place on 1st June 1927, Mt. Kalli had sold eight rupees

four-annas worth of counterfeit four-anna and two-anna bits to one Gulzari Lal. Gulzari Lal has appeared in evidence and has corroborated the statement, and he further produced a box containing four anna and two anna bits which the treasurer, also a prosecution witness, declares to be counterfeit coin. The learned Magistrate also finds that they are counterfeit coin and that it is apparent to the eye. Bhairo Singh further deposes that on the day of the arrest Bhoja was given Rs. 3 by Vaina Ram accused to be taken to Shahzad (P. W. No. 2).

The Inspector deposes that Shahzad came to him on 31st of May and told him that there was a gang of coiners about the place who were making counterfeit four anna bits. That same day Shahzad showed him two counterfeit four anna pieces. According to Shahzad these had been obtained from Bhoja. The Inspector told Shahzad to get some more counterfeit coin and the Inspector and some constables went and waited on the 1st June morning at the shop of Shahzad who is a *pan* seller and who told the Inspector that the coiners would appear at his shop for the purpose of selling counterfeit coin. No coiner appeared and finally Shahzad went off to see what the matter was and returned with Bhoja and Bhairo Singh. On the person of Bhoja being searched Rs. 3 were found and these have been declared by the treasurer to be counterfeit coin. Bhairo Singh proceeded to make a statement which has already been related. The police then proceeded to Gulzari Lal's shop where they got counterfeit four anna pieces, etc., from him. The police then raided the house accompanied by some witnesses and Mt. Sohni and Vaina Ram were actually found making counterfeit coin, and mould together with some metal and other instruments for counterfeiting coin were found in their possession.

I see no reason to disbelieve this evidence against Vaina Ram and Mt. Sohni, and Vaina Ram admits a previous conviction under S. 232/235. I, therefore, consider the case against Vaina Ram and Mt. Sohni fully proved under S. 243, and it is also fully proved against Vaina Ram under S. 232/235. The sentences are by no means severe and I dismiss their appeals.

As regards Mt. Kalli the evidence of Bhairo Singh and of Gulzari Lal shows that she actually passed counterfeit coin and I do not consider that the sentence is severe in her case and I, therefore, dismiss her appeal also. She might have been convicted under S. 240, I. P. C. but the sentence is anyhow adequate.

Against Bhoja the evidence of the Inspector Nur Muhammad shows that he was in possession of Rs. 3 counterfeit coin. The evidence of Bhairo shows that he used to assist in making these counterfeit coins and, therefore, he knew that these coins were counterfeit and were to be passed on to Shahzad. I therefore, consider that he has been rightly convicted under S. 243. The learned Magistrate has refused to send him to a reformatory school though Bhoja gives his age as thirteen and the doctor who examined him states that his age is between fourteen and fifteen. The reason given by the learned Magistrate is that the statement of Bhoja shows that he is an habitual criminal and a liar. It is rather hard that a boy between thirteen and fifteen should be called a liar because he did not immediately proceed to confess his guilt and implicate his mother and his other relatives. That he is associated with habitual criminals is hardly his fault and I should think that this was a fit case for applying the provisions of the Punjab Borstal Act 11 of 1926. I, therefore, while maintaining the conviction, alter the sentence of three years rigorous imprisonment passed to one of three years detention under this Act in a Borstal institution. Otherwise the appeal is dismissed.

S.J. *Sentence altered.*

A. I. R. 1928 Lahore 497

SHADI LAL, C. J., AND BROADWAY, J.

Chandar and *others* — Defendants—Appellants.

v.

Bala Pershad and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 37 of 1927, Decided on 21st March 1928, from judgment of Dalip Singh, J., D/- 24th January 1927, in Civil Appeal No. 1807 of 1926.

Easements Act (5 *of* 1882), *S.* 13—*Quasi easement—Property on slope—Partition—Person holding quasi dominant position possesses easment to drain water through the lower portion.*

Where the entire property stood on a slope and before partition all the rain-water which fell on the property was allowed to pass over the courtyard in its entirety and thence into the municipal drain through an outlet:

Held : that, on partition, it is reasonable to hold that the person to whom the quasi dominant portion of the premises was allotted was given the right to continue to drain his water on to the courtyard and this right of easement was not only continuous but, having regard to all the circumstances, apparent.

[P 498 C 2, P 499 C 1]

Kishen Dayal—for Appellants.

Anant Ram Khosla and *Jagan Nath Aggarwal*—for Respondents.

Broadway, J.—One Kalwa owned certain property in Delhi. In 1919 this property was partitioned at the instance of one Rupa, a grandson of Kalwa, who was entitled to a 1/5th share. The property, which consisted of certain buildings with a courtyard in the middle, was situate in a slight slope, the upper level being about 18 inches to 2 feet higher than the lower. Rupa was allotted the buildings and part of the courtyard which existed on the upper level. He sold his property to one Thakar Das in 1920. Thakar Das, however, lost this property as a result of a pre-emption suit brought by Lala Bala Pershad and others, and in August 1922 these pre-emptors as plaintiffs instituted a suit against the owners of the property on the lower level claiming an easement entitling them to discharge their rain-water and water for daily use through the courtyard of the defendants and an injunction prohibiting the defendants from interfering with this easement. It appears that a wall had been erected by the defendants across the courtyard which interfered with the flow of water, rain or for daily use, from the property of the plaintiffs. The trial Court decreed the plaintiffs' suit which was however dismissed by the learned District Judge on appeal. The plaintiffs thereupon came up to this Court in second appeal when Mr. Justice Dalip Singh maintained the order of the learned District Judge so far as the water for daily use was concerned but granted the plaintiffs a decree for an injunction restraining the defendants from preventing the rain-water from the plaintiffs' property passing into the courtyard of the defendants and discharging itself at a certain point X marked in the plan into the municipal drain. The defendants thereupon preferred an appeal under Cl. 10, Letters Patent, through Mr. Kishen Dayal. Mr. Jagan Nath Aggarval appeared for the plaintiffs-respondents.

Now the easement claimed by the plaintiffs was one of those, termed quasi easements and

may be described as conveniences to which an owner subjects one part of his property for the benefit of another. Whenever such parts are separated by grant or devise on the part of the owner of what is called the quasi dominant heritage, these conveniences, in the absence of a stipulation to the contrary, are taken as easements by the grantee or devisee.

It was contended by Mr. Kishen Dayal that in this case it had not been shown that the easement claimed was an "apparent" one although he admitted that it was "continuous." He further contended that in order to make an easement "apparent" it was necessary that some drain or outlet should be visible either on the dominant or servient tenement, and that an easement could not be acquired for a flow of water over the surface of a servient tenement, without a definite channel for its carriage. This latter contention is however opposed to *Munshi Missar* v. *Bhim Rajman* (1).

It having been admitted that the right to drainage which has been decreed was a continuous easement the question for determination is whether it was an "apparent" one. Now having regard to the fact that before partition the entire property stood on a slope there can be no doubt that before partition all the rain-water which fell on the property was allowed to pass over the courtyard in its entirety and thence into the municipal drain through the outlet at point X referred to above. On partition, inasmuch as there was no stipulation to the contrary, I think it reasonable to hold that the person to whom the quasi dominant portion of the premises was allotted (in this case Rupa) was given the right to continue to drain his water on to the courtyard which still remained in possession of the defendants, and I agree in the view taken by the learned

(1) [1913] 40 Cal. 458=17 C. L. J. 368=18 I. C. 824=17 C. W. N. 306 (F. B.)

Judge in Chambers that this right of easement was not only continuous but, having regard to all the circumstances, apparent. The plaintiffs stood in the shoes of Rupa and I would, therefore, dismiss this appeal with costs.

Shadi Lal, C. J.—I concur.

S.J. *Appeal dismissed.*

A. I. R. 1928 Lahore 499

HARRISON AND DALIP SINGH, JJ.

Tara Singh—Plaintiff—Appellant.

v.

Ram Saran and *others*—Defendants—Respondents.

First Appeal No. 3040 of 1922, Decided on 29th February 1928, from decree of 1st Class Sub-Judge, Sialkot, D/- 16th November 1922.

(a) *Hindu Law—Coparcenery of father and son—Father can not exclude son from survivorship by will.*

A Hindu son, if he is a coparcener with his father, acquires by birth a right in the joint family property and the father cannot, by will, exclude him from the right of survivorship. [P 500 C 2]

(b) *Will — Construction — An invalid will cannot be ratified.*

A will is not a voidable alienation which can be ratified or consented to, and if a will was invalid from the start, it would remain invalid, though, of course, a person entitled to take property disposed of by the will may waive his right to take that property at any time. [P 501 C 1]

(c) *Limitation Act, Art. 144 — Assertion of exclusive right by one cosharer against the other —Art. 144 applies.*

Where two coparceners have separated but before the property is divided by metes and bounds, one of them asserts an exclusive right of the whole property in himself, a suit by a usufructuary mortgagee from the other for possession would be barred if brought after 12 years, limitation commencing from the date of assertion of adverse title. Art. 144 applies and not Art. 127. [P 502 C 1]

Sardha Ram, *Bishen Narain* and *M. L. Puri*—for Appellant.

G. C. Narang and *C. Rai*—for Respondent No. 1.

Dalip Singh, J.—These three appeals can be disposed of in one judgment as the facts of all three are similar. One Ganpat Rai had two sons, the elder Nathu and the younger son Ram Saran. Mohan Lal is the son of Ram Saran. It is conceded on both sides that Ganpat Rai and his two sons at one time formed a joint Hindu family. On 23rd March 1904, Ganpat Rai executed a will which is printed at p. 23 in First Appeal No. 756 of 1924 (*Harjas Rai and Shiv Ram* v. *Ram Saran and others*). In this wil Ganpat Rai stated that he was owner, and in possession of certain property, some of which was ancestral and some of which was self acquired. He also stated that his son Nathu was not a good character and was disobedient and, therefore, would not be able to keep the ancestral property intact or pay the debts due by Ganpat Rai and perform the death ceremonies according to Hindu law. Therefore, he made a will declaring that after his death his son Ram Saran would be entitled to the whole of the property left by him. Nathu was to get Rs. 1,000 in cash only. Ganpat Rai died on 29th November 1908 Nathu made the following alienations to Tara Singh :

1. Mortgage-deed dated 25th July 1909, for Rs. 4,500 with interest, of shops Nos. 5 and 6 shops Nos. 263 and 264.
2. Mortgage-deed dated 30th September 1909, for Rs. 2,000 with interest, of shops Nos. 8 and 9.
3. Mortgage-deed dated 6th October 1909, for Rs. 1,000 with interest of shop No. 10.
4. Mortgage-deed dated 26th November 1909, for Rs. 3,000 with interest of shops Nos. 332, 11 and 12.

All these mortgage-deeds were with possession.

The mortgagee Tara Singh brought a suit on the basis of these mortgage-deeds, The trial Court gave a decree for Rs. 37,840 and costs in favour of the plaintiff against Ram Saran, the decretal amount and costs to be recovered from the property of the deceased Nathu if he left any property. It dismissed the suit so far as the property mortgaged was concerned. Hakim Singh, the legal representative of Tara Singh, is the appellant in civil appeal No. 3040 of 1922 :

Nathu made the following alienations to Harjas Rai and Shiv Ram :

1. Mortgage-deed dated 25th October 1909, for Rs. 1,000 ; Rs. 750 with interest at Rs. 2 per cent. per mensem and Rs. 250 without interest.
2. Mortgage-deed dated 5th January 1910, for Rs. 400 at Rs. 2 per cent. per mensem.
3. Mortgage-deed dated 12th February 1910, for Rs. 4,000; Rs. 3,000 with interest at Re. 1-8-0 per cent. per mensem and Rs. 1,000 without interest.
4. Mortgage-deed dated 12th February 1910, for Rs. 2,000 at Re. 1-8-0 per cent. per mensem.

All these mortgages were with possession. Harjas Rai and Shiv Ram brought a suit on the basis of these mortgage-deeds. They were in possession of one

shop only, namely 12 comprised in the mortgage-deed dated 25th October 1909. The trial Court gave them a decree for Rs 21,737 and costs against Ram Saran, defendant, as the legal representative of the deceased Nathu Ram, the amount to be realized from such property of the deceased Nathu Ram, as he may have left. It dismissed the suit so far as the mortgaged property was concerned. Harjas Rai and Shiv Ram are appellants in civil appeal No. 756 of 1924.

Ram Saran brought a suit for possession of the shop referred to above which was in the possession of Harjas Rai and Shiv Ram, alleging that they were his tenants. Shiv Ram pleaded that he was in possession as mortgagee. Ram Saran also asked for Rs. 180 as rent. The trial Court dismissed the plaintiff's suit about rent, holding that there was no relationship of landlord and tenant established, but it passed a decree for possession of the shop in dispute on the ground that the mortgage by Nathu to Shiv Ram was invalid. Shiv Ram is the appellant in civil appeal No. 1696 of 1926.

On 17th November 1909, Nathu Ram brought a declaratory suit against Ram Saran praying for a declaration to the effect that Nathu Ram was owner of, and entitled to, a half-share of the immovable property left by his father. Neither the plaint nor the pleas, nor the judgment of the trial Court in the suit is on any of the records in the present suit. The trial Court dismissed the suit on 2nd February 1910, holding, as conceded by both sides, that Nathu Ram was not in possession of any of the property and, therefore, could not bring a declaratory suit. Nathu appealed and the decision in the appeal is at p. 29 of the paper book in Civil Appeal No. 756 of 1924. The decision is based on a compromise which is printed at p. 18 of the same paper book. The decision is dated the 25th March 1912. By the compromise Nathu admitted that the will made by his father was valid, that he had received Rs. 1,000 left by his father for him under the will from Ram Saran and that Ram Saran was the sole owner of the entire property left by Nathu's father ; but Nathu was entitled to have for purposes of residence only two shops and a baithak situate in Jiwan Singhwala bazar and was further entitled to Rs. 20 per mensem as maintenance for life. The parties were to bear their own costs.

The first question to be decided in all these appeals is whether Nathu and Ram Saran continued to be joint until Nathu's death, which seems to have occurred some time before 7th October 1912, or whether Nathu and Ram Saran and Ganpat Rai ceased to be members of a joint Hindu family during the lifetime of Ganpat Rai, or whether Nathu and Ram Saran continued to be joint for some time after the death of Ganpat Rai but separated before the alienations by way of mortgage were made by Nathu.

So far as Tara Singh's case is concerned, the position is fairly clear. Counsel for the plaintiff in oral pleadings before issues printed at p. 36 of the paper book in civil appeal No. 3040 of 1922 pleaded that Nathu and Ram Saran were joint owners as members of a joint family in all the 21 shops after the death of Ganpat Rai, but before mortgaging the property Nathu had become separate from his brother, though the property remained joint. The counsel for the defendant Mohan Lal, son of Ram Saran, pleaded that Nathu was not joint with his brother at the time of mortgage either as a member of the joint Hindu family or as a co-owner in the property, because Ganpat Rai had disinherited him and the property was the self-acquired property of Ganpat Rai. There is no oral pleading by Ram Saran. However, on the evidence led in the case together with the admission of counsel for the defendant Mohan Lal, who in this matter may very well be presumed to represent the knowledge of Ram Saran as well as of Mohan Lal it is clear that at the time of the first mortgage Nathu and Ram Saran were not members of a joint Hindu family. It is clear, however, that, unless it be held that the will of Ganpat Rai was valid, Nathu and Ram Saran were co-owners or tenants-in-common of property left by their father. It has not been seriously contended before us, and indeed could not be contended, that Ganpat Rai's will was valid in its inception. A Hindu son, if he is a coparcener with his father, acquires by birth a right in the joint family property, and there is nothing whatever to show us that Ganpat Rai was entitled to exclude Nathu Ram from his right of survivorship without giving him a share by partition which admittedly was never

done. Counsel for the respondent Ram Saran faintly argued that, though the will was invalid in its inception, yet it became good by the agreement made by Nathu Ram in the compromise deed dated 26th July 1911 ; but a will is not a voidable alienation which can be ratified or consented to, and if the will was invalid from the start it would remain invalid, though, of course, a person entitled to take property disposed of by the will may waive his right to take that property at any time.

We, therefore, hold that Nathu and Ram Saran were not members of a joint Hindu family at the date of the first mortgage to Tara Singh, namely 25th September 1909, but they were joint owners in equal shares of the property left by Ganpat Rai. The trial Court on this point had held that Nathu and Ram Saran had continued to be joint up to the date of Nathu's death, and, therefore, one coparcener could not dispose of his undivided interest in the coparcenary property by way of mortgage. On the finding that Nathu and Ram Saran continued to be joint this decision would be correct. It follows equally, however, that if Nathu and Ram Saran had separated after their father's death Nathu was competent to alienate his share of the property that he held in tenancy-in-common with his brother Ram Saran. As regards the reasons for our decision, we consider that, apart from the oral evidence and the pleadings, all the circumstances of the case tend to show that, after the death of their father Ganpat Rai, Nathu and Ram Saran ceased to have their meals in common or to reside in a common house, and it is equally clear that Ram Saran asserted a right under his father's will to be exclusive owner of the property. It is clear that when Nathu brought his suit declaring that he was entitled to a half share he regarded himself as owner of a specified share in the property. This could not be the case if he were still a member of the joint Hindu family, and we, therefore, consider, as held above, that the pleadings the evidence and the circumstances of the case show that there had been a disruption of the joint Hindu family some time after Ganpat Rai's death and before the first alienation in suit by Nathu which alienation itself is of a half share in certain properties.

The next question which was raised before us by counsel for the respondent is that the last alienation in Tara Singh's case, namely the mortgage dated 26th November 1909, was made pendente lite, the suit having been brought on 17th November 1909. In Harjas Rai's case all the alienations except the first, namely. the mortgage dated 25th October, 1909, were made pendente lite, and, therefore, as by the decree in the suit it was declared that Nathu had no title in this property, the alienees got no title whatsoever also. The following rulings have been cited in this connexion ; *Bharat Ramanuj* v. *Surat Kamini* (1) *Annamalai* v. *Malayandi* (2) and *Pulla kal Kathur* v. *Chenna Jadam* (3). Counsel for the appellants however cited *Jhuna* v. *Zarachand* (4), *Raghubar Dayal* v. *Ghasite* (5) and *Tinoo Dhan* v. *Trailokya Saran* (6).

The Full Bench ruling of the Madras High Court and the Calcutta ruling are in favour of the respondents. It is urged, however, by counsel for the appellants that the point as to lis pendens was never raised in the Court below and this is correct. He contends that had the point been raised he would have raised the plea of fraud and collusion. This plea was actually raised in Tara Singh's case, but was not put in issue specifically. No such plea was raised in Harjas Rai's case. Counsel further contended that on the record itself the fraud and collusion are apparent, and his contention on this point, put briefly, is as follows:

At the time of the compromise Nathu had only an equity of redemption in all the properties to which he might have been entitled on the death of his father. It, therefore, meant nothing whatever to him to acknowledge that he had no title in the property provided he got the money equivalent of his equity of redemption, and this, according to counsel, he got by getting Rs. 1,000 in cash and a right of residence in two shops and a baithak and Rs, 20 maintenance for life. There is nothing to show us that counsel is correct in his estimation of

(1) A. I. R. 1922 Cal. 358=49 Cal. 220.
(2) [1906] 29 Mad. 426=16 M. L. J. 372 (F. B.).
(3) [1913] 38 Mad. 450=20 I. C. 976=(1913) M. W. N. 672.
(4) [1910] 6 I. C. 168.
(5) [1910] 13 O. C. 98=6 I. C. 750.
(6) [1913] 17 O. W. N. 413=18 I. C. 177.

the monetary value of the equity of redemption, but it was not contended by the other side that this was incorrect. In fact counsel for the respondents contended that the fact that Nathu got good consideration for his compromise was proof of the bona fides of Nathu and the absence of fraud and collusion in the case. It is unnecessary to decide any of these points in Harjas Rai's case because we consider that the whole matter can be disposed of on another point raised by counsel for the respondents, namely, that the suit is barred by limitation. We have found, as already stated above, that Nathu and Ram Saran were no longer members of a joint Hindu family but were only co-owners of the joint property. It is clear that at least in November 1909 Ram Saran asserted an adverse title to the whole of the property to the knowledge of Nathu and thereupon Nathu brought his declaratory suit. Therefore, ever since 1909 it seems to us that Ram Saran has been holding the property, of which he is in possession, adversely to the claim of Nathu. Limitation, therefore, ran from that date The present suit in which Harjas Rai and Shiv Ram are appellants was brought on 10th February 1922, and is, therefore, barred by the rule of adverse possession. In the lower Court the article relied on appears to have been 127, Lim. Act, but the article applicable on the above reasoning is Art. 144 and, as all the mortgages were with possession, it is clear that the adverse possession of Ram Saran was adverse both to the mortgagor and the mottgagee and the suit is, therefore, barred. We therefore, dismiss the appeal of Harjas Rai and Shiv Ram with costs.

In the case in which Shib Ram is the appellant and Ram Saran was plaintiff, namely, civil appeal No. 1696 of 1926, it is clear from the findings given above that Nathu had a right to alienate his half share. The shop in dispute in that appeal formed part of the mortgage deed dated 25th October 1909, which was, therefore, ante litem. The point about lis pendens, therefore, does not arise. We, therefore, accept the appeal of Shib Ram in that case and dismiss the suit of Ram Saran with costs throughout.

Now, as regards Tara Singh's case: similarly his appeal would have to be accepted on the reasoning explained above *qua* the mortgages dated 25th July 1909 the 30th September, 1909, and 6th October 1909 for these are all ante litem. The question remains about the mortgage deed dated 6th November 1909. We consider that in the circumstances of the case we should allow the respondent to raise the point of lies pendens. It is obvious on the record and the fact that there may be a good defence to the point extraneous to the point itself, namely, fraud, or collusion on the part of Nathu and Ram Saran with respect to the compromise, would, in our opinion, in this case entitle the appellant only to a remand to lead evidence to prove his defence. We consider it unnecessary at present to decide the question of lis pendens and we remand the case accordingly framing an issue as follows:

Was the compromise dated 26th July 1911 entered into between Nathu Ram and Ram Saran as a result of fraud or collusion and is it therefore, not binding on the appellants.

Both parties will be entitled to lead evidence on this point, and the trial Court will record that evidence together with its finding on the point and will report it to this Court within a period of six months. The remand is under O. 41, R 25, Civil P. C.

A.L./G.B. . *Case remanded.*

A. I. R 1928 Lahore 502

SHADI LAL, C. J., AND BHIDE, J.

Sher Singh—Defendant—Appellant.

v.

Sham Kaur—Plaintiff—Respondent.

First Appeal No. 2518 of 1925, Decided on 8th December 1927, from decree of 1st Class Sub-Judge, Ludhiana, D/- 4th July 1925.

Hindu Law—Maintenance—Husband willing to keep wife in his house but wife refusing—She is not entitled to separate maintenance.

A wife, who is voluntarily living apart from her husband for no improper motive, may at any time return to her husband and claim to be maintained by him, but she cannot be held to be entitled to separate maintenance when the husband is willing to keep her in his house and she refuses to accept his offer without sufficient justification: 31 *Mad.* 338, *Ref.* [P 503 C 2]

Moti Sagar and *Badri Das* — for Appellant.

Ghulam Mohi-ud-din and *Ghulam Rasul*—for Respondent.

Bhide, J.—The plaintiff, Mt. Sham Kaur, who is a wife of the defendant Sardar Sher Singh, sued in this case for maintenance at Rs. 200 per mensem.

According to the allegations in the plaint the plaintiff was married to the defendant some sixteen years before the suit and bore him a son two years later. The defendant had another wife who grew jealous as she had no male issue, and the defendant at her instance began to ill-treat the plaintiff. The plaintiff's son was murdered when he was about six years of age and the plaintiff suspected her co-wife to be responsible for the murder. After the death of the plaintiff's son she was subjected to even greater ill-treatment than before and was turned out of the house six months later. She began to live with her parents. Her father went several times with a panchayat to induce the defendant to give her maintenance and residence, but the defendant refused to do so and eventually the present suit was instituted.

The defendant denied the allegations and pleaded that the plaintiff was leading an immoral life and had left his house of her own accord. He expressed his willingness to take her back provided she led a chaste life. The learned Senior Subordinate Judge, who tried the suit, found that the allegation of unchastity was not proved and that the defendant had refused to keep the plaintiff in his house without any justification. A decree for Rs. 80 per mensem by way of maintenance was, therefore, passed in favour of the plaintiff. From this decision the defendant has appealed.

The plaintiff's own evidence shows that she herself left her husband's house after her son's death, probably on account of suspicions about the co-wife being responsible for the death of her son and consequent ill-treating towards her. There is no evidence to prove that she was actually ill-treated and turned out as alleged in the plaint. All that the plaintiff's witnesses have said is that the plaintiff left the defendant's house and that thereafter, the defendant refused to take her back, although her father approached him with a panchayat for the purpose several times.

The learned Senior Subordinate Judge has found the defendant's evidence as regards the plaintiff's alleged unchastity to be valueless and that evidence has not been laid stress on before us. It was, however, argued that the plaintiff's evidence as regards the defendant having refused to take her back in his house is also worthless and in the circumstances the plaintiff having herself left her husband's house without any justification is not entitled to claim any maintenance. I think this contention is justified. I am not impressed by the evidence produced by the plaintiff as regards the attempts made to induce the defendant to take her back in his house. According to the plaintiff's father's own statement the defendant refused to admit her in his house when she was taken there only two months after she had left it after her son's death, and althougd she went again four or five times, the defendant refused to listen to him (vide Narain Singh's statement at p. 26 of the printed record). No explanation whatsoever has been offered as to why the present claim was delayed for some eight years. If the plaintiff was really willing to go to the defendant she might have been expected to take some prompt action. When the present suit was lodged by the plaintiff the defendant offered to take the plaintiff back into his house and maintain her, but she refused to do so except on certain conditions as regards being given a house and furniture of the same kind as her co-wife. During the pendency of this appeal also an offer was made by the defendant to take her back, but when he went to her village for the purpose the plaintiff failed to avail herself of the offer on a flimsy excuse. In the circumstances I find it difficult to believe that the plaintiff has been genuinely anxious to live with the defendant and that the defendant has refused to allow her to do so. It is true that a wife, who is voluntarily living apart from her husband for no improper motive, may at any time return to her husband and claim to be maintained by him; but she cannot be held to be entitled to separate maintenance as claimed in the case when the husband is willing to keep her in his house and she refuses to accept his offer without sufficient justification (cf. *S. Bangaramma* v. *S. Brambaze* (1) and Mayne's Hindu law and Usage, p. 651, 9th edn.

I would, therefore, accept this appeal and dismiss the suit but in view of all the circumstances of the case leave the parties to bear their own costs throughout.

Shadi Lal, C. J.—I concur.

N.K *Appeal accepted.*

(1) [1909] 31 Mad. 333=18 M. L. J. 254.

A. I. R. 1928 Lahore 504

BHIDE, J.

Imam Din—Defendant—Appellant.

v.

Feroze Din and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2 of 1928, Decided on 26th March 1928, from decree of Addl. Dist. Judge, Lahore D/- 21st October 1927.

Punjab Pre-emption Act (1913), *S.* 3 (5)—*Mortgaged property sold in execution of a decree is exempt from the right of pre-emption.*

The object of the exemption in S. 3 (5) of the Act appears to be to exclude those sales which are not made voluntarily but by an order of the Court, as every person who chooses to buy the property has the opportunity of bidding for it in the latter case. Mortgaged property, as such, sold in execution of a decree is exempt from the right of pre-emption. [P 504 C 2]

Tirath Ram—for Appellant.

M. Obedullah and *Balkrishen* for *Mohammad Hussain*—for Respondents.

Judgment.—The sole point for decision in this second appeal is whether a sale of mortgaged property in execution of a decree is subject to the right of pre-emption. Both the Courts have held that such a sale is subject to the right of pre-emption and have decreed the plaintiff's suit. From this decision the vendee Imam Din has filed a second appeal.

The decision of the point turns on the question whether the sale can be said to have been made "in execution of a decree for money" (vide "definition of sale" in S. 3 (5), Punjab Pre-emption Act 1913) The learned District Judge has referred to certain rulings bearing on the interpretation of the words "decree for payment of money" occurring in S. 73, Civil P.C., and following the view taken by the Calcutta High Court in *Fazil Howladar* v. *Krishna Bandhoo* (1) and *Kartick Nath* v. *Juggernath* (2) in preference to the view taken by the Madras High Court in *Kommachi Kather* v. *Pakker* (3) and *Abdullah Sahib* v. *Oosman Sahib* (4) has held that a mortgage decree is not a decree "for payment of money." The view taken by the Calcutta High Court in *Fazil Howladar* v. *Krishna Bandhoo* (1) was not followed by a single Bench Judge of the Punjab Chief Court in 121 *P. L. R.* 1908. The rulings of the Calcutta High Court relied upon by the learned District Judge appear to turn on the interpretation of the words "decree for payment of money" occurring in various section ot the Civil Procedure Code and on the scope of S. 73, Civil P. C. In the present instance the expression used is "decree for money" and it occurs not in the Civil Procedure Code but in a different enactment, namely, the Punjab Pre-emption Act, 1913. The rulings relied on have thus no direct bearing on the interpretation of the expression "decree for money" as used in the latter enactment. No authority directly in point has been cited; but it seems to me that in the absence of any indication to the contrary the words "decree for money" occurring in S. 3 (5), Punjab Pre-emption Act, should be taken in their ordinary sense, i. e., any decree passed for satisfaction of a claim for money.

It appears that wording of the definition of sale in in the Punjab Pre-emption Act of 1905 was different. Sale was defined therein as follows :

"Sale" shall not include sales in execution of a decree or order of a civil, criminal or revenue Court or of a revonue officer.

This definition appears to have given rise to some difficulty and in *Nawab* v. *Jawaya* (5) on the wording of the definition a sale made in execution of a decree for specific performance of a contract was held to be not subject to the right of pre-emption. As a result any person could have easily defeated the rights of pre-emptors by first entering into a contract for sale and then obtaining a decree in a suit for specific performance of the same. It appears that the definition was amended in the Punjab Pre-emption Act, 1913 to avoid this result and the words "for money" were inserted after the word "decree." The object of the exemption in S. 3 (5), Punjab Pre-emption Act, 1913 appears to be to exclude those sales which are not made voluntarily but by an order of the Court, as every person who chooses to buy the property has the opportunity of bidding for it in the latter case. Bearing this in mind, there seems to be no good reason

(1) [1898] 25 Cal 580=2 C. W. N. 118.
(2) [1900] 27 Cal 285.
(3) [1897] 20 Mad. 107=7 M. L. J. 66.
(4) [1905] 28 Mad. 224.
(5) [1911] 40 P. R. 1911=203 P.L.R. 1910=8 I. C. 777=105 P. W. R. 1911.

why mortgaged property which is sold in execution of a decree should not be exempt from the right of pre-emption.

In the present instance the original decree was for a sum of Rs. 839-5-6. It was directed by the decree that the sum should be paid by a certain date and in default of payment the house mortgaged was to be sold. It will thus appear that the decree was in reality for payment of the sum of money and could have been satisfied by payment on or before the specified date. There seems to be no good reason why the mere fact that the decree was to be satisfied by sale of the mortgaged property in the event of failure of payment by the specified date should change the character of the decree.

I am of opinion that the sale in the present instance falls within the scope of the exemption in S. 3 (5), Punjab Pre-emption Act. I accordingly accept the appeal and dismiss the plaintiff's suit with costs throughout.

A.L./R.K. *Appeal accepted.*

A. I. R. 1928 Lahore 505

TEK CHAND, J.

Ramji Das and *others*—Defendants—Appellants.

v.

Harjas and *others*—Plaintiffs—Respondents.

Second Appeal No. 1484 of 1927, Decided on 22nd December 1927, from decree of Dist. Judge, Sargodha, D/- 7th March 1927.

Transfer of Property Act, S. 74—Purchaser under a Court auction sale by a puisne mortgagee in whose suit prior mortgagee is not joined is postponed to a purchaser under a Court auction sale by a prior mortgagee in whose suit the puisne mortgagee is joined.

If the second mortgagee sues first without making the prior mortgagee a party, the prior mortgagee can, while the first suit is pending, sue for sale making the second mortgagee and the mortgagor parties, in which case there can be no sale in the first suit, and if there has been a sale pending the prior mortgagee's suit, the purchaser will be affected by lis pendens. He can redeem the prior mortgagee in which case there will be no sale in the prior mortgagee's suit and if there is a sale, he can claim the balance of the sale proceeds after payment to the prior mortgagee, as both the second mortgagee and the mortgagor must be presumed to have obtained the value of their interests in the property out of the sale proceeds in the first sale. In such a case the purchaser under the second sale gets the property and is entitled to possession against the first purchaser : 5 *Cal* 265 and 269 and 26 *Mad.* 486, *Dist.* : *A. I. R* 1920 *P. C.* 81 ; 40 *Mad.* 77 ; and *A. I. R.* 1926 *All.* 460 ; *Foll.* [P 507 C 1,2]

Jiwan Lal Kapur—for Appellants.

Ram Chand Manchanda—for Respondents.

Judgment.—The facts of the litigation which has given rise to this second appeal, are somewhat complicated and must be set out in some detail. One Harsu Ram was the owner of two shops which may be described as *A* and *B*. On 9th December 1911, he executed an unregistered deed of mortgage for Rs. 99 in respect of shop *A* in favour of Harjas Ram and Surta Ram. The mortgage was without possession and was to carry interest and compound interest at Re. 1 per cent per mensem. On 5th July 1912, Harsu Ram, mortgagor, executed a registered deed of mortgage in favour of one Tara Chand in respect of the shop *A* and one-half of the shop *B*. This mortgage was also without possession and was to carry interest at Re. 0-11-6 per cent. per mensem.

On 6th July 1918, Tara Chand, the mortgagee under the second mortgage dated 5th July 1912, instituted a suit against Harsu Ram, mortgagor for recovery of Rs. 926-8-0, the amount due to him on foot of the mortgage. In this suit he did not implead Harjas Ram and Surta Ram, the mortgagees under the first deed. On 27th November 1919 a preliminary decree was passed in favour of Tara Chand for Rs. 695 payable in two months and it was ordered that on failure of the mortgagor to pay the aforesaid sum within the specified period both the mortgaged properties *A* and one-half of *B* should be sold. Nothing having been paid Tara Chand, mortgagee decree-holder, applied for the final decree being passed in his favour and this was done on 14th July 1921. As already pointed out Harjas Ram and Surta Ram, the mortgagees under the unregistered deed of 9th December 1911, were not parties to these proceedings.

A few months later but before Tara Chand, decree-holder had taken any steps to bring these properties to sale Harjas Ram and Surta Ram, the mortgagees under the first deed of mortgage dated 9th December 1911, instituted a suit against Harsu Ram, mortgagor, for recovery of Rs. 320 due to them on foot of the

aforesaid mortgage. To this suit Tara Chand, the puisne mortgagee, was made a party. He, however, did not file any written statement. A preliminary decree in favour of Harjas Ram and Surta Ram was passed on 23rd May 1922. Nothing having been paid within the prescribed period proceedings were taken by Harjas Ram and Surta Ram to have this decree made final and Tara Chand was made a party to these proceedings also. This time he appeared and filed an application on 26th March 1923, urging that the unregistered mortgage-deed set up by Harjas Ram and Surta Ram was fictitious and was not binding on him. He did not, however, pursue this application, and on 7th April 1923, a final decree was passed in favour of Harjas Ram and Surta Ram for recovery of Rs. 320 plus costs recoverable by sale of shop *A*. In the meantime Tara Chand who had, as already stated, obtained a final decree in his favour on 14th July 1921, for sale of properties *A* and one-half of *B*., took out proceedings to sell these properties. The sale was accordingly held on 21st April 1923, when both properties *A* and one-half of *B* were purchased by Ramji Das and Wishan Das. This sale was confirmed on 28th April 1924, and the purchasers, having obtained a sale-certificate on 8th May 1924, were put in possession of both the shops.

Harjas Ram and Surta Ram who had obtained a final decree for sale of property *A* on 7th April 1923, started proceedings to sell it. This sale was held on 12th December 1924, and the property *A* was sold to Harjas Ram and Surta Ram, the decree-holders, themselves. The sale was confirmed on 16th January 1925 and a sale-certificate granted on 23rd January 1925. Thereupon the purchasers Harjas Ram and Surta Ram tried to obtain possession of this shop *A*, but they were resisted by Ramji Das and Wishan Das, purchasers under the sale of 28th April 1924, who, as stated above, had already obtained possession. On 7th May 1926, the plaintiffs Harjas Ram and Surta Ram accordingly instituted the suit out of which this second appeal has arisen, claiming possession of shop *A*. Their suit was decreed by the Sub-Judge who held that in this dispute between the rival auction-purchasers the Court has to be guided by priority in the dates of the mortgages to enforce which the auction sales were respectively held. The defendants appealed to the District Judge who affirmed the decree in favour of the plaintiffs in so far as it granted them possession of the shop, but added a rider that the plaintiffs shall retain possession not as owners but only as prior mortgagees and that the defendants shall be entitled to redeem the shop from them if so advised.

The defendants Ramji Das and Wishan Das have preferred a second appeal to this Court and pray for dismissal of the plaintiffs' suit in its entirety. Their counsel, Mr. J. L. Kapur, urges that the determining factor in settling the relative rights of purchasers at separate auction sales held in execution of decrees obtained on different mortgages is not priority in the dates of the mortgages but priority in the dates of the auction sales, and as in this case the defendants held possession under the earlier sale they cannot be ousted by the plaintiffs who purchased subsequently even though in execution of a decree based on a mortgage which was of a prior date. In support of his contention the learned counsel relies upon two decisions of the Calcutta High Court in *Nanak* v. *Teluckdye* (1) and *Dirgopal* v. *Bulakee* (2). Both those rulings are, however, clearly distinguishable from the present case as in none of them had the puisne mortgagee been made a party to the suit which had been instituted by the prior mortgagee to enforce his mortgage. In each of these cases, separate suits had been instituted by each mortgagee against the mortgagor alone to enforce the mortgage in his own favour, the other mortgagee not having been impleaded at all. The facts in *Akalti Moidin* v. *Chirayil* (3) were also similar. But here we find that in the suit instituted by the prior mortgagee Harjas Ram and Surta Ram, the puisne mortgagee Tara Chand was made a party and, therefore, he is clearly bound by the result of that suit. I am, therefore, of opinion that the rule enunciated in these rulings is inapplicable to the present case.

Under the explanation to R. 1, O. 34, a puisne mortgagee can sue for sale without making the prior mortgagee a party, but it is settled law that a decree so obtained by him does not in any way affect the rights of the prior mortgagee

(1) [1880] 5 Cal. 265=4 C. L. R. 358.
(2) [1880] 5 Cal. 269.
(3) [1903] 26 Mad. 486.

and in a sale held in execution of such a decree the property shall be presumed to have been sold subject to the rights of the prior mortgagee. As pointed out by their Lordships of the Privy Council in the well-known case of *Radha Kishen* v. *Khurshaid Hussain* (4) the property in such cases can only be sold subject to the rights of the prior mortgagee "who had a paramount claim outside the controversy of the suit," and, therefore, his rights are in no way affected. If, therefore, nothing further had happened, the equity of redemption in the property would, on the sale in execution of Tara Chand's decree, have vested in the purchasers Ramji Das and Wishan Das, but they would have been bound to redeem the prior mortgage in favour of Harjas Ram and Surta Ram, plaintiffs.

But before the sale in execution of the aforesaid decree (obtained by Tara Chand, puisne mortgagee) was held the prior mortgagees (plaintiffs) instituted a suit to enforce their mortgage impleading Tara Chand as a defendant. As already pointed out, a final decree in this suit was passed before the sale in execution of Tara Chand's decree could be held and there is the additional fact found by the learned District Judge that the defendants (the auction-purchasers in Tara Chand's decree) bought with full knowledge of the mortgage in favour of the plaintiffs. These facts alter the situation materially and render the sale in execution of Tara Chand's decree ineffectual against the plaintiffs In these circumstances Tara Chand is bound by the sale in execution of the plaintiff's decree as he was a party to that decree. and so are the defendants who stand in Tara Chand's shoes. The question has been considered at length in *Chinnu Pillai* v. *Venkatasam Chettiar* (5) in which the rights and liabilities of auction purchasers in execution of decrees obtained on several mortgages are examined in detail and conclusions recorded at pp. 91 and 92. The present case falls within Cl. (5) where it is stated that

> if the second mortgagee sues first without making the first mortgagee a party, the first mortgagee can, while the first suit is pending, sue for sale making the second mortgagee and the mortgagor a party in which case there can be no sale in the first suit, and if there has been a sale pending the first mortgagee's suit, the purchaser will be affected by lis pendens. He can redeem the first mortgagee in which case there will be no sale in the first mortgagee's suit or if there is a sale, can claim the balance of the sale proceeds after payment to the first mortgagee, as both the second mortgagee and the mortgagor must be presumed to have obtained the value of their interests in the property out of the sale proceeds in the first sale. In this case, the purchaser under the second sale gets the property and is entitled to possession against the first purchaser.

The question is also elaborately discussed in a recent judgment of the Allahabad High Court in *Lachhmi Narain* v. *Hriday Narain* (6) though the facts in that case were somewhat different. I must, therefore, hold that the sale in favour of the plaintiffs-respondents, though of a subsequent date, has, in the peculiar circumstances of this case, priority over the sale in favour of the defendant-appellants, and the correct legal position is that the title in the shop in question has passed to the plaintiffs. As, however, no appeal or cross-objections have been preferred by the plaintiffs-respondents Harjas Ram and Surta Ram for deleting the rider added by the learned District Judge, I cannot grant them this relief. The decree in favour of the plaintiffs-respondents must, therefore, stand in the terms in which it was passed. Accordingly I dismiss the appeal, but having regard to all the circumstances of the case I leave the parties to bear their own costs throughout.

A.L./R.K. *Appeal dismissed.*

(4) A. I. R. 1920 P. C. 81=47 Cal. 662=47 I. A. 11 (P. C.).

(5) [1916] 40 Mad. 77=30 M. L. J. 347=34 I. C. 507=(1916) 1 M. W. N. 245.

(6) A. I. R. 1926 All. 480.

A. I. R. 1928 Lahore 507

ADDISON AND COLDSTREAM, JJ.

Dharam Singh and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 410 of 1927, Decided on 7th December 1927, from order of Sess. Judge, Lyallpur, D/- 28th March 1927.

(a) *Criminal P. C., S. 154—First information report can be used in evidence to corroborate or contradict maker thereof but not to contradict other witnesses.*

First information report is not substantive evidence and can only be properly used to corroborate or contradict the maker thereof. It cannot be used to contradict numerous other witnesses who are unanimous on a particular fact : *A. I. R. 1928 Lah. 17, Ref. to.*[P 509 C 1]

(b) *Criminal P. C., S. 162—Police Diary—Only its contents and not what Police officer stated that witness said or did not say can be used to contradict a witness — Evidence Act, S. 45.*

It is only what is written in the police diaries that can be used under S. 145, Evidence Act, to contradict the witness, and what the Police officer stated that a witness said or did not say, is inadmissible. The way to prove those portions of the written statement of a witness which have been specifically put to him in order to contradict him is for the accused to mark the passage or passages in the copy from the police diaries given to him and then to ask the writer of the statement to say that it is a true copy : *A. I. R.* 1926 *Lah.* 347 and *A. I. R.* 1925 *Lah.* 337, *Ref. to.* [P 510 C 1]

(c) *Criminal P. C., S. 439—Accused tried for lesser as well as for graver offence but convicted for lesser offence—High Court can alter conviction to the graver offence—High Court will enhance sentence only when sentence is grossly inadequate.*

Where the accused is tried under Ss. 302 and 325 but convicted only under S. 325 High Court can alter the conviction to one under S. 302. High Court can also enhance the sentences without altering the convictions but this is not done usually but only when the sentences are grossly inadequate. [P 509 C 2]

Bhagat Ram Puri—for Appellants.

Sunder Das for *Govt. Advocate*—for the Crown.

Addison, J.—Dharam Singh and his three sons, Bighwan Singh, Sawan Singh and Mangal Singh, were tried for the murder of Budkan and for causing grievous hurt to his elder son Labhu on 5th November 1926, i. e., the Dewali day, under Ss. 302 and 325, I. P. C., respectively. Sawan Singh has been convicted under the second part of S. 304 and under S. 325 read with S. 34, I. P. C., and sentenced to seven years' and one year's rigorous imprisonment in respect of the offences charged against him. The other three have been sentenced to four years' rigorous imprisonment each under S. 325 read with S. 34. I. P. C., in connexion with the first offence and under the same sections to one year's rigorous imprisonment each in connexion with the second offence. They have appealed while the son of the deceased has preferred a revision petition to the effect that all should have been convicted of murder under S. 302, I. P. C., and that, in any case, the sentence should be substantially enhanced.

The four assessors were of opinion that the appellants were guilty of the murder of Budkan. They accepted the prosecution story in its entirety. As regards motive, the learned Sessions Judge found that it had been established, quarrels having commenced between the two families for years before, which continued upto the day in question when there was a dispute over the trespass of a calf and a quarrel that very evening between Kalu, the younger son of the deceased, and Harnama on the one side and Sawan Singh appellant on the other owing to Sawan Singh extinguishing Harnama's lighted candle (it was Dewali night) in attempting to light his own candle at it. The Sessions Judge, however, thought that the two quarrels of that day were not serious enough for the appellants, as a result thereof, to have intended to murder the deceased or to cause such bodily injury as they knew to be likely to cause death.

On the facts the learned Sessions Judge held it established by the evidence that when the deceased went to get water about 7-30 p. m., he was seen by Sawan Singh, appellant, and that the appellants waited for him in their doorway till his return with the bucket when they attacked him with lathis. The first severe blow was struck by Sawan Singh who had quarrelled that evening with Kalu. Labhu, the elder son of the deceased was at once called by Sajada, P. W. No. 3, servant of the deceased, and he, too, was severely beaten when he intervened. Mt. Bishni, wife of the deceased, also arrived and received an injury. Then Kalu, the youger son, came and Sawan Singh, appellant, struck at him but the blow was warded off and Kalu in self defence severely injured Sawan Singh's nose with a lathi with an iron band at one end.

The learned Sessions Judge further held that the defence raised by Sawan Singh and Mongal Singh was false. Their case was that Sawan Singh was attacked by Kalu and Harnama after the quarrel over the candle and that in the course of that fight Labhu arrived with an axe, whereupon Mangal Singh, appellant, came to help his brother and the deceased also arrived, received a blow from a lathi and fell down on a peg. He also rejected the alibis of the other two appellants. No evidence was called for the defence by any of the appellants.

On these findings the Sessions Judge held that the common intention was to

beat the deceased and Labhu, when the latter arrived, and not to murder the deceased; that Sawan Singh knew that the blow he inflicted was likely to cause death and he, therefore, was guilty under the second part of S. 304, while the other knew that the aged deceased was likely to suffer grievous hurt from the lathi blows given and were guilty under S. 325 read with S. 34. He further held all the appellants guilty under S. 325 read with S. 34 of causing grievous hurt to Labhu, who suffered from severe concussion of the brain and did not recover consciousness for ten days and whole life was in danger.

We have been taken very carefully through all the evidence by the learned counsel, appearing for the appellants, and I can see no reason to disagree with the main findings of the learned Sessions Judge. It is not necessary to recapitulate all the reasons he has given for accepting the evidence for the prosecution. The Civil Surgeon was in favour of the prosecution story that three, possibly four, blows were struck on the head of the deceased, though he admitted the possibility that they were fewer. There is no reason to disbelieve the testimony of Sajada and Sarwan, or even of Thakar Singh, whose name was not given in the first information report. This document is not substantive evidence and can only be properly used to corroborate or contradict the maker thereof. It cannot be used to contradict numerous other witneces who are unanimous that Thakar Singh was there : see *Emperor* v. *Ibrahim* (1). Thakar Singh's evidence is consistent and the fact that he lives in the *ihta* of Jiwan, the father of Harnama, who is a friend of Kalu, or that he stated at the trial that he had gone to the bazar to buy sweets while he did not say so in his statement to the police. was not a proper reason for rejecting his testimony. It cannot be said that there was any contradiction in the two statements. Dharam Singh and Bhagwan Singh, appellants, had no injuries. It is not likely that they would have had injuries as the four appellants attacked one man at a time and it was only when Kalu arrived that any injuries were caused to them. A small abrasion on the shoulder of Mangal Singh, appellant, might have been due to other reasons and there is no evidence that he was struck by any one. Sawan Singh, however, was struck by Kalu who reported the occurrence. Though he was not an eyewitness of the attacks on his father and brother, the report he made was on the whole in accordance with the present story except that it, as usual, omited the fact that he retaliated and assaulted Sawan Singh. In these circumstances I would hold that the appellants are certainly guilty of the offences of which they have been convicted.

The revision petition has been put in by a private person and not by the Crown. It must, therefore, be taken that the Crown is satisfied with the decision of the learned Sessions Judge. It is well recognized that this Court will only interfere in revision for exceptional reasons, and all the more so when the petition is by a private person. There is no doubt that we could interfere and alter the convictions to murder under S. 302, I. P. C., vide *Bhola* v. *Emperor* (2), *Kampam Bali Reddy* v. *Emperor* (3) and *Fazal Khan* v. *Emperor* (4) while we could also enhance the sentences without altering the convictions though this is not done usually but only when they are grossly inadequate. In the present case, in my judgment, the immediate exciting causes of the attack, combined with the previous enmity, were sufficient to inflame to a considerable extent the passions of persons belonging to the class of the appellants. Further, the evidence probably establishes that the appellants had the knowledge that their attack upon the aged deceased with lathi was likely to cause his death. I am not, however, prepared to alter the convictions of the three appellants, who were not convicted under S. 304, for the reason that the sentence awarded are substantial though inadequate, and this, therefore, is not a proper case for interfering in revision.

In conclusion I would draw the attention of the learned Sessions Judge to *Bahadur Singh* v. *Emperor* (5) and *Labh Singh* v. *Emperor* (6) as they explain the provisions of S. 162, Criminal P, C., which he does not seem properly to

(1) A. I. R. 1928 Lah. 17=8 Lah. 605.

(2) [1904] 12 P. R. 1904 Cr.=110 P.L. R. 1904.
(3) [1914] 37 Mad. 119=22 I C. 756=15 Cr. L. J. 180.
(4) A. I. R. 1927 Lah. 369=8 Lah. 136.
(5) A. I. R. 1926 Lah. 367=7 Lah. [illegible]4.
(6) A. I. R. 1925 Lah. 337=6 Lah. 24.

understand. It is only what is written in the police diaries that can be used under S. 145, Evidence Act, to contradict the witness, and what the Sub-Inspector of Police stated that a witness said or did not say is inadmissible. The way to prove those portions of the written statement of a witness which have been specifically put to him in order to contradict him is for the accused to mark the passage or passages in the copy from the police diaries given to him and then to ask the writer of the statement to say that it is a true copy. For the reasons given above, I would dismiss the appeal and the revision.

Coldstream, J.—I agree.

S.J. *Appeal dismissed.*

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* * A. I. R. 1928 Lahore 510

ADDISON AND COLDSTREAM, JJ.

Emperor—Appellant.

v.

Bal Mukand and *others*—Accused—Respondents

Criminal Appeal No. 135 of 1927, Decided on 22nd March 1928, from order of Sess Judge, Gujranwala, D/- 22nd August 1927.

* * (*a*) *Criminal P. C., S.* 476—*Complaint can be made against person though he is not a party to the proceedings.*

The presiding officer of a Court can make a complaint not only against persons who are parties to proceedings before him but also against persons who are not parties.

Every person including the presiding officer of a Court has power to make a complaint as a rule. It is only when that general power is taken away by statute that a complaint becomes incompetent unless made by the only authority allowed to do so. There being nothing in S. 476 to the effect that the presiding officer of a Court cannot make a complaint against a person who is not a party, it follows that the general power of the presiding officer to make a complaint is not taken away by implication, because he is the only person who can make a complaint against a party in certain circumstances : *A. I. R.* 1925 *Rang.* 28 ; 3 *Rang.* 48; and *A. I. R.* 1228 *Sind* 69; *Diss. from.*: 1 *Pat. L.J.* 298; *A. I.R.* 1922 *Oudh* 220; and 40 *All.* 24; *Rel. on.*: *A. I. R.* 1922 *Lah.* 401, *Dist.*

[P 512 C 2]

* (*b*) *Criminal P. C., S.* 195—*Scope.*

Section 195 is a limiting section providing an exception to the general rule that anyone could make a complaint of a criminal offence.

[P 512 C 2]

* (*c*) *Criminal P. C., S.* 4 (1) (*h*)—*Putting wrong section in a complaint does not invalidit.*

The essence of the complaint is the statement of facts relied upon as constituting the offence. It is sufficient that the complainant shall state the true facts in his own language, and it is for the Magistrate to apply the law to those facts.

[P 514 C 1]

Where a Court, while making a complaint under S. 476, Criminal P. C., wrongly described S. 477, I. P. C., though the facts disclosed a case under S. 465, I. P. C., and it was contended that the complaint was invalid on the ground that S. 477 was not one of those sections mentioned in S. 195, Criminal P.C.:

Held : that the complaint was not illegal on that ground: *A. I. R.* 1925 *Lah.* 631, *Ref.*

[P 514 C 1]

C. H. Carden Noad—for the Crown.

B. R. Puri and *Har Prasad*—for Respondents.

Addison, J.—Bal Mukand of Ramnagar was convicted under S. 465 and Bal Mukand of Kot Harazaka Ullah, Ahlmad of the Court of Lala Hukam Chand, Magistrate 1st Class, were convicted under S. 465/114, I. P. C., by a Magistrate of the 1st Class. Each was sentenced to 18 months rigorous imprisonment. On appeal to the Sessions Judge they were acquitted and against their acquittal the Crown has preferred this appeal.

Mt. Jiwan Devi had instituted a complaint in the Court of Lala Hukam Chand, Magistrate 1st Class, under S. 465/471. I. P. C., against Balmokand of Kot Hara and certain other persons. It was alleged in the complaint that a will which had been produced by Balmokand of Kot Hara before the revenue authorities was forged document. It purported to be the will of one Damodar Mal. In order to see if the thumb-mark on the will was that of Damodar Mal, Lala Hukam Chand had sent for the record of a civil suit as the plaint in it bore the thumb-marks as well as the signature of Damodar Mal. The criminal case was adjourned on 17th July 1926 after the statement of one witness had been recorded. The Magistrate went on leave from the 1st to the 12th August 1926. On 6th August his reader was also on leave. On that day at about 2 p. m. Balmokand of Kot Hara, who was an accused in the case, and Balmokand of Ramnagar, who was not a party are alleged to have gone to Zaka Ullah, the Ahlmad of the Magistrate, and obtained the record of the civil suit from him. The Police Naib Court Inspector saw the two Balmokands with the record and told the clerks of Mt. Jiwan Devi's counsel about it. These clerks and another person ran to the Court-room

and it is alleged that they saw Balmokand of Ramnagar trying to rub out the thumb-mark upon the plaint of the civil suit. On their arrival the Ahlmad snatched the record from this Balmukand, in this way tearing the paper a little at the place where Damodar Mal's thumb-mark was. The clerks told the counsel about it. He saw the record on 9th August. When the Magistrate returned on 12th August a formal application was put in by Mt. Jiwan Devi reporting what is alleged to have occurred. The Magistrate held an enquiry and on 17th August 1926 signed a complaint against the two Balmukands and Zakaullah under S. 477, I. P. C. The complaint was sent by the District Magistrate for trial to another Magistrate who convicted them as already stated. It is clear that the Magistrate made a clerical mistake in writing 477, I. P. C., in the complaint. It seems that for the moment he forgot that it was a plaint which had been tampered with and not a will. The case before him was about a will and that is how by inadvertence he wrote S. 477. The complaint, however, gave all the facts, and those facts, if correct, amounted to a complaint under S. 465, I. P. C. The learned Sessions Judge has not accepted the appeal on the merits but on the ground that the Magistrate had no power under S. 476, Criminal P. C., to institute a complaint against persons who were not parties to the proceedings before him, It was held that it was a good complaint as against Balmukand of Kot Hara who was an accused in the case before him, but that as he was tried along with two other persons who could not be tried on the Magistrate's complaint, the whole trial was illegal.

It follows from S. 4 (g) and S. 190, Criminal P. C., that the general rule is that any person can set the law in motion by a complaint. Certain exceptions are however created by statute, for example, Ss. 195 and 198, Criminal P. C., offences about the stamp laws, lotteries, etc. The case for the Crown is that Ss. 195 and 476, Criminal P. C., are sections, limiting and confining the general rule that any person can prefer a complaint. Thus, if an offence has been committed by a party which falls under S. 195 (1) (c), Criminal P. C., no Court can take cognizance of it except upon the complaint of the Court in which the document was produced or given in evidence. The case for the Crown is that the Magistrate can make a complaint in the same way as any other individual and that in certain cases a complaint can only be made by a particular Magistrate or Court. Thus, in the present case the Magistrate who made the complaint was the only person competent to make a complaint as against Balmukand of Kot Hara under the limiting S. 195, Criminal P. C., while under the general law he had power to include the two other persons alleged to be concerned in the offence as there was nothing to limit the general rule in their case.

Sections 195 and 476, Criminal P. C., were considerably altered in 1923. Under the old S. 195 it was competent for certain public servants and Courts to give sanction to a private person to prefer complaints of a particular kind, which could not be made without such sanction. For example. had the old Code been in existence when this case was started Mt. Jivan Devi could have applied for sanction to the Magistrate as against Balmukand of Kot Hara and then have instituted a complaint against him and the other two persons. Under the new Code, however, sanction has been done away with and the complaint must in these cases be by the Court. Again under the old S. 195 the Court itself could prefer a complaint. Lastly, under the old S. 476, the Court, after making any enquiry that might be necessary, could send the case for enquiry or trial to the nearest Magistrate along with the accused. In such a case no complaint or sanction was necessary. Now, under the new S. 195 (1) (c), the complaint must always be by the Court in respect of an offence alleged to have been committed by a party to any 'proceeding in any Court in respect of any document produced or given in evidence in such proceeding, while under the new S. 476 the Court can either of its own motion, or on application made to it in this behalf, make a complaint about any offence referred to in S. 195 (1) (b) and (c). Nowhere in the Code is it said that the Magistrate or the presiding officer of a civil Court cannot take action against persons who are not parties to the proceedings before him in respect of the offences mentioned in S. 195, and if there is any such restriction it is only there by

implication. *Bhag Singh* v. *The Crown* (*A. I. R.* 1922, *Lah* 401) was referred to by the Sessions Judge. That was a case under the old Code. It was held in it that a Court could not give sanction to prosecute a person not a party to a particular proceeding under the old S. 195. That case, however, is not in point as the complaint lay against such persons without any sanction. Under the old S. 476, Criminal P. C., it was held by the Madras High Court in *Govinda Iyer* v. *Rex* (1), that proceedings under it could not be taken against a person who was neither a party nor a witness in a suit in respect of abetment of forgery of a document exhibited in the suit on the ground that the words "any offence referred to in S. 195" in the old S. 476 incorporate the conditions laid down by S. 195 as to the offence being alleged to have been committed by a party, and a Court could take action under S. 476 only under such conditions. This view, however, was not held by all the High Courts. The Court of the Oudh Judicial Commissioners held in *Ejaz Ali Khan* v. *Emperor* (2) that an order under the old S. 476 for prosecution for an offence under S. 465, I. P. C., could be passed also against a person who was not a party to the civil suit. *Govinda Iyer* v. *Rex* (1) was not followed. In *Emperor* v. *Ganga Ram* (3) the Allahabad High Court took the same view as the Court of the Oudh Judicial Commissioner. *Jadu Nandan Singh* v. *Emperor* (4) was dissented from in it. The matter is also mentioned in the last paragraph at p.310 of the report [43 *Bom.*: *Emperor* v. *Waman Dinkar* (5)] where it is said:

> Then as to the words "offence" in S. 476: of course where you have an offence, you must have an offender though you may not know who the offender is. But it seems to me that the section not only intends to, but it is expressly worded so that it may, confer on a Court the power to inquire into a case and to take action, whoever may prove to be the offender, although months or even years may elapse before it becomes known with any degree of certainty who the offenders are.

In *Rajkumar Singh* v. *Emperor* (6), the Patna High Court also held that the old S. 476, Criminal P.C., did not restrict the action of the Court to offences committed within its own jurisdiction. It was said that S. 476 was a self-contained section and the reference made to S. 195 was only for the purpose of avoiding the enumeration of the sections mentioned in S. 195. It follows from this that the Court could proceed against persons not parties to the proceedings before it.

The cases principally relied upon by the learned Sessions Judge were *C. T. Guruswamy* v. *D. K. S. Ebrahim* (7), and *Maung Shew Pha* v. *Ma Me Hmoke* (8), where it was held that it is not open to a Court to make a complaint under S. 476, Criminal P. C., in respect of any person other than persons who are parties to the proceedings before it. In those two cases appeals had been preferred against the order of the Court directing the prosecution of certain persons. At p. 380 of the first report it is said :

> As no complaint by the Court is necessary in respect of Abdul Rahman or Guruswamy before the Magistrate can hold an enquiry or trial against them, it appears to me that it is not open to the Court, and it was not intended that the Court should lay a complaint covering them, as they were not parties to the proceedings before it. On this ground in my opinion the appeal must succeed.

Again at p. 281 it is said :

> Section 476 gives the Court power with respect to any offence referred to in S. 195.

With very great respect it appears to me that this is the wrong way to look at the matter. Every person including the presiding officer of a Court has power to make a complaint as a rule. It is only when that general power is taken away by statute that a complaint becomes incompetent unless made by the only authority allowed to do so. There is nothing in S 476 to the effect that the presiding officer of a Court cannot make a complaint against a person who is not a party, and it seems to me that the general power of the presiding officer is not taken away by implication because he is the only person who can make a complaint against a party in certain circumstances.

The Court of the Sind Judicial Commissioners has followed the Rangoon

(1) [1919] 42 Mad. 540=36 M. L. J. 448=9 M. L. W. 422=50 I. C. 824=(1919) M. W. N. 459 (F. B.).
(2) A. I. R 1922 Oudh 220.
(3) [1918] 40 All. 24=42 I. C. 927=15 A. L.J. 817.
(4) [1910] 37 Cal. 250=10 C. L. J. 564=4 I. C. 710=14 C. W. N. 330.
(5) [1919] 43 Bom. 300=51 I. C. 257=20 Bom. L. R. 998.
(6) [1917] 1 Pat. L. J. 298=37 I. C. 487=3 Pat. L. W. 33.
(7) A. I. R. 1925 Rang. 28=2 Rang. 374.
(8) A. I. R. 1925 Rang. 195=3 Rang. 48.

rulings referred to above : see *Emperor* v. *Rahimdino* (*A. I. R.* 1928 *Sind* 69). It was admitted by the Judges who decided that case that the view they took was attended with inconvenient consequences. They pointed out that it was obviously desirable that where a party to a proceeding in a Court has committed an offence and the offence has been abetted by persons who are not parties, all the persons concerned in the offence should be tried and not only those who are parties to the proceedings in which the offence was committed.

If the view of the Rangoon Court and the Sind Court is correct that by implication it must be held that the legislature did not intend that the Court should exercise the powers conferred by S. 476, with regard to offences referred to in S. 195 (1) (c) unless they are committed by parties to proceedings in such Courts, it is obvious that the result will be most inconvenient. Of course it would be possible for a private complainant to make a complaint against the persons who are not parties while the Court could make a complaint against the party, but in that way there would be the anomalous state of affairs that two different cases about the same transaction would have to be heard at the same time. It is true that the Magistrate to whom the complaint of the Court goes might be able on reading the complaint to take cognizance, under S. 190 (1) (c), Criminal P. C., of the offence against the persons who were not parties, but in that case the accused would have the option of asking that the case should be sent to another Magistrate. It seems to me that unless the legislature has specifically enacted that Courts should not take action against persons who are not parties, though they alone can take action against parties, it would not be proper to read such an intention into the Act especially as it gives rise to such inconvenient consequences. I am unable to discover anything in the Act definitely forbidding the presiding officer of a Court to make a complaint about an offence committed in connexion with a document produced in his Court when the person complained of is not a party, All that has been enacted is that he alone can do so if the alleged offender is a party to the proceeding. I am, therefore, unable to hold that the Magistrate, First Class, in whose Court the offence complained of is alleged to have taken place, was only competent to make a complaint against the person who was accused in the criminal case before him. In my judgment he could make the complaint not only against him but against the two other persons alleged to have been concerned in the same offence.

I do not think that the new proviso to S. 252 goes to show that the Magistrate can only proceed against a person who was a party before him. Under S. 252 when an accused person appears before a Magistrate he shall proceed to hear the complainant and take the prosecution evidence. The new proviso is that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court, but he can do so if he considers it desirable In the present case, however, the Magistrate was examined as a witness though he knew nothing personally as to what had occurred as he was not present at the time of the alleged offence. The two persons who were not parties were therefore not prejudiced as the Magistrate was examined as a witness.

The learned counsel who appeared for respondent 1 admitted that S. 195 was a limiting section providing an exception to the general rule that anyone could make a complaint of a criminal offence. His argument in the main was that when the Magistrate acted as a Court by holding an enquiry he could only proceed against persons who were parties to the proceedings before him and that the Crown could not be allowed to take up the position that as regards the other persons the Magistrate acted as one of the general public. He admitted that the complaint in the present case would have been legal if the Magistrate had held no enquiry under S. 476. I have already discussed this question in detail and it is sufficient to add that in my judgment the Magistrate had power to make the complaint against all the persons alleged to have taken part in the offence regarding the document produced in his Court.

The fact that the Magistrate in his complaint by mistake wrote S. 477 instead of S. 465, Indian Penal Code, does not make the complaint illegal in any way. The essence of the complaint

[see *Mt. Naurati* v. *Emperor* (9)], is the statement of the facts relied upon as constituting the offence. It is sufficient that the complainant shall state the true facts in his own language, and it is for the Magistrate to apply the law to those facts. It might be added that it is clear that S. 477 is a clerical mistake as that section does not fall within S. 195, Criminal P. C.

I would, therefore, hold that the complaint made by the Magistrate against all three persons was legal and that the learned Sessions Judge erred in acquitting the three respondents on the ground that there was not a legal complaint against them. As the Sessions Judge has not gone into the merits I would accept the appeal of the Crown, set aside the order of acquittal passed by the Sessions Judge on the ground that the complaint was illegal, and remand the case to him to decide the appeal of the three respondents on the merits.

Coldstream, J.—I agree.

D.D. *Case remanded.*

(9) A. I. R. 1925 Lah. 631=6 Lah. 375.

A. I. R. 1928 Lahore 514

ADDISON, J.

Guran Das—Petitioner.

v.

Administrator-General, Punjab, and *another*—Respondents.

Civil Misc. Petn. No. 335 of 1927, Decided on 20th April 1928.

Administrator-General's Act (3 *of* 1913), *S.* 25 *—High Court should not advise on disputed points of law and fact.*

The High Court should not advise on disputed points of law and fact under S. 28 but only on such questions as advancement, management, change of investments, etc. of the estate in charge of the Administrator: 7 *Bom.* 381; 12 *Bom.* 638; and 18 *Mad.* 443; *Ref.* [P 514 C 2]

Kahan Chand—for Petitioner.

C. H. Carden Noad and *Durga Das*—for Respondents.

Order.—One Bishen Das died leaving him surviving a widow, Mt. Tara Devi, a daughter by that widow, and also two sons by a predeceased wife. The executors of the will took out probate but later the administration of his estate was transferred to the Administrator-General. One of the sons has now moved this Court under S. 28, Administrator General's Act, to give to the Administrator-General special directions on three points. Notice was served on ths widow and she also asked that he should be given special directions on another point in case this Court was prepared to give directions.

Under the will one house was to go to the sons and the other to the widow. The widow is in possession of the Lahore house and the Administrator-General of the Gorakhpur house. According to the son the Lahore house is ancestral, and his case is that as the two sons and their father constituted a joint Hindu family at the time of the father's death, the father had no power of disposition by will with respect to the Lahore house. It is claimed, therefore, that the Administrator-General should be directed to make over this house to the sons. It is not admitted by the widow that the Lahore house is ancestral. Obviously under S. 28 this Court can give no directions in this matter. The question is one of evidence and is a difficult one. It involves questions which seriously affect the rights of the parties under the will. This Court in my judgment should not advise on disputed points of law and fact under S. 28 of the Act but only on such questions as advancement, management, change of investments, etc. In this connexion *Samuel Marie Sreretun, In re* (1), *Lakshmibai, In re* (2) and *Madras Doveton Trust Fund, In the matter of* (3), might be referred to. In these circumstances I refuse to give directions to the Administrator-General on this point. In my judgment it is a matter which should be decided by a suit.

Under the will all the ornaments were to go to the surviving widow, except two pairs of karas, two chains and some rings, which were to go to the sons. The son has asked that the Administrator-General should be directed to recover from the widow the few ornaments bequeathed to the sons and hand them over to them. The widow, however, has stated that all the ornaments, including those bequeathed to the sons, were lost in a railway accident and that, therefore, she was unable to hand over to the sons those few ornaments which were bequeathed to them. The value of those ornaments is in dispute. The widow is unable to recover from the railway the value of the

(1) [1883] 7 Bom. 381.
(2) [1888] 12 Bom. 638.
(3) [1895] 18 Mad. 443.

ornaments lost. In these circumstances in my judgment this matter also ought to be decided by a regular suit. It would appear that the sons would have to claim and prove the value of the ornaments, while the question would also arise whether the widow was liable to make good the loss in the circumstances described. This also is not an easy matter and is not one as to which I am prepared to give directions under S. 28, Administrator-General's Act.

The third request made by the son is that the Administrator-General should be directed to hand over to the son the furniture in the Lahore house. Under the will this furniture was to go to the widow. There is, therefore, nothing in this request. Similarly, I am not prepared to give any directions in the case of the widow's petition. For the reasons given I reject both the petitions.

N.K. *Petition rejected.*

A. I. R. 1928 Lahore 515

TEK CHAND, J.

Mangal Singh and *another*—Defendants—Petitioners.

v.

Bishen Singh—Plaintiff—Respondent.

Civil Revn. Petn. No. 413 of 1927, Decided on 1st December 1927, from order of Senior Sub-Judge, Amritsar, D/- 4th June 1927.

Provincial Small Cause Courts Act (9 of 1887), Sch. 2, Arts. 2 and 23—Suit by purchaser of goods for refund of price on being deprived of them by police — Suit can be tried by Small Cause Court.

A suit for the refund of the money paid as price for the goods by a purchaser of stolen goods, who has been deprived of the goods by the police under the orders of the Sessions Judge for returning them to their owner, can be tried by a Court of Small Causes. [P 516 C 1]

L. C. Mehra—for Petitioners.

Rustomji—for Respondent.

Judgment. — This is a petition for revision of the order of the Senior Subordinate Judge, Amritsar, holding that the appeal against the decree of the Subordinate Judge, Fourth Class, Tarn Taran, dated 8th April 1927, lay to the District Judge and not to him, as the suit was not of a small cause nature but was an unclassed one, the value of which was over Rs. 100.

The relevant facts are these : Balwant Singh, defendant 1, and Bur Singh, defendant 2, sold certain ornaments for Rs. 140 to Bishen Singh, plaintiff. About two months later it was discovered that these ornaments really belonged to Mangal Singh, defendant 3, and Sikatar Singh, defendant 4, and they had been stolen from their house in a dacoity. Bur Singh, Balwant Singh and a number of other persons were suspected of having committed the dacoity and were proceeded against by the police. They were convicted and sentenced. Some time after their conviction by the Sessions Judge of Amritsar, an application was presented to him by Mangal Singh and Sikatar Singh (the persons at whose house the dacoity was committed) that the ornaments which had been seized by the police during the investigation from Bishen Singh and about Rs. 600 in cash which had been taken from the dacoits might be made over to them. The Sessions Judge directed that the ornaments and the cash might be made over to the Police, who subsequently made them over to Sikatar Singh and Mangal Singh.

Bishen Singh, who had purchased the ornaments, instituted the present suit to recover Rs. 140 which he alleged he had paid in good faith for these ornaments to Balwant Singh and Bur Singh. The suit was decreed by the trial Court and Mangal Singh and Sikatar Singh preferred an appeal to the senior Subordinate Judge who has held that the suit is excluded from the cognizance of the Small Cause Court under Arts. 2 and 23, Sch. 2, Small Cause Courts Act,

I do not see how the suit, as framed, falls under either of the two clauses, and indeed Mr. Rustomji, who had appeared for the respondent, has expressed his inability to support the judgment of the lower Court. Art. 2 excludes from the cognizance of a Court of Small Causes a suit concerning an act purporting to be done by an officer of the Government in his official capacity, or by an officer of a Court of Wards in the execution of his office. It is obvious that the plaint as laid down does not in any way concern an act or order of an officer of the kind mentioned in this clause. Similarly, Art. 23 relates to a suit to alter or set aside a decision, decree or order of a Court or of a person acting in a judicial capacity. The present suit does not in any way intend to alter or set aside any judicial

decision. Indeed, the learned Subordinate Judge in ordering the ornaments and the cash to be made over to the police, and the police in handing over these things to the persons in whose house the dacoity was committed, were not deciding the relevant rights of Bishen Singh and these persons with respect to the ornaments in question or the price thereof. The suit as framed is clearly cognizable by the Court of Small Causes, and I hold accordingly.

For the foregoing reasons I accept the petition for revision, set aside the order of the lower appellate Court and remand the case to it for disposal in accordance with law. Costs will abide the events.

S.J. *Petition accepted.*

✻ A.I.R. 1928 Lahore 516

BROADWAY AND JAI LAL, JJ.

Fateh Ali Shah and *others* — Defendants—Appellants.

v.

Muhammad Bakhsh and *others*—Plaintiffs—Respondents.

First Appeal No. 2720 of 1923, Decided on 5th December 1927, from decree of Sr. Sub-Judge, Multan, D/- 27th August 1923.

(a) *Custom (Punjab)—Gift of ancestral immovable property—Property reverts to donor and his heirs on failure of issue of the donee.*

The ordinary custom in the Punjab is that in the case of a gift of ancestral immovable property to a relation, on the failure of the issue of the donee the property reverts to the donor and his heirs, the presumption in such cases being that the object of the gift is to make a settlement for the benefit of the donee and his issue, and therefore on the failure of the issue of the donee the object of the gift fails and the property reverts to the original donor. [P 518 C 1]

(b) *Custom (Punjab)—Gift—Rule of reverter does not apply to hiba-bil-iwaz—Devolution in such cases must be regulated by the law applicable to donee.*

The rule of the customary law as to reverter applies only to cases of pure gifts.

What is commonly called a hiba-bil-iwaz is not a gift in the technical sense of that term and is not governed by the rules relating to gifts pure and simple, but it partakes of the incidents relating to sales and the devolution of such an estate after the death of the donee must therefore be regulated according to the law which is applicable to the donee and not to the donor: 43 *P. R.* 1908; 5 *P. W. R.* 1915; 13 *C. W. N.* 160; and *A. I. R.* 1927 *Cal.* 808; *Rel. on.* [P 518 C 1, 2; P 519 C 2]

✻ (c) *Custom — Succession—Prostitute contracting marriage—Custom making her forfeit all rights in original family is opposed to public policy—Heirs of such prostitute, even if prostitutes, are not disqualified from inheriting her—Contract Act, S. 23—Mahomedan law—Succession.*

A custom among the prostitutes that if one of them contracts a marriage she forfeits all rights in her original family, in other words, that she becomes practically an outcaste, is opposed to public policy and is immoral and consequently unenforceable in the British Indian Courts. Even if such a custom exists and is enforceable, it does not necessarily follow therefore that the converse proposition is established that the heirs of a prostitute who has contracted marriage and has discarded the profession of the prostitutes are also disqualified from inheriting her estate even if they be prostitutes. [P 520 C 1]

✻ (d) *Record-of-Rights — Unchallenged adverse entry in, or an order to alter the entry without actual alteration, does not extinguish the right of the party unless the other party proves adverse possession or some similar reason in support of his plea.*

An adverse entry in the Record-of-Rights, even if allowed to remain unchallenged, does not necessarily extinguish the right of the party against whom such entry has been made and a fortiori an order to alter the entry to the prejudice of the party without the actual alteration of the entry cannot by itself extinguish the right unless the other party can prove adverse possession for the statutory period or some similar reason in support of his plea of such extinction: 56 *I. C.* 931; 79 *P. R.* 1917 *Dist.*; 30 *P. R.* 1880 and 140 *P. R.* 1907, *Rel. on.* [P 522 C 1]

(e) *Limitation Act, Art.* 120—*Plaintiff in possession need not bring a suit on first denial of his title—He must take proceedings within* 6 *years from the time when his rights are being actually jeopardized.*

If a plaintiff is in possession or enjoyment of the property in suit he is not obliged to sue for a declaration of title on the first or each succeeding denial of his title by the defandant. He may look upon each denial with complacency or at his option may institute a suit to falsify the assertions of the other side. But when he finds that his rights are being actually jeopardized by the action or assertion of the defendant, then he must take proceedings within six years from the date of such actions or assertions: *A. I. R.* 1922 *Lah.* 94; *A. I. R.* 1925 *Lah.* 391; and 140 *P. R.* 1907; *Dist.* [P 522 C 1, 2]

(f) *Punjab Land Revenue Act* (1887), *S.* 45—*No distinction exists between a suit under S.* 45 *and one under Specific Relief Act, S.* 42.

There is no distinction between a suit under S. 45, Punjab Land Revenue Act, and one under S. 42, Specific Relief Act, because S. 45, Punjab Land Revenue Act, also contemplates a declaratory suit with or without consequential relief under the provisions of the Specific Relief Act. It does not create a new description of suit but merely indicates the remedy of a person who may feel aggrieved by an adverse entry in the Record-of-Rights in other words, it specifies an occasion when a party may bring a

declaratory suit under the provisions of the Specific Relief Act. [P 522 C 2]

*(g) *Civil P. C., O. 7, R. 1—Cause of action.*

The plaintiff cannot be tied down to the date of the accrual of the cause of action mentioned in the plaint. The Court is entitled to determine the date on which the cause of action arose from the facts alleged and proved. [P 523 C 1]

Badri Das and *Basant Kishen*—for Appellants.

Sheo Narain, Kishan Dayal and *Hem Raj*—for Respondents.

Jai Lal, J.—The original owner of the property in dispute in this appeal was one Muhammad Hamid Shah, a Gardezi Sayed of Multan City. He belonged to the Shiah sect and had four wives at the time of his death which occurred some time in the year 1900. Two of his wives namely, Mt. Mughlani Bibi and Allah Wasai were prostitutes before their marriage with Muhammad Hamid Shah while the other two, Mt. Umarao Bibi and Mt. Jindwaddi, belonged to the family of Sayads. On 1st October 1896, Muhammad Hamid Shah made what purports to be a gift of certain properties both movable and immovable, in favour of his wife Mt. Mughlani Bibi. The latter gifted a part of immovable property in favour of her brother's son Muhammad Bakhsh and Ali Muhammad, but we are not concerned with that property in this litigation. Mt. Mughlani Bibi died on 16th June 1913 leaving immovable property which is the subject of dispute in the present appeal. A part of this property had been mortgaged by Muhammad Hamid Shah before the gift in favour of Mt. Mughlani Bibi and has since been in possession of the mortgagees. After the death of this lady possession of such of the immovable property as was in her actual possession at the time of her death was taken by her sister Mt. Rani and mutation of the same, as well as of the property in possession of the mortgagees, was made in the revenue records in her favour on 21st October 1913 by the Naib Tahsildar. The order of the Naib Tahsildar was however, on appeal by Mt. Umrao Bibi and Mt. Jindwaddi, widows of Muhammad Hamid Shah, reversed by the Collector of Multan on 11th November 1913, and it was ordered that the properties be entered in the names of the aforesaid widows of Muhammad Hamid Shah. It appears that there was an appeal from this order to the Financial Commissioner but without success. The result was that on 4th January 1917 the name of Mt. Rani was removed from the proprietary column in the revenue records in respect of the properties in dispute and the names of Mt. Umrao Bibi and Jindwaddi substituted in its place, and thereupon the two widows dispossessed Mt, Rani of the property which was in her possession and took possession thereof.

The suit out of which the appeal has arisen was thereupon instituted by Mt. Rani and her two nephews to whom she had gifted portions of the property in suit, against Mt. Umrao Bibi and Jindwaddi, Sayad Fateh Ali Shah, Mt. Amir Ladi and others who claimed to have derived their interests in the property through the widows. Fateh Ali Shah and Mt. Amir Ladi are a brother and a daughter respectively of Muhammad Hamid Shah. The suit was for possession of properties described as Nos. 1, 2, 3 and 4 in the plaint and for a declaration of the plaintiffs' title as owners of the properties described as Nos. 5, 6 and 7. These last-mentioned properties are those which are in possession of the mortgagees under the mortgages created by Muhammad Hamid Shah and which admittedly have not yet been redeemed. The suit was contested by the defendants on various grounds some of which are repeated before us and will be dealt with presently. The learned senior Subordinate Judge decreed the suit. The defendant Fateh Ali Shah has presented the present appeal in this Court and the other defendants apparently are taking no further interest in this litigation. Mt. Rani having died during the pendency of this appeal, her legal representatives have been substituted in her place.

The first question that needs determination is whether Mt. Mughlani Bibi was a Shiah before her marriage and whether Mt. Rani is her real sister. There is overwhelming evidence on the record in support of the conclusion of the learned Senior Subordinate Judge that Mt. Mughlani Bibi was a Shiah and that Mt. Rani was her real sister. In this connexion reference may be made to the testimony, inter alia of Hashim Ali Shah (P. W. 1) whose father acted as agent of Mt. Mughlani Bibi, Raza Ali Shah (P. W. 2) Gulab (P. W. 3) and Khuda Bakhsh (P. W. 4). Mt. Rani herself went

into the witness-box and stated that she was a sister of Mt. Mughlani Bibi and that the latter was a Shiah. The appellant Fateh Ali Shah was examined as a witness on behalf of the defendants and admitted that Mt. Mughlani Bibi was buried in the graveyard of the Shiahs and that she and Mt. Rani were both daughters of Ghulam Muhammad though he added that he did not know whether they were from the same mother. He also stated that Allah Bakhsh, brother of Mt. Mughlani Bibi, was also buried in the Shiah graveyard. I consider, therefore, that there can be no manner of doubt that Mt. Mughlani was the real sister of Mt. Rani and was a Shiah.

The next question that we have to consider is whether the property in dispute, which was admittedly given to Mt. Mughlani Bibi by her husband and was his ancestral property, descends to the heirs of Mt. Mughlani Bibi under the Shiah-law, or whether it reverts to the heirs of Muhammad Hamid Shah under the customary law. The proposition is not contested before us that the ordinary custom in this province is that in the case of a gift of ancestral immovable property to a relation on the failure of the issue of the donee the property reverts to the donor and his heirs, the presumption in such cases being that the object of the gift is to make a settlement for the benefit of the donee and his issue, and therefore on the failure of the issue of the donee the object of the gift fails and the property reverts to the original donor. The contention of Mr. Badri Das, advocate, for the appellant, is that Muhammad Hamid Shah was governed by the customary law and not by the Mahomedan law and, therefore, the rule of reverter, already mentioned, applies to the ancestral property gifted by him to his wife Mt. Mughlani Bibi. I will assume for the present that Muhammad Hamid Shah was governed by custom and there is no dispute before us that the property gifted by him was not ancestral *qua* the plaintiffs. The gift to Mt. Mughlani Bibi was not attacked by the collaterals of the donor and is not attacked before us and the only question is as to the devolution of the estate on the death of Mt. Mughlani Bibi. It is to be noted, however, that the rule of the customary law as to reverter applies only to cases of pure gifts.

The question that we have to consider is whether the transfer to Mt. Mughlani Bibi amounted to a gift or whether, as contended by Mr. Kishen Dayal, counsel for the respondent, it amounted to what is ordinarily called heba-bil-iwaz. An examination of the deed of gift which is to be found on the p. 5 of the printed paper-book shows that the transfer of the property by Muhammad Hamid Shah was in lieu of dower due to his wife and her right of maintenance. The deed after the usual covenants recites that :

> she has become the absolute owner of the property settled upon her and I have been left no connexion or concern whatever with the said property, nor shall I have any in future.

It is, therefore, clear that an absolute title in the property in dispute was conferred on Mt. Mughlani Bibi in lieu of the dower admitted to be due to her and of her right of maintenance. It is no doubt true that the amount of the dower is not mentioned in the deed and it is not, therefore, possible to ascertain how much of the consideration for the gift was on account of a debt due from the donor to the donee and how much was on account of her right of maintenance. But this, in my opinion, is immaterial because there is judicial authority in support of the proposition that even if there is partial consideration for what purports to be a hiba or a gift, the transaction ceases to be a gift or hiba as that term is used by the Mahomedan jurists.

Now it has been held in several reported cases that what is commonly called a Hiba-bil-iwaz is not a gift in the technical sense of that term and is not governed by the rules relating to gifts pure and simple but is tentamount to a sale and therefore confers an absolute heritable title on the donee or the transferee. In *Nur Muhammad* v. *Mt. Allah Wassi* (1), it was held by a Division Bench of the Chief Court of the Punjab that according to the Mahomadan law a gift by a husband of landed property in lieu of dower in favour of his wife amounts to a hiba-bil-iwaz which was held to be tantamount to a sale.

The Calcutta High Court in *Abbas Ali Shikdar* v. *Karim Bakhsh* (2) held that a transfer of immovable property by a

(1) [1915] 5 P. W. R. 1915=27 I. C. 562=35 P. L. R. 1915.
(2) [1909] 13 C. W. N. 160=4 I. C. 466.

Mahomedan to his wife purporting to be made in consideration of a dower debt of Rs. 49 and on account of right of inheritance was a sale and that such a transaction was wrongly described as a hiba-bil-iwaz. It was also held in that case that a copy of the Koran was a valid consideration for a hiba-bil-iwaz. The matter was again elaborately discussed by a Division Bench of the same Court in *Sarif-ud-din Muhammad* v. *Mohi-ud-din Mohamed* (3), and it was held that the transaction which was called by the learned Judges as a "false hiba-bil-iwaz" was not a hiba at all but was nothing more or less than sale and was therefore governed not by the Mahomedan law of hiba but was amenable to the general law in India relating to contracts and transfer of property. The transfer in that case was in consideration of the promise by the donee to maintain the donor and to pay her Rs. 999 for that purpose annually and also to arrange for her nursing and proper treatment in case she fell ill. In the deed the transaction was described as hiba or gift, but the learned Judges after a consideration of several authorities both textual and judicial arrived at the conclusion that such a transaction could not be considered to be the real hiba-bil-iwaz but was wrongly called as such by people generally and, therefore, they called it a false hiba-bil-iwaz.

For the purposes of this case it is not necessary to enter into a discussion as to the proper legal terminology to be applied to such transaction ; it is sufficient to hold that they are not governed by the rules relating to gifts but that they partake of the incidents relating to sales.

The devolution of such an estate after the death of the donee must therefore be regulated according to the law which is applicable to the donee and not to the donor : see *Faqir Mohamed* v. *Miran Bakhsh* (4), where it was held that succession to unpaid dower of a deceased female among Mahomedan Rajputs governed by agricultural custom of the province must be determined in accordance with the Mahomedan law in the absence of proof of special custom to the contrary.

From the above discussion it follows that the property in dispute must be held to be the absolute estate of Mt. Mughlani Bibi at the time of her death and not subject to reversion to her husband's heirs and consequently heritable by her personal heirs according to the law which governed her estate. It is admitted on both sides that if Mt. Mughlani Bibi was a Shiah, and if the succession to the property is to be governed by that law, then Mt. Rani is the sole heir thereto. In view of my decision that Mt. Mughlani Bibi was a Shiah and that Mt. Rani was her full sister, it must be held that Mt. Rani was entitled to succeed to the whole of the property left by her.

It is consequently unnecessary to decide whether S. Muhammad Hamid Shah was governed in matters of succession by the customary law of the Province or by the Mahomedan law. The material on the present record is inconclusive to enable me to express a definite opinion on the subject though in *Gulam* v. *Ruku* (5) and *Rahim Shah* v. *Hussain Shah* (6) it was held that in matters of succession the Gardesi Sayads are governed by the customary law of the Province. But this view is opposed to 5 *P. R.* 1888 and if the question is raised in any proceedings hereafter it will have to be considered in the light of the evidence produced therein. As it is not necessary for the purposes of this case to decide this question I refrain from doing so.

A half-hearted contention was raised by counsel for the appellants that Mt. Mughlani Bibi was governed by the Sunni Law in matters of succession and it was contended that under that law Mt. Rani would be entitled to only half of her estate. This matter must be deemed to have been disposed of by what I have stated above and it will suffice to add that there is absolutely no material on the record in support of the contention of the learned counsel.

At this stage it will be convenient to dispose of another contention raised on behalf of the appellants which was that Mt. Mughlani Bibi being a prostitute before her marriage was governed by the custom relating to the prostitutes, and that as there is a custom among the prostitutes that if one of them contracts a marriage she forfeits all rights in her original family, in other words, that she

(3) A. I. R. 1927 Cal. 808=54 Cal. 754.
(4) [1908] 48 P. R. 1908=90 P. W. R. 1908=188 P. L. R. 1908.
(5) [1889] 18 P. R. 1889.
(6) [1901] 102 P. R. 1901.

becomes practically an outcast and, therefore, it was asserted that Mt. Rani, who herself was a prostitute, could not inherit the property of her outcasted sister. The learned counsel put his client's case in the following manner : that according to the Code of the prostitutes their's is a respectable profession and that any member of that profession who contracts a marriage falls from the level of morality as understood among them and consequently becomes immoral and therefore incurs a forfeiture of all her rights in the earnings of the members of the profession. The counsel sought to support this proposition from an extract from the Wajib-ul-arz of the Multan District, but we declined to permit him to refer to this document because we found that it had not been proved and placed on the record. There is, however, the statement of Gulab (P. W. 3) to the effect that :

> according to the Riwaj-i-am governing the prostitutes a giri after marriage forfeits her share in her parent's property. Property inherited or obtained from the husband goes to the husband's relatives and not to the parent's family.

I am not disposed to place much value on this statement of a solitary witness to prove a custom of such importance and in any case would be disposed to hold that such a custom if proved is opposed to public policy and is immoral and consequently unenforceable in the British Indian Courts. Morever even if such a custom exists and is enforceable it does not necessarily follow therefore that the converse proposition is established that the heirs under the Mahomedan law of a prostitute who has contracted marriage and has discarded the profession of the prostitutes are also disqualified from inheriting her estate even if they be prositutes.

We have next to consider the question of limitation. The suit as I have already mentioned, involves two prayers : (1) for possession of the property of which Mt. Rani was dispossessed in January 1917 ; and (2) for a declaration of title in respect of the property which was in possession of the mortgagees. It is conceded by counsel for the appellants that the suit so far as the prayer for possession of the property first above named is concerned is within time, but he contends that it is barred by time so far as the prayer for declaration of title as owner with regard to the second set is concerned. It is common ground that Art. 120, Sch. 1, Lim. Act, governs the case so far as this prayer for declaration is concerned. Art. 120 provides :

> that the time within which a suit for which no other period is provided in Sch. 1, Lim. Act, must be filed is six years and that this period must be counted from the date when the right to sue accrues.

The question therefore that we have to decide is when the plaintiff's right to sue accrued in this case.

The contention of the appellants is that the right to sue accrued at the latest on the 11th November 1913 when the Collector of Multan ordered that the mutation in the name of Mt. Rani be substituted by one in favour of the two widows, Mt. Umrao Bibi and Mt. Jindwaddi. The case of the plaintiffs, on the other hand, is that the time began to run from the 4th January 1917 when the order of the Collector was actually given effect to and the name of Mt. Rani was removed from the revenue records, and as a result she was dispossessed of the properties which had been formerly in her possession. It is asserted that it was on this occasion that her rights were really jeopardized by any action taken by, or at the instance of, the defendants and that before this it was not necessary for her to take steps to safeguard her interests as she was in actual possession of such of the property as was capable of being taken possession of and her name still stood in the column of ownership in the revenue records with regard to all the properties in dispute in the suit.

It is also the case of the plaintiffs that the property with which we are now concerned being in the actual possession of the mortgagees the only right which descended to the heirs of Mt. Mughlani Bibi was the right to redeem it and not a right of immediate possession thereof and, therefore, that it was really an incorporeal right that vested in Mt. Mughlani Bibi and her heirs which not being capable of being actually retained by either party the possession thereof must be deemed to be with the rightful owner of it. This suggestion is due to the phraseology of S. 45, Punjab Land Revenue Act, on which reliance is placed by the plaintiffs and which provides that :

> a person who is in possession of any right and against whom an entry has been made in the Record-of-Rights may institute a suit under

the provisions of Chap. 6, Specific Relief Act, for a declaration of such right.

It is admitted on both sides that the period of limitation for such a suit is six years and it is therefore contended on behalf of the respondents and that Mt. Rani having been found to be the rightful heir to Mt. Mughlani Bibi must be deemed to be in possession of the equity of redemption in the property with which we are now concerned and that as the entries in the Record-of-Rights were made against her on '4th January 1917 it is from that date that time for a suit under S. 45, Land Revenue Act, began to run against her. If that view is correct then the present suit which was instituted on 10th December 1921 must be held to be within limitation.

The counsel for the appellants contends that it is the first denial of the plaintiff's right that gave her a right to sue for a declaration and that even if it be held that there were later denials on the appellants a fresh cause of action did not accrue in favour of the plaintiffs on each subsequent denial. The cases of *Khushal Singh* v. *Kanda* (7) and *Ghulam Hussain* v. *Saifullah Khan* (8) were cited in support of this contention. In the first of these cases an adoption was made by a proprietor more than six years before the institution of the suit and later a gift of his property was made by him to the adopted son. In a suit by the reversioners to set aside the gift it was held by this Court that the right to impeach the adoption having become barred by limitation the suit to set aside the gift was also barred by time as the gift did not involve any further denial of the rights of the reversioners than was involved in the adoption. This case in my opinion does not assist us in the present case. The adoption of a son amounts to a complete infringement of the rights of the reversioners and the gift to the adopted son is merely an acceleration of what is bound to happen in course of time. No fresh cause of action in favour of the reversioners therefore arises by virtue of the gift. In the present case it cannot be predicated that the defendants by merely asserting their title to the mortgaged property and denying the plaintiffs' title thereto in any way interfered with the rights of the latter and improved their own position with regard to such rights. In the second reported case the right of the plaintiff to claim a partition of the property in dispute was denied by the defendant in the partition proceedings before the revenue officer who decided the objection in the defendant's favour and declined to give a share to the plaintiff. The proceedings had however to be kept in abeyance for years owing to civil litigation between the parties about other lands, and on their revival the plaintiff again claimed a share in the same property but the claim was again negatived. In a suit for declaration of title instituted by the plaintiff more than six years from the first denial and adjudication thereon by the revenue officer it was held that the suit was barred by time as the resistance offered to the plaintiff's claim on the second occasion was merely a reiteration of the former resistance and not a fresh invasion of his rights. A revenue officer has jurisdiction to adjudicate on disputes as to title in partition proceedings and to enforce them. It is to be observed that in this case there was adjudication against the plaintiff by the revenue officer as a result of an objection raised by the defendant in the partition proceedings which were not dropped but were merely kept in abeyance ; therefore there was a clear infringement of the plaintiff's right on the first occasion and the second denial did not affect the title of either party to the disputed property. This case is also, therefore, distinguishable from the present case as here it is the action of the revenue officer in 1917 and the consequent dispossession of Mt. Rani that really affected the plaintiff's title to the property in dispute.

Reliance was also placed by the appellants' counsel on *Sheo Gopal* v. *Bishen Singh* (9) and *Hakim Singh* v. *Waryama* (10) in which it was held that even if the right to demand a correction of an entry in the revenue record is lost by time, a party may be entitled to a declaration of his proprietary title to the land claimed. I am unable to see how these cases help the appellants ; they seem on the other hand to favour the contention of the respondents as it appears to follow from the law laid down therein that an

(7) [1919] 56 I. C. 931.
(8) [1917] 79 P. R. 1917=42 I. C. 846=140 P. W. R. 1917.

(9) [1880] 30 P. R. 1880.
(10) [1907] 140 P. R. 1907.

adverse entry in the Record-of-Rights even if allowed to remain unchallenged does not necessarily extinguish the right of the party against whom such entry has been made and a fortiori an order to alter the entry to the prejudice of the party without the actual alteration of the entry cannot by itself extinguish the right unless the other party can prove adverse possession for the statutory period or some similar reason in support of his plea of such extinction. In the present case the mere assertion of a claim by the defendants followed by an order to substitute their names in place of the plaintiff's name cannot be held to extinguish the undoubted title of the latter to the mortgaged property and to pass it to the defendents. The true test seems to me to be whether, if Mt. Rani files a redemption suit against the mortgagees, the latter can defeat it on the plea that she has lost her right by the adverse claim of the defendants or in the alternative whether the defendants can succeed in a suit for redemption in the presence of Mt. Rani. In my opinion the answer must in both cases be in the negative.

On behalf of the respondents the cases of *Muhammad Hanif* v. *Ratan Chand* (11) and *Bela Singh* v. *Lakhmi Das* (12) and *Hakim Singh* v. *Waryama* (10) were cited in which it was held that each invasion of the plaintiffs' right gave them a fresh cause action for a suit for declaration of title, but it is to be observed that all these cases related to immovable property which was actually in possession or in the enjoyment of the respective plaintiffs and consequently each subsequent denial by the defendant was held to be a fresh infringement of the plaintiffs' right. These cases therefore do not afford much assistance in deciding the question now in issue. Thus no judicial authority has been cited by either party which is exactly applicable to the facts of the present case. The principle, however, is fully established that if a plaintiff is in possession or enjoyment of the property in suit he is not obliged to sue for a declaration of title on the first or each succeeding denial of his title by the defendant. He may look upon each denial with complacency or at his option may institute a suit to falsify the assertions of the other side. But when he finds that his rights are being actually jeopardized by the action or assertion of the defendant then he must take proceedings within six years from the date of such actions or assertions.

Having regard to the fact that the defendants are not in the actual enjoyment of the right in dispute and have never been so and in view of the rule that possession of incorporeal rights must be deemed to be with the rightful owner unless the person who disputes such rights can prove his actual enjoyment thereof or effective disturbance by him of the plaintiff's title for the statutory period, I consider that the present suit is within limitation, whether it is a suit under S. 45, Punjab Land Revenue Act or an ordinary suit for declaration of title under S. 42, Specific Relief Act.

A distinction was sought to be drawn by the appellants' counsel between the two kinds of suit, but the matter is not of much importance in view of what I have stated above, though personally I am unable to set any distinction, because S. 45, Punjab Land Revenue Act, also contemplates a declaratory suit with or without consequential relief under the provisions of the Specific Relief Act. It does not create a new description of suit but merely indicates the remedy of a person who may feel aggrieved by an adverse entry in the Record-of-Rights ; in other words it specifies an occasion when a party may bring a declaratory suit under the provisions of the Specific Relief Act.

In connexion with this part of his case the learned counsel for the appellants invited our attention to para. 4 of the plaint and contended that the plaintiff's did not in that paragraph base their cause of action on the reversal of the entries in favour of the defendant and consequent dispossession of the plaintiff, but that they definitely stated that the cause of action accrued on 13th June 1913.

Now, it is no doubt true that in the plaint the plaintiffs did not mention the date of the reversal of the entries in favour of the defendants nor of their dispossession by them, but the learned Senior Subordinate Judge has held that this took place on 4th January 1917. This finding is not attacked before us by the appellants. Moreover, the

(11) A. I. R. 1922 Lah. 94=3 Lah. 43.
(12) A. I. R. 1925 Lah. 391=6 Lah. 132.

Civil Procedure Code nowhere provides that the plaintiff shall state in a separate paragraph of the plaint the date of the accrual of the cause of action. All that it requires is that the facts constituting the cause of action and when it arose should be stated in the plaint. Order 7, R. 1, Civil P. C., is quite clear on this point and the forms of the plaints and the pleadings in Appendix A of Sch. 1, Civil Procedure Code, do not contain a separate paragraph stating when the casue of action arose. The omission to mention the dates of the reversal of the entries and dispossession of the plaintiffs was not noticed by the parties when the issues were framed; but the necessary information, it appears, was supplied during the trial. In my opinion this was merely a formal omission which does not in any way affect the merits of the case and the plaintiffs cannot be tied down to the date of the accrual of the cause of action mentioned in the plaint. The Court is entitled, as the learned Senior Subordinate Judge has done, to determine the date on which the cause of action arose from the facts alleged and proved. After an examination of the pleadings and the finding of the Senior Subordinate Judge I have no doubt that it was on 4th January 1917 that the right of the plaintiffs was really infringed by the defendants necessitating the present suit and, therefore, the time must be held to run against them from that date and not earlier.

I therefore, hold that Mt. Rani's title to the property in dispute had not been extinguished at the date of the suit by any act of the defendants and consequently that the latter had not then displaced her title by their own and that the present suit was rightly held by the trial Court to be within time, having been brought within six years of the invasion of the plaintiffs' right by the defendants by getting their names recorded in the revenue records in place of the plaintiff's name and by taking possession of the estate of Mt. Mughlani Bibi

For the reasons stated above I am of opinion that the decree of the Senior Subordinate Judge must be affirmed and the appeal dismissed with costs.

Broadway, J.—I concur in dismissing the appeal with costs.

R.D. *Appeal dismissed.*

A. I. R. 1928 Lahore 523

ADDISON, J.

Fazal Din—Plaintiff—Appellant.

v.

Chaudhri and *others*—Defendants—Respondents.

Second Appeal No. 2027 of 1926, Decided on 13th March 1928, from decree of Dist. Judge, Jhelum, D/- 19th July 1926.

Custom (Punjab) — Alienation — Awans of Jhelum District.

A sonless Awan of Jhelum District can sell ancestral property in the presence of his near collaterals to a stranger: 151 *P.L.R.* 1914; 72 *P.R.* 1914; *Dist.*: 56 *P.R.* 1915; 53 *P.R.* 1899; 26 *P.R.* 1901 and 46 *P.R.* 1900; *Rel. on.* [P 525 C 1]

Anant Ram—for Appellant.

Amar Nath Chona—for Respondents.

Judgment.*—Four collaterals belonging to different branches of the same family sold in 1907 the land in dispute to Chaudhri, the husband of the sister of Sharaf, one of the vendors. It would appear that the sale was made in order to give Chaudhri a better chance of being appointed a lambardar. No member of the family objected to the sale till in 1925, Fazal, the sole plaintiff, instituted the present suit for a declaration that the sale in question being effected without necessity and consideration should not affect his reversionary rights. He was able to bring this suit so late because at the time he was a minor. It is in evidence that he had at least one adult brother alive at the time of the sale. The plaintiff is the son of Haidar, brother of Sharaf, one of the vendors. He is thus the nephew of the vendee's wife. He was born just prior to the sale. The trial Court decreed the claim, but on appeal the learned District Judge dismissed the suit. He granted a certificate under S. 41, Punjab Courts Act, that there was a doubtful question requiring decision regarding the validity of the following custom, namely, whether a childless Awan of the Jhelum District can make an alienation of ancestral property in favour of a stranger in the presence of his own near collaterals. On this certificate this second appeal was preferred, the sole ground of appeal being that the reply to the question stated in the certificate should be in the negative.

It has frequently been held that among Awans of the adjoining district of

[* No Letters Patent Appeal was filed—Ed.]

Jhelum, Shahpur, Mianwali, Rawalpindi and Attock there is an extensive power of alienation especially in the absence of sons. It was held in *Sher Mahomed* v. *Ali Mahomed* (1), that although Awans of tahsil Talagang in the Jhelum District have extensive powers of alienation of ancestral immovable property to their relatives such as daughters, sisters and their sons, their powers are limited when the alienation of the property is in favour of a stranger whether he is an Awan or not. This was a decision of a Judge in Chambers and it is the principal case relied upon by the appellant's counsel. *Lal Khan* v. *Nura* (2) was also relied upon by him, but it does not seem to me to be in point. It was held in it that Customary Law did recognize a distinction between the powers of alienation of a sonless proprietor and those of a proprietor who had sons and that it had not been proved that among Awans of the Talagang tahsil a proprietor who has sons has unlimited power to deal with his property as he pleases.

It was held in *Nur Ahmad* v. *Ghulam Hussain* (3), a case dealing with the powers of alienation of Awans of tahsil Rawalpindi, that by custom a childless proprietor had power to alienate ancestral property in the presence of a first cousin without necessity. This was a case of a sale, in which it was held that necessity had not been established. It is thus on all fours with the present case except that it decided the custom among Awans of Rawalpindi, while the present case is concerned with Awans of Pind Dadan Khan tahsil of the Jhelum District. Again it was held in *Devi Das* v. *Bhakra* (4), that by custom among Awans of the Mianwali tahsil a childless proprietor had an unrestricted power of disposing by sale of his ancestral land. This case also is on all fours with the present case except for the distinction already noted. It was held in *Ali Mahomed* v. *Dulla* (5), that by custom among Awans of the Shahpur District, a sonless proprietor could bequeath his land to his daughter's sons in the presence of his brothers.

The next case, *Nura* v. *Tara* (6), deals with Awans of the Talagang tahsil of the Jhelum District. It was held in it that among Awans a gift by a childless male proprietor of ancestral land to his wife's sister's son in the presence of a brother was valid. It is true that this was a case of gift, but it shows the wide powers of Awans to alienate their land.

In *Khuda Baksh* v. *Wahamali* (7) it was held that the plaintiff had failed to prove that by custom among Awans of Talagang tahsil his father was incompetent to make an alienation of ancestral property in his (the sons') presence. This case goes very far and does not recognize the distinction usually made between alienations by a sonless Awan and those by an Awan with male issue. It is true that it was pointed out in *Khuda Bakhsh* v. *Ahmad Khan* (8), that the above case might have been decided on a different ground, but it is important to show the view taken by a Judge of this Court as to the powers of Awans to alienate their property.

It was held in *Nur Khan* v. *Sarfruz* (9), that by custom among Awans of the Talagang tahsil a childless proprietor could sell his ancestral property to his first cousin, once removed, in the presence of his stepbrother even without necessity. This again is not quite on all fours with the present case. This ruling shows that when a vendee is a near collateral the sale to him without necessity is valid. In the case before me the vendee is the husband of the sister of one of the vendors and I have already shown that there is little or no distinction made regarding alienations to collaterals and to near female relatives.

Certain remarks in *Khudayar* v. *Fatteh* (10), may be quoted with advantage. Rattigan, J., at p. 22 in discussing *Nura* v. *Tara* (6) said:

> A perusal of the judgment as a whole can leave no doubt that the Judges who decided the case under discussion were satisfied that Awans had by custom in the Jhelum District, no less than in the districts of Shahpur and Bannu (now Mianwali) practically unrestricted powers of alienation.

(1) [1914] 151 P.L.R. 1914=25 I.C. 715=60 P.W.R. 1914.
(2) [1914] 72 P.R. 1914=25 I.C. 556=233 P.L.R. 1914.
(3) [1915] 56 P.R. 1915=51 P.L.R. 1916=30 I.C. 90=135 P.W.R. 1915.
(4) [1899] 53 P.R. 1899.
(5) [1901] 26 P.R. 1901=65 P.L.R. 1901.
(6) [1900] 46 P.R. 1900.
(7) [1911] 88 P.R. 1911=144 P.L.R. 1911=10 I.C. 36=116 P.W.R. 1911.
(8) [1913] 114 P.R. 1913=151 P.L.R. 1913=19 I.C. 459=124 P.W.R. 1913.
(9) [1912] 100 P.R. 1912=249 P.L.R. 1912=16 I.C. 21=238 P.W.R. 1912.
(10) [1906] 8 P.R. 1906=64 P.L.R. 1906.

He also pointed out that the gift in *Nura* v. *Tara* (6) was to a wife's sister's son. Again at p. 24 the learned Judge said:

> It has been found as the result of further and more exhaustive enquiry that Awans in various parts of the province concede far larger powers of alienation to the proprietor in possession than are admitted by other agricultural tribes.

The customary law of the Jhelum District is also in favour of the view that a sonless Awan has full power of alienation other than that of gift. This is the reply to question 105 of Talbot's customary law of the Jhelum District though there is a note that there are a good many dissentients who say that it is not lawful for him to alienate without necessity. At p. 8 of this Customary Law occurs the following remark:

> But a proprietor having no sons or son's sons is among Talagang Awans almost absolute owner of his whole estate and can gift it to any relative without the consent of the other.

In view of this statement in the Riwaj-i-am the onus was upon the plaintiff to establish that a sonless Awan could not sell his ancestral property without necessity. The authorities referred to show that this power has been conceded at different times to Awans in different parts of the country and that in all parts it has been held that Awans have much wider powers of alienation than other tribes. The plaintiff, however, has given little or no evidence to show that a sonless Awan has not the power of selling ancestral property. Some of his witnesses have stated that there is a general power under custom to make a will and to gift land in the case of Awans, whereas the customary law of the district does not lay down such a general proposition as regards gifts. One witness did state that a sale or mortgage by a sonless Awan could only be entered into for necessary purposes. On the other hand the defendants' witness stated that the power of sale existed in the case of a sonless proprietor as recerded in the Riwaj-i-am. On the record, therefore, I agree with the finding of the learned District Judge that a sonless Awan of the Jhelum District can sell ancestral property in the presence of his near collaterals to a stranger.

I dismiss the appeal with costs.

A.L./R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 525

ZAFAR ALI, J.

Jai Chand—Defendant—Appellant.

v.

Fauja and *others*—Plaintiffs—Respondents.

Second Appeal No. 698 of 1927, Decided on 7th December 1927, from decree of Dist. Judge, Hoshiarpur, D/- 18th December 1926.

Wajib-ul-arz — Construction — Adna malik competent to alienate land by will or gift—He cannot be held competent to alienate it in any other way.

Where according to the Wajib-ul-arz an adna malik can alienate his land by will or gift, it does not follow, in the absence of evidence to the contrary, that he is also competent to sell or mortgage or alienate it in any other way.

[P 526 C 1]

Mehr Chand Mahajan—for Appellant.

Gulla Ram—for Respondents.

Judgment.*—The defendant-appellant is the ala malik of the land in dispute and the land was in possession of the adna maliks, Indar and Shaman. In 1890 a mutation order was made at the instance of Indar and Shaman according to which Sih and Bishnun were shown as adna maliks in possession along with Indar Shaman. Indar and Shaman both died some time before 1914, and in that year Fauja, etc. (the plaintiff-respondent in the present case) brought a suit for possession of the land stating that the land was ancestral, *qua* them, that they were the reversioners of Indar and Shaman and that the gift made to Sih and Bishnun was not binding upon them. This suit ended in a compromise and a decree was passed in accordance therewith. The terms of the compromise were that Sih and Bishnun would remain in possession of the land so long as they should live and Fauja etc., would succeed to the whole of it if Sih and Bishnun should die childless, and to half of it if they should leave male issue. Sih and Bishnun died childless in August 1921, and the land was mutated in the name of ala malik on the ground that the line of adna malik had become extinct

Fauja, etc., sue for possession of the land. According to the wajib-ul-arz the land of a sonless adna malik must revert to the ala malik unless the former should have alienated it by gift or will.

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* [Letters Patent Appeal No. 21 of 1928 was dismissed *in limine* on 15th March 1928.]

As regards Fauja, etc. plaintiffs, it was found that they were not the collaterals of Indar and Shaman and so the land was not ancestral *qua* them. That being so they had no locus standi to challenge the gift made by Indar and Shaman to Sih and Bishnun. But Fauja, etc., based their claim on the said entry in the Wajib-ul-arz and contended that the alienation by compromise was equivalent to a gift or will. This contention found favour with the learned District Judge and he decreed their suit. The defendant appeals.

I am of opinion that by no stretch of language or imagination the compromise can be said to be equivalent to a gift or will. It is clear that Fauja, etc., had no right whatsoever to challenge the gift to Sih and Bishnun, but the latter, in order to get rid of the litigation, brought it to an end by a compromise. They thereby neither made a will nor a gift. They evidently had not the patience and capacity, or perhaps the necessary funds, to fight out the case and to extricate themselves from that predicament and, therefore, sought refuge in a compromise.

Evidently they did so under compulsion. A gift or will is on the other hand a voluntary act.

The next question is: Could the terms of the compromise be operative as against the defendant or, in other words, was an adna malik competent to alienate his land or divert succession in any way other than by will or gift. Nor is it clear that according to the Wajib-ul-arz the power of alienation that was recognized was by will or gift. If an adna malik can alienate his land by will or gift, it does no follow, in the absence of evidence to the contrary, that he is also competent to sell or mortgage or alienate it in any other way.

I, therefore, accept the appeal and, setting aside the order of the lower appellate Court, restore that of the trial Court. The plaintiffs to pay the appellant's costs throughout.

N.K. *Appeal accepted.*

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* A. I. R. 1928 Lahore 526

ZAFAR ALI AND DALIP SINGH, JJ.

Neki Ram—Defendant—Appellant.

v.

Kure and *another*—Plaintiffs—Respondents.

Second Appeal No. 2180 of 1923, Decided on 24th April 1928, from decree of Dist. Judge, Karnal, D/- 4th August 1923.

* *Hindu Law—Alienation—Alienee knowing alienor to be spendthrift—Alienee is bound to see that the money is utilized for the purpose for which it is borrowed.*

It is not generally the alienee's duty to see that the money advanced by him was properly expended for the purpose for which it was advanced. But where the alienee knows the spendthrift character of the vendor and knows that money which he might advance will not be spent for the purpose for which it is meant, and he still advances money, without seeing that it is applied for the purposes for which it is borrowed, the sale is apt to be set aside.

[P 526 C 2 ; P 527 C 1]

Shamair Chand—for Appellant.

N. C. Mehra—for Respondents.

Dalip Singh, J.—The plaintiff in this case brought the usual declaratory suit to avoid two sales dated 14th February 1921, and 19th December 1921, respectively, by his father, defendant 2. The trial Court granted the plaintiff a decree with proportionate costs to the effect that the sale dated 14th February 1921 would bind him to the extent of Rs. 600 only, while the sale dated 19th December 1921 would not bind him at all. Both sides appealed to the learned District Judge. The learned District Judge dismissed the appeal of the alienee and the relevant words in his judgment are as follows :

Under the circumstances I entirely agree with the Sub-Judge, that it was Subedar Neki Ram's duty to see that Bharat Singh applied to its proper purposes the money raised by the second sale at any rate and he has failed to do so. I reject his appeal.

He accepted the appeal of the plaintiff holding that the alienee was well aware of the character of the alienor and, therefore there was no necessity for the advance of Rs. 650 which had been advanced for, but was not applied to redeeming the mortgages. He, therefore, accepted the plaintiff's appeal with costs.

In second appeal it has been contended that the learned District Judge is obviously wrong in holding that it was the alienee's duty to see that the money was properly expended for the purpose for which it was advanced. This is clear and has not been contested by the counsel for the respondent. We have, however, heard the case as a first appeal from the judgment of the learned Sub-Judge. We agree with the learned Sub-Judge in holding that as regards the second sale the item of Rs. 1,900, which was advanced for the purpose of redemption of land, was not for necessity. In the previous sale of February 1921 the alienee had advanced

Rs. 560 for the purpose of redeeming land, no such redemption had admittedly taken place and we fail entirely to see how the alienee again relied on the simple word of the alienor that he intended to redeem the land. As pointed out by the learned Sub-Judge the sale took place in December and as the mortgages were with possession the alienor could not obtain possession before June at the earliest. The alienee states that he does not reside in the village, but he does reside in Sonepat and belongs to this village and the distance between them is only eight miles and as he has been purchasing property in his ancestral village it is probable that he is acquainted with the happenings of that village. He must, therefore, be taken to have known the character of the vendor who undoubtedly is proved to be a spendthrift. We, therefore, agree with the Sub-Judge in holding that there was no justification for the advance of Rs. 1,900 to the alienor.

As regards the first sale: we find from the memorandum put in by the patwari that at the time of that sale there was an existing mortgage of Rs. 500 for redemption of which the money might justifiably have been advanced. Taking all the circumstances of the case into consideration we are satisfied that the learned Sub-Judge was right in allowing this Rs. 560 plus Rs. 40 incurred as expenses for registration. As regards the other three items in the first sale we agree with the finding of the learned Sub-Judge that the debts are not proved to exist.

We, therefore, restore the decree of the trial Court. As regards costs, the plaintiff should bear the costs of his appeal before the District Judge and proportionate costs of the present appeal before us. The alienee should bear the costs of his appeal before the District Judge and proportionate costs of the appeal before us.

N.K. *Appeal allowed.*

A. I. R. 1928 Lahore 527

JAI LAL, J.

Ismail Khan—Plaintiff—Petitioner.

v.

Mt. Umar Jan and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 616 of 1927, Decided on 24th February 1928, from order of Dist. Judge, Rawalpindi, D/- 7th June 1927.

(a) *Punjab Courts Act* (1918), *S. 41—District Judge failing to decide a particular issue relating to custom—Whether certificate necessary (doubted).*

It is doubtful whether a certificate is at all necessary if the party aggrieved wishes to appeal from the decree of the District Judge on the ground that he has failed to decide a particular issue involved in the case, even if that issue relates to a matter of custom. [P 528 C 1]

(b) *Punjab Courts Act* (1918), *S. 41 (1) (a)—Certificate is necessary only on grounds covered by this section.*

It is only when the grounds in support of the appeal are covered by S. 41 (1) (a) that a certificate by the District Judge is necessary and not otherwise. [P 528 C 1]

(c) *Punjab Courts Act* (1918), *S. 41 (3)—Ordinarily it is not the practice of the Lahore High Court to interfere with the order of the District Judge.*

The discretion of refusing or granting a certificate has expressly been given by the legislature to the District Judge and ordinarily it is not the practice of the Lahore High Court to interfere with the order passed by the District Judge, unless it appears that it is perverse or proceeds on an apparent error in procedure or on a misapprehension of the nature of the case before him or of his jurisdiction; 50 *I. C.* 651 and 69 *I. C.* 425; *Dist.* [P 528 C 2]

Mohammad Amin—for Petitioner.

Abdul Qadir—for Respondents.

Judgment. — This is a petition for revision of an order dated 20th July 1927 passed by the District Judge of Rawalpindi declining to grant a certificate to the petitioner under S. 41 (3), Punjab Courts Act. From the pleadings and the issues framed two points arose in the litigation before the District Judge. Firstly whether according to the custom applicable to the parties the collaterals in the third degree excluded the daughters in the matter of inheritance and, secondly, whether a daughter who had succeeded to the inheritance lost her right on marriage.

The District Judge held that collaterals in the third degree did not exclude daughters. He did not, however, give any finding on the second issue. Whether this was argued before him or not does not appear from the record. An application was thereupon made to the District Judge for grant of a certificate, but curiously enough the custom on which the District Judge has given a finding was not made the subject of the petition. On the other hand the only custom on which the certificate was prayed for was that the marriage of a daughter who had succeeded to the estate

of her father had the effect of depriving her of her inheritance. The District Judge thereupon passed the order : " I am not prepared to grant the certificate prayed for." It would thus be observed that the certificate was asked for on a point which had not been decided at all by the District Judge. It is doubtful whether a certificate is at all necessary if the party aggrieved wishes to appeal from the decree of the District Judge on the ground that he has failed to decide a particular issue involved in the case, even if that issue relates to a matter of custom.

In my opinion the proposed appeal was not governed by S. 41 (1) (a). It is only when the grounds in support of the appeal are covered by S. 41 (1) (a) that a certificate by the District Judge is necessary and not otherwise. Moreover, even if such a certificate was necessary, the District Judge has declined to grant one. The learned counsel, however, contends that the order of the District Judge is very brief. That order reads as follows :

I am not prepared to grant the certificate prayed for. Reliance is placed on *Chandot* v. *Sona Devi* (1) and *Nur Mahomed* v. *Mehr Chand* (2). In the former of these cases there were two matters mentioned in the application for grant of a certificate in respect of which the certificate was prayed for. The District Judge discussed one of the points only and without referring to the other points involved declined to grant a certificate. The Chief Court of the Punjab remanded the case to him with direction to consider the second point also. This was because it was apparent from the order of the District Judge that he had omitted to apply his mind to one of the points involved in the petition. That by no means is the case in the present case. If a question of custom could arise on the petition made to the District Judge that was whether or not daughters were excluded by the collaterals in the third degree, as that was the only question of custom that had been decided by the District Judge and it cannot, therefore, be predicated that that question was not present in the mind of the learned Judge, when he refused to grant the certificate. The only order written by the District Judge was " refused". It was held that was not sufficient. The learned Judge remarked that from the order of the District Judge refusing a certificate it must appear that, having regard to the nature of the case and the point involved, the District Judge had applied his mind to the question on which the certificate was to be granted or refused. I am unable to hold that this case supports the contention of the petitioner before me.

Perhaps it would have been more satisfactory if the learned Judge had written a more detailed order, but the discretion of refusing or granting a certificate has expressly been given by the legislature to the District Judge and ordinarily it is not the practice of this Court to interfere with the order passed by the District Judge, unless it appears that it is perverse or proceeds on an apparent error in procedure or on a misapprehension of the nature of the case before him or of his jurisdiction.

I am, therefore, unable to hold that in this case there is any ground for revising the order of the District Judge, firstly, because, in my opinion it does not appear from his order that the simple point of custom which he has decided against the petitioner was not present before his mind when he refused the application ; and secondly, the certificate was sought on a point which had not been decided by him. I must, therefore, assume that he purported to refuse to grant a certificate on the point which he had decided against the petitioner and which, he considered, did not comply with the conditions relating to the grant of a certificate. I dismiss the petition with costs.

A.L./R.K. *Petition dismissed.*

(1) [1919] 50 I. C. 651.
(2) [1921] 69 I. C. 425.

A. I. R. 1928 Lahore 528

TEK CHAND, J.

Lal Chand—Judgment-debtor—Appellant.

v.

Firm Dwarka Dass-Badri Parshad—Decree-holder—Respondent.

Misc. First Appeal No. 803 of 1927, Decided on 16th December 1927, from order of Sr. Sub-Judge, Delhi, D/- 21st March 1927.

(a) Civil P. C., O. 21, R. 50—Summons served on authorized agent of partners is individual service on partners and the decree so obtained can be executed against the partners personally.

Where the summonses issued to the firm were duly served upon an authorized agent who actually appeared in Court and produced a power-of-attorney executed by both partners in his favour which empowered him to act not only on behalf of the firm, but on behalf of each partner individually and jointly:

Held: that the service on him was service upon each partner individually and a decree passed against the firm can be executed against the partners individually: 19 *C. W. N.* 1008, *Ref.* [P 529 C 2]

(b) Civil P. C., O. 30, R. 6—Individually.

The word "individually" in R. 6 is not synonymous with "in person": 78 *P. R.* 1918, *Foll.* [P 529 C 2]

Sardha Ram—for Appellant.

Kishen Dayal—for Respondent.

Judgment.—This is an appeal arising out of execution proceedings. The relevant facts are that the respondent instituted a suit against the firm of Ghumandi Lal-Lal Chand, piece goods merchants, Chandni Chowk, Delhi, through Lal Chand and Bhondu Mal (wrongly described in the plaint as Bunda Mal) as partners. The summonses were issued against the firm and were served on one Abad Bihari who held a power-of-attorney on behalf of Lal Chand and Bhondu Mal. Abad Bihari appeared and defended the suit, but none of the partners attended the Court personally at any hearing. It is admitted by both counsel now that the lower Court is not right in saying that Bhondu Mal, partner, appeared personally on some occasions. A decree was in due course passed against the firm and the decree-holder applied for execution of the decree against both the partners personally. Each of them objected that the decree could not be executed against him without the leave of the Court obtained under O. 21, R. 50, Civil P. C., as he had not been served individually as a partner during the pendency of the suit. The lower Court has disallowed this objection and the present appeal is on behalf of Lal Chand.

It is contended that under Cl. (1), R. 50 execution could proceed against the appellant personally only if he had been individually served as a partner and had failed to appear and that this was not done in this case. I am, however, of opinion that there is no force in this contention. The summonses issued to the firm were duly served upon Abad Bihari who actually appeared in Court and produced a power-of-attorney executed by both Lal Chand and Bhondu Mal in his favour on 27th July 1924. Now this power-of-attorney is in the widest terms possible. It empowers him to act not only on behalf of the firm, but on behalf of each partner individually and jointly Service on him, therefore, was service upon each partner individually. Moreover under O. 30, R. 5, read with R. 3, where persons are sued as partners in the name of the firm and the summons is served either upon one or more of the partners or at the principal place at which the partnership is carried on and no notice as required by the first part of R. 5 has been given, the person served shall be deemed to have been served as a partner. Accordingly service on Abad Bihari must be held to be service upon each partner individually. Reference may in this connexion be made to a Division Bench ruling reported as *Baishnab Charan Shaha* v. *Bank of Bengal* (1).

Mr. Sardha Ram has contended that in this case the appellant never appeared individually as contemplated by R. 6, O. 30, but it has been held that the word "individually" in R. 6 is not synonymous with "in person": see *Bridges & Co.* v. *Shamas Din & Co.* (2). I, therefore, find no force in this contention of the appellant's learned counsel.

Lastly, Mr. Sardha Ram sought to argue that his client had left the firm long before the suit was instituted, but this plea was not raised during the trial and does not appear to have been argued before the lower Court, and cannot be allowed to be agitated in appeal for the first time.

For the foregoing reasons the appeal fails and is dismissed with costs.

R.K. *Appeal dismissed.*

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(1) [1916] 19 C. L. J. 581=26 I.C. 866=19 C. W. N. 1003.

(2) [1918] 78 P. R. 1918=105 P. L. R. 1918 =47 I. C. 422=155 P.W.R. 1918.

A. I. R. 1928 Lahore 530

TEK CHAND, J.

Raja Singh—Defendant—Appellant.

v.

Daulat Ram and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No 1346 of 1927, Decided on 5th December 1927, from decree of Dist. Judge, Ambala, D/- 28th February 1927.

Co-sharer—Sale of a house in abadi by a non-proprietor to one co-proprietor — Another proprietor suing for its possession—Decree directing to remove the materials of the house from the site cannot be passed.

A co-proprietor can occupy a portion of the abadi and build a house on it. If instead of buildnig it himself he has purchased from a non-proprietor the superstructure built by him, his position is not made worse in any way. Therefore in a suit by a co-proprietor for possession of a house in the abadi purchased by another co-proprietor a decree directing to remove the materials of the house from the site cannot be passed: *A. I. R.* 1927 *Lah.* 197, *Dist.*

[P 530 C 2]

Fakir Chand for *Jagan Nath Agarwal*—for Appellant.

Muhammad Monir—for Respondents.

Judgment *—Two non-proprietors occupied a house in the abadi of mauza Jatwar in the Ambala District and sold it with the site underneath to Raja Singh one of the proprietors in the village. The plaintiffs, four in number, who are members of the proprietary body sued for possession of the house alleging that the site underneath the house had fallen to their share in a partition and that, in any case, the sale of the house by the non-proprietors was invalid according to the village custom. The defendants denied the plaintiffs' exclusive ownership of the site and contended that non-proprietors in the village had according to custom the right to alienate it. The Subordinate Judge held a lengthy enquiry into the custom relating to the power of alienation by non-proprietors and found that the alleged custom was not proved. He also came to the conclusion that the plaintiffs had failed to prove that on the alleged partition the house in question and the site underneath it fell exclusively to their share. He accordingly held that the sale was invalid, but in view of the fact that the vendee was himself a proprietor in the village and had a right equal to that of the plaintiffs, he passed a decree for joint possession of the site in favour of the plaintiffs.

Both parties preferred appeals to the District Judge who upheld the finding of the trial Court both with regard to the failure of the plaintiffs to prove the alleged partition and that of the defendants to prove the alleged custom. He accordingly confirmed the decree passed by the trial Court in favour of the plaintiff giving them joint possession of the site in suit, but added a direction that the defendant-vendee must within three months from the date of the District Judge's decree remove the materials of the house from the site. The vendee has come up in second appeal to this Court and Mr. Fakir Chand on his behalf has made a faint-hearted attempt to challenge the finding of the learned District Judge on the question of custom; but as no certificate had been granted, this Court is precluded from going into that matter.

The only, question, therefore, is what is the nature of the decree that is to be passed in favour of the plaintiffs-respondents. The sale of the house by the non-proprietors in favour of the appellant Raja Singh gave him no right whatsoever but at the same time this sale does not deprive him of the rights which he possessed as a member of the proprietary body irrespective of the sale. He is one of the members of the proprietary body and has done nothing to divest himself of those rights. As a proprietor he could occupy a portion of the abadi and build a house on it,

If instead of building it himself he has purchased from a non-proprietor the superstructure built by him, I do not think that his position is made worse in any way. In these circumstances all that the plaintiffs-respondents are entitled to is a decree for joint possession of the site. Mr. Muhammad Munir for the respondents has referred to a single Bench judgment of this Court in *Sultan Muhammad* v. *Surkhru Khan* (1), where a decree for joint possession of the site after removal of the materials standing thereon was passed, but the facts of that case were wholly distinguishable. There the sale had been originally effected by a non-proprietor in favour of a proprietor and the latter had re-sold the property to two strangers who were not among

* [No Letters Patent Appeal was filed.]

(1) A. I. R. 1927 Lah. 197.

the proprietary body and who had no right to retain possession of the house sold.

Accordingly I accept the appeal and vary the decree of the learned District Judge by striking out the direction contained therein that the defendant Raja Singh should remove the materials of the house. Having regard to all the circumstances of the case the parties shall bear their own costs in this Court.

N.K. *Appeal accepted.*

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*A. I. R. 1928 Lahore 531

FFORDE AND ADDISON, JJ.

Amir—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 954 of 1926, Decided on 15th December 1926, from order of Sess. Judge, Shahpur D/- 13th July 1926.

***Penal Code, S. 302—Murder—Youth of accused is no ground for imposing lesser penalty.**

The mere fact that the murderer is 19 or 20 years of age is a wholly insufficient reason for not imposing the extreme penalty.

[P 532 C 2]

Bodh Raj Sawhney—for Appellant.

Des Raj Sawhney—for the Crown.

Fforde, J.—The appellant Amir has been convicted under the provisions of S. 302, I. P. C., of having murdered his cousin Umaid Ali, a boy of 10 and 12 years of age, and has been sentenced to transportation for life. The learned Sessions Judge gave as his reason for imposing the lesser penalty the fact that the appellant is a youth between 19 and 20 years of age. The appellant appeals against his conviction and sentence, and the Crown has presented a petition under the provisions of S. 439, Criminal P. C. asking that the sentence of imprisonment be enhanced to the death penalty.

The story for the prosecution is shortly as follows:

The murdered boy had been for some years betrothed to a cousin of his named Mt. Subhani, a girl of 9 or 10 years of age. Some couple of months or so prior to the crime in question the appellant asked for the hand of this girl in marriage but was refused. About seven days before the occurrence he came to stay with Mt. Alan, who is the stepmother of the deceased and the mother of Mt. Subhani.

According to Mt. Alan he on two more occasions asked for the hand of Mt. Subhani and was again refused. On 7th May 1926 the appellant and the deceased left their house to take cattle out grazing. They went out alone, and the appellant came home a little before sunset without the deceased. On being asked what had happened to Umaid Ali, he replied that he had left him at about noon in order to fetch a kahi to stop a breach in a certain watercourse. The appellant's further explanation of the absence of Umaid Ali was that the latter told him that he felt hungry and would go home for his food. Mt. Alan thereupon searched the village for deceased, but could find no trace of him. Subsequently a number of villagers joined together in a search and the body of the deceased was discovered next morning buried in a pit. When brought before the committing Magistrate charged with the offence of having murdered Umaid Ali, the appellant, after one witness Mehra, had been examined, stated that he wished to relate the story of the death of Umaid Ali and he then proceeded to give an account. His account is that it came on to drizzle while the two were together in the fields, and that thereupon the deceased and he agreed to dig a pit in which they could take shelfrom the rain. Umaid Ali was cleaning the pit with a sickle while the appellant was levelling the walls and the banks of the pit with an axe. While so doing his axe accidentally struck Umaid Ali on the head and he died instantaneously from this injury. Being frightened at what he had done he buried the body in the pit and went home. The appellant further stated that one Lakhi had seen him digging the pit. When he again came before the committing Magistrate on 10th June the appellant retracted this statement. He then stated that he did not strike the deceased at all, that he did not bury the body in the pit, and in fact, denied any knowledge of the circumstances under which the deceased came by his death. On 10th July, however, when put on his trial before the Sessions Judge he admitted that his statement made on 10th June was correct. He repeated that he had dug a pit to protect himself and his clothes

from the rain. He admitted that Lakhi had met him and had seen him digging the pit, and he admitted having told Ahmad, son of Sajjada, that Umaid Ali had died as a result of having been accidentally struck by him with an axe; but he added that the police were there and this statement was made to Ahmed as the latter had threatened to kill him and had himself advised him to give that explanation. In his appeal to this Court the appellant refers to the various statements made by him in Court and states that this case relates to an occurrence which took place by accident.

There is not the slightest doubt that the appellant did admit that he had dug a pit, and did admit that he struck the blow which caused Umaid Ali's death, but he has throughout contended that this blow was the result of an accident. The only matter for consideration, therefore, is whether or not the injury was accidental. Ahmad, son of Sajjada (P. W. 14), has stated that when he asked the appellant whether he killed Umaid Ali accidentally or intentionally, the appellant replied that Umaid Ali was sitting in the pit digging it with his sickle and that he himself was standing on the bank, that he struck the wrong end of of the blade of his axe in the ground to level the bank but it accidentally came in contact with Umaid Ali's head and caused his instantaneous death, and, as he was afraid of being accused of murder, he buried the body. Lakhi (P. W. 12) has stated that a day before the body of the deceased was found buried in a pit he saw the appellant and the deceased before noon. The appellant had an axe in his hand and the deceased was standing close to him. The appellant was digging a pit with the axe at the time that he saw him. On enquiring as to what he was doing the appellant told him that he was digging a pit to protect themselves and their clothes from rain. The witness thereupon left them. The spot where this witness saw the appellant digging a pit was the spot where the body was subsequently discovered buried.

The medical witness who examined the body has stated that there was a deep incised wound five inches long by one-fourth of an inch wide about the middle of the head, running from the front backwards and that from this injury brain matter was oozing. The skull and its membranes underneath had been cut through. This witness was of opinion that death was due to the smashing of the skull caused by a heavy blow from some sharp edged weapon such as an axe. The wound opened the scalp. The blow, the witness says, was a heavy one inflicted with great force and was necessarily fatal.

There can be no doubt that the explanation of the appellant that this injury was caused by the axe accidentally striking the head of the deceased is absurd. Moreover, the explanation given by the appellant as to why he came to be digging a pit is also, in my opinion, a wholly incredible one. I am satisfied on the evidence that the appellant deliberately murdered Umaid Ali and dug the pit for the purpose of burying his victim's body; moreover, that he prepared this pit for the purpose of concealing the crime which he intended to commit.

The motive alleged was a desire to kill the person to whom the girl, whom he desired to wed, was betrothed. Whether this be the reason for the murder or not it is difficult to say with certainty. There is no doubt, however, that the appellant did desire to wed this girl; there is no doubt that he was refused her hand on more than one occasion when he asked for it, and there is no doubt that the deceased was himself betrothed to this girl. The probabilities are that these circumstances actuated the appellant in committing the crime in question.

I am satisfied that the conclusion of the Sessions Judge as to the guilt of the appellant is the only possible conclusion which could be arrived at, and accordingly, I would dismiss the appeal.

The Crown presses for an enhancement of sentence on the ground that no adequate reason has been given by the learned Sessions Judge for imposing the lesser penalty. As I have already said the learned Sessions Judge has given as his reason for not imposing the death penalty the fact that the appellant is 19 or 20 years of age. In my opinion that reason is wholly inadequate. The murder in the present case was a particularly ruthless and brutal crime. There are no extenuating circumstances whatsoever, and the mere fact that the murderer is 19 or 20 years of age, in my

opinion is a wholly insufficient reason for not imposing the appropriate sentence provided by law. I would accordingly accept the petition of the Crown and alter the sentence from one of transportation for life to that of death.

Addison, J.—I concur.

D.D. *Sentence enhanced.*

A. I. R. 1928 Lahore 533

BROADWAY, J.

Nur Din—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1997 of 1927, Decided on 24th February 1928, from order of Sess. Judge, Mianwali, D/- 1st August 1927.

Evidence Act, S. 45—Expert evidence on commission loses much of its value.

The evidence of an expert has always to be carefully weighed, but when given on commission its value is very considerably reduced.

[P 533 C 2]

Maya Das for *Ram Lal Anand*—for Petitioner.

Ram Lal—for the Crown.

Judgment.—Nur Din, son of Qadir Bakhsh, of Khushab, District Shahpur, was convicted by a Magistrate of the First Class of an offence under S. 409, I. P. C., and sentenced to four months rigorous imprisonment and the payment of a fine of Rs. 100 or in default to undergo rigorous imprisonment for a further period of three months. He appealed to the learned Sessions Judge who, while maintaining the conviction, reduced the sentence to rigorous imprisonment for two months and the payment of a fine of Rs. 50 or in default 15 days' rigorous imprisonment.

Nur Din has now moved this Court under S. 439, Criminal P. C. The facts briefly, are that the petitioner Nur Din took over charge of the office of Secretary to the Municipal Committee of Khushab on 13th June 1923, from one Kadir Din, and apparently held the post in question up to October 1924. When the petitioner took over charge from Kadir Din he was handed a file regarding the making of a channel connecting with the river. In October 1926 the Municipal Committee instituted this case charging the petitioner with having received a sum of Rs. 9-10-1 from Kadir Din on 13th June 1923, and with having criminally misappropriated the same. His conviction is based on the testimony of Kadir Din and Sultan Ahmad, one of the employees of the Municipal Committee. These two witnesses state, the former that he handed over the money, and the latter that he saw it handed over. The former, Kadir Din, produced, in support of the statement, a document marked Ex. P.-B, dated 11th June 1923, in the handwriting of the petitioner, it being a list of the various documents, etc., which were handed over to him by the outgoing Secretary, Kadir Din. On the last page but one of this document appears the entry relating to the file regarding the making of the channel in question and in this entry appears a reference to the receipt by the petitioner of the file along with Rs. 9-10-1. The sum is entered in writing as well as in figures. Kadir Din when he made over charge also prepared a list of the various files, etc., that he was making over to the petitioner. No. 61 is the entry relating to this file. Here no mention whatever is made of Kadir Din having made over to the petitioner any money whatever. The entry in Ex. P-B where this sum is mentioned is said by the petitioner to have been subsequently made. He denied that it was in his handwriting. The document in question was sent down to Calcutta to one F. H Bennat, Handwriting Expert, who gave it as his opinion that the entry was in the handwriting of Nur Din. F. H. Benuat was examined on commission and not in the presence of the petitioner—a circumstance which I do not regard as satisfactory. The evidence of an expert has always to be carefully weighed but when given on commission, as in this case, its value to my mind is very considerably reduced.

In the present case the conviction of the petitioner has been based on the testimony of Kadir Din and Sultan Ahmad supported by the opinion of this expert. Kadir Din is, undoubtedly, a very interested person, while Sultan Ahmad has admitted that he was constantly being found fault with by the petitioner when he was the Secretary without any rhyme or reason. The evidence of these two witnesses is, to my mind, not sufficient for the conviction of the petitioner and I cannot regard the opinion of the expert in this case as affording

such corroboration of that evidence as would justify the finding that the petitioner had committed the offence of which he has been charged. I would note that the reference to the money in Ex. P-B appears to be an interpolation and its absence from Ex. P-K is a matter not without significance.

In these circumstances I feel constrained to accept this petition and set aside the conviction and sentence. The fine, if paid, is to be refunded.

S.J. *Petition accepted.*

A. I. R. 1928 Lahore 534 (1)

JAI LAL, J.

Mohar Singh—Plaintiff—Petitioner.

v.

Daulat Ram — Defendant — Respondent.

Civil Revn. Petn. No. 592 of 1927, Decided on 23rd February 1928, from decree of Small Cause Court Judge, Delhi, D/- 15th July 1927.

Civil P. C., O. 2, R. 2—Prior suit for possession of demised premises—Subsequent suit for recovery of compensation is not barred.

A prior suit for possession does not bar a subsequent suit for compensation for holding over in respect of the same land as the cause of action in the two suits is different: *A.I.R.* 1922 *Lah.* 118 and 129 *P.R.* 1889 (*F.B.*), *Foll.*; 38 *Bom.* 444, *Diss. from.* [P 534 C 2]

Shamair Chand and *Qabul Chand*—for Petitioner.

Sardha Ram—for Respondent.

Judgment.—The only question in this case is whether the plaintiff's suit for recovery of compensation from his tenant for contumacious holding over of the demised premises was barred under O. 2, R. 2, Civil P. C., the plaintiff having instituted a suit for possession of such premises prior to the institution of the present suit. The Judge, Small Cause Court, has held, relying on *Kashinath Ramchandra* v. *Nathu Keshav* (1), that such a suit is barred under O. 2, R. 2, and has consequently dismissed it. This view of the Judge is opposed to two judgments: one of a Full Bench of the Chief Court of the Punjab, *Bikrama* v. *Prab* (2); and one of a Division Bench of this Court, i. e., *Khushi Ram* v. *Abdul Ghafur* (3). In the last-mentioned case *Kashinath Ramchandra* v. *Nathu Keshav* (1) was referred to and dissented from, and it was held that suits for possession and recovery of rent by a landlord against a tenant on breach of a condition contained in the rent-deed are not suits based on the same cause of action, and, therefore, the provisions of O. 2, R. 2 do not apply to such suits. In *Bikrama* v. *Prab* (2), it was held that suits to recover possession from a trespasser and compensation for illegal possession of the property are not suits which are based on the same cause of action, the ratio decidendi being that the right to recover profits and the right to possess property in respect of which a suit for profits was filed are distinct rights and can be claimed in separate suits. The combined effect of the two judgments cited above is that to a case like the present the provisions of O. 2, R. 2, Civil P. C., have no application Consequently the distinction sought by Mr. Sardha Ram to be drawn between *Kushi Ram* v. *Abdul Ghafur* (3) and the present case does not really exist, because a suit for rent and recovery of demised property and a suit for recovery of compensation for illegal occupation and possession of property trespassed upon have been treated by this Court and the Chief Court of the Punjab on the same footing.

I hold, therefore, that the view of the learned Judge, Small Cause Court, is wrong and consequently his decree must be set aside and the plaintiff's suit decreed with costs throughout.

N.K. *Decree set aside.*

(1) [1914] 38 Bom. 444=25 I.C. 73=16 Bom. L.R. 454.
(2) [1889] 129 P.R. 1889 (F.B.).
(3) A.I.R. 1922 Lah. 118.

A. I. R. 1928 Lahore 534 (2)

DALIP SINGH, J.

Kalu Ram—Plaintiff—Petitioner.

v.

Ghazita Ram and *another*—Defendants—Respondents.

Civil Revn. Petn. No. 603 of 1927, Decided on 30th January 1928, from order of Small Cause Court Judge, Lahore, D/- 24th August 1927.

Civil P. C., S. 151, and O. 9. Rr. 3 and 4—Scope.

A Court has an inherent jurisdiction to restore a case which has been dismissed in default through the mistake of the Court itself. [P 535 C 1]

Duni Chand Kapur —for Petitioner.

Judgment.—The plaintiff's suit was dismissed in default on 29th April 1927, under O. 9, R. 3, Civil P. C. An application was filed for restoring the suit on 9th August 1927. In that application the petitioner stated that the case had been fixed for hearing on 26th April 1927. On that date the presiding officer of the Court was absent and the petitioner was given 9th August 1927 as the next date of hearing. He, therefore, prayed that this case might be restored. This application was itself dismissed as time barred on 24th August 1927.

The petitioner has now come on revision from both the original order dismissing the case in default and from the order dismissing the application as time barred. The last order is obviously correct. It seems to me that the Court might well have exercised its inherent jurisdiction in restoring the case if after enquiry it had discovered that the facts stated by the petitioner were correct, for in such a case the mistake was the mistake of the Court and not of the petitioner and the suit could not be properly dismissed on 29th April 1927. I allowed the petitioner to add a ground of revision against the original order. His statement as to the facts is supported by an affidavit of the pleader who appeared in the Court below for him originally as well as when the application to restore was made. The other side is not present though served and in the circumstances I restore the case, assuming the fact to be correct that the petitioner and his counsel were both given a wrong date on 26th April 1927, If this was so the case was improperly dismissed in default under O. 9, R. 3, which was not the date of hearing of which the petitioner had notice.

The revision is accepted accordingly.

S.J. *Revision accepted.*

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* A. I. R. 1928 Lahore 535

JAI LAL, J.

Singer Sewing Machine—Plaintiff—Petitioner.

v.

Mt. Begam and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 726 of 1927, Decided on 24th April 1928, from order of Sr. Sub-Judge, Ludhiana, D/- 3rd August 1927.

* *Provincial Small Cause Courts Act, Sch. 2, Cl. (15)—An action for the delivery of a specific chattel, if the right to delivery flowed from the contract, differs from an action for specific performance and is not, therefore, excepted from the jurisdiction of a Small Cause Court.*

An action for specific performance is appropriate only to the enforcement of obligations of an executory as distinguished from an executed contract. For this purpose an executory contract is an agreement which is not intended between the parties to be the final instrument regulating their mutual relations under their contract; an executed contract, on the contrary, is a contract in which all has been already done to settle finally the relative position of the parties. [P 536 C 1]

An action for the delivery of a specific chattel, if the right to delivery flowed from contract, differs from an action for specific performance, since it is based on an allegation not that a contract to deliver has not been performed, but that the chattel is the property of the plaintiff and is being wrongfully detained by the defendant, and, therefore, such an action is not excepted from the jurisdiction of a Small Cause Court by virtue of Cl. (15). Such a suit is one for the return of a chattel from the bailee thereof on breach of the conditions on which the bailment took place. [P 536 C 1, 2]

Madan Lal—for Petitioner.

Ram Lal—for Respondents.

Judgment.—The plaintiffs, who are the petitioners before me, describing themselves as the firm Singer Sewing Machine, instituted a suit against the defendants for the recovery of Rs. 229 and in the alternative for possession of a sewing machine alleging that they had given the machine on the hire-purchase system to Walayat Khan, predecessor-in-interest of defendants 1 to 4, and that Walayat Khan had illegally pawned the machine to defendant 6. The suit was partially decreed by the trial Judge. The plaintiffs filed an appeal against the decree in the Court of the Senior Subordinate Judge of Ludhiana, who, on an objection being raised by the respondent, has returned the memorandum of appeal to be presented to the proper Court on the ground that as the plaint involved a prayer for the return of the sewing machine, the suit was really for the specific performance of a contract and, therefore, excepted from the jurisdiction of a Small Cause Court under Cl. 15 of the schedule to the Small Cause Courts Act and consequently the appeal from the decree passed in such a suit did not lie to the Senior Subordinate Judge. This is a petition by the plaintiffs for revision of that order.

It is admitted before me that if it be held that the suit was cognizable by a Small Cause Court, then the appeal would lie to the Senior Subordinate Judge. The only question, therefore, is whether that is a suit which is excepted from the jurisdiction of the Small Cause Court by virtue of Cl. 15 of the schedule of the Provincial Small Cause Courts Act. That clause excepts from the jurisdiction of the Small Cause Courts Act all suits for the specific performance or rescision of a contract. It is contended that as in the plaint a prayer in the alternative is made for the return of the sewing machine, the suit is really for the specific performance of the contract. Some authorities of the Chief Court of Oudh were cited by the respondents' counsel in support of the view of the learned Senior Subordinate Judge, but, with great respect, I am not prepared to agree with those cases.

An action for specific performance is appropriate only to the enforcement of obligation of an executory as distinguished from an executed contract. For this purpose an executory contract is an agreement which is not intended between the parties to be the final instrument regulating their mutual relations under their contract; an executed contract, on the contrary, is a contract in which all has been already done to settle finally the relative position of the parties. Halsbury Laws of England, Vol. 27, para. 3, p. 3. Later in the same book instances are given of "kindred but distinct remedies," i. e., remedies which do not fall within the purview of "specific performance," and the opinion is expressed that an action for the delivery of a specific chattel, if the right to delivery flowed from contract, differs from an action for specific performance, since it is based on an allegation not that a contract to deliver has not been performed, but that the chattel is the property of the plaintiff and is being wrongfully detained by the defendant.

These remarks fully apply to the present case, which involves the performance of the conditions of an executed contract and not the enforcement of an executory contract and the plaintiffs' action is for the delivery of the sewing machine alleged to be the property of the plaintiffs which is being wrongfully detained by the defendants.

The prayer in the plaint no doubt involves the return of a specific article and the expression used therein is that by way of "specific reliefs" the return of the sewing machine be ordered if for some reason a decree for the amount claimed cannot be given. The expression "specific relief" as used in the plaint is probably unfortunate, but still it is not tantamount to a claim for specific performance of the contract. The suit in my opinion is a suit for the return of a chattel from the bailee thereof on breach of the conditions on which the bailment took place. It cannot by any stretch of language be called to be a suit for the specific performance of a contract as that term is technically understood.

I accept this petition, set aside the order of the Senior Subordinate Judge returning the memorandum of appeal and remit the case to him with the direction to proceed with the appeal in accordance with law. The costs of these proceedings will abide the result.

N.K. *Petition accepted.*

A. I. R. 1928 Lahore 536

FFORDE AND ZAFAR ALI, JJ.

Rallia Singh—Defendant—Appellant.

v.

Parshotam Singh—Plaintiff—Respondent.

Second Appeal No. 1542 of 1923, Decided on 20th October 1927, from decree of District Judge, Amritsar, D/- 13th April 1923.

Civil P. C., S. 100—*Appellate Court refusing to entertain point not raised in memorandum of appeal—Second appeal does not lie.*

Where the lower appellate Court has in his discretion refused to allow a point, which had not been raised in the memorandum of appeal to his Court, to be taken at the hearing no second appeal lies against that exercise of discretion unless the discretion has been improperly or unjudicially exercised. [P 537 C 1]

Chandar Gupta for *Fakir Chand*—for Appellant.

Badri Das and *Kishen Dayal*—for Respondent.

Judgment.—Mr. Chandar Gupta for the defendant-appellant has sought to challenge the judgment of the lower appellate Court on grounds which were not

raised in the memorandum of appeal to that Court.

He urges that the agreement in question cannot be enforced on account of uncertainty. The point was not taken in the appeal to the District Judge. He further urges that the decree went beyond the plaint in which the plaintiff stated his readiness to pay costs of registration which have been wrongly imposed upon the defendant by the decree. That is a point which was not raised before the learned District Judge in the memorandum of appeal to his Court and the learned District Judge for that reason refused to entertain that ground when the appeal came before him for hearing. The learned District Judge, in refusing to allow that point to be taken, was exercising his discretion and it cannot be said that he exercised that discretion improperly or unjudicially. That being so no second appeal lies against that exercise of discretion.

Another point which Mr. Chandar Gupta now seeks to argue is that there was no consideration for the original sale contract of 1908. That matter has been determined by the decision of the High Court in a judgment delivered on 27th October 1921, and is now not open to the appellant.

There is no other point raised before us and accordingly, as the other questions are concluded by the findings of the learned District Judge, this appeal must be dismissed with costs.

S.J. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 537

SHADI LAL, C. J., AND ZAFAR ALI, J.

Minna Heatherly and *others*—Defendants—Petitioners.

v.

B. C. Sen and *others* — Plaintiffs—Respondents.

Civil Misc. Petn. No. 413 of 1927, Decided on 19th March 1928, for leave to appeal to Privy Council from order of Shadi Lal, C. J., and Zafar Ali, J., dated 1st April 1927.

* *Civil P. C., S. 110—Single Judge's decision affirmed by Division Bench—Single Judge is a Court "immediately below" the Division Bench.*

The words "immediately below" in S. 110 do not necessarily mean "subordinate to." Where, therefore, a Division Bench of the High Court affirms a decision of a single Judge, and the case involves no question of law, no leave can be granted : 33 *Cal.* 918 (*P. C.*), *Foll.* ; 43 *Cal.* 90, *Diss. from.* [P 538 C 1]

Shamair Chand and *M. Obedullah*—for Petitioners.

Moti Sagar—for Respondents.

Zafar Ali, J.—This is a petition under O. 45, R. 2, Civil P. C. (Act 5 of 1908) praying for a certificate that is required to appeal to His Majesty in Council from an appellate order of a Division Bench of this Court. The learned counsel for the respondents opposes the application on the ground that the case does not fulfil the requirements of S. 110, Civil P. C., inasmuch as

the final order appealed from affirms the decision of the Court immediately below the Court passing the final order, and the appeal involves no substantial question of law.

The facts briefly are that a Judge of this High Court sitting alone in exercise of his original testamentary jurisdiction granted, after a prolonged enquiry, probate of the will and codicils made by Mrs. Jane Skinner of Delhi to one B. C. Sen, the executor appointed in the will. The caveators' appeal from the order of that learned Judge was heard by us, two Judges, and was dismissed. The case involved no question of law and we affirmed the findings of fact that had been arrived at by that learned Judge.

Counsel for the petitioner contends that, though an order of a single Judge of a High Court may be appealable to a Division Bench of that Court, the former could not be said to be immediately below the latter, and in support of this contention he cites *Debendra Nath Das* v. *Bibudhendra Mansingh* (1), where on second appeal to the High Court the decree of the lower appellate Court was set aside by a single Judge, but the judgment of the single Judge, was reversed on appeal by a Division Bench and the decree of the lower appellate Court was restored.

Thus the first judgment of the High Court reversed the decree of the Court immediately below, but this reversal was afterwards in effect cancelled with the result that the only effective judgment of the High Court affirmed the decision of the Court immediately below (S. 110, Civil P. C.)

Thus the decision of the single Judge was altogether eliminated in applying S. 110. In doing so, Jenkins, C. J., who

(1) [1916] 43 Cal. 90=33 I. C. 745.

delivered the judgment of the Bench, made the following observations :

This appears to me to be the true result of the Letters Patent and the Code, for the Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court. This right of appeal depends on Cl. 15 of the Charter,

(corresponding to Cl. 10 of the Letters Patent constituting the High Court of Judicature at Lahore.)

and here I may point out that a Judge sitting alone is not a Court subordinate to the High Court. but performs a function directed to be performed by the High Court (Cl. 36, Letters Patent)

(corresponding to Cl. 26 of our Letters Patent.)

and thus no decision of a single Judge can be revised under S. 115 of the Code.

But it appears that the decision of their Lordships of the Judicial Committee in *Tulsi Persad Bhakt* v. *Benayek Misser* (2) was not brought to the notice of the learned Judges in the above case. In *Tulsi Persad* v. *Benayek Misser* (2), a Division Bench of the Calcutta High Court had affirmed the decree of a single Judge passed in the exercise of the original jurisdiction of that Court, and the case involved no question of law. Their Lordships of the Judicial Committee, in view of the last clause of S. 110, held that the appeal to His Majesty in Council could not be entertained. Thus, "the single Judge" was considered by their Lordships to be "immediately below" the Division Court for the purposes of S. 110, Civil P. C., and it may be pointed out that "immediately below" does not necessarily mean "subordinate to."

We, therefore, are of opinion that the requirements of S. 110, Civil P. C., are not fulfilled in the case before us, and we accordingly dismiss this petition with costs.

(2) [1897] 23 Cal. 918.

D.D. *Petition dismissed.*

A. I. R. 1928 Lahore 538

ADDISON, J.

Garib Chand—Appellant.

v.

Emperor—Opposite Party.

Misc. First Appeal No. 1470 of 1927, Decided on 25th January 1928, from order of Sr. Sub-Judge, Ferozepore, D/- 28th April 1927.

Guardians and Wards Act (8 *of* 1890), *S.* 45 (1) (*b*)—*Guardian submitting application at the instance of minor's mother for investing minors' money in a way different from that ordered by the Court—Court's order fining guardian is illegal as the case does not come under S.* 45 (1) (*b*)—*Guardians and Wards Act,*

A guardian put in a petition to the Court to the effect that he had collected some money belonging to the minor, which should be deposited at a proper rate of interest and that he would be responsible for it. The Court ordered that he should put the money in fixed deposit in a bank on a certain date on which the guardian appeared and stated that he had not brought the money as the mother of the minor did not wish it to be deposited in a bank but wished that it should be lent out at a higher rate of interest with the help of the minor who had reached the age of 18 years. Thereupon the Court at once fined the guardian Rs. 50 for not having carried out its orders and it further directed that he would be fined Rs. 10 a day until he deposited the money.

Held : that the Court had no power under S. 45 (1) (b), Guardians and Wards Act, to impose the fine in question. That section only authorizes a Court to impose a fine on a guardian if the guardian fails to pay into Court on a requisition under S. 34 (d) of the Act, the balance due on the account exhibited by him in compliance with a requisition under S. 34 (c) and not for failure to deposit other moneys: 25 *C. L. J.* 149, *Foll.* [P 539 C 1]

Chandar Gupta for *Fakir Chand*—for Appellant.

Carden Noad—for the Crown.

Judgment.—A guardian put in a petition to the Court on the 24th March 1927 to the effect that he had collected Rs. 15,000 belonging to the minor from Gurdial Mal, which should be deposited at a proper rate of interest and that he would be responsible for it. Upon this the Court ordered that he should put the money in fixed deposit in the Punjab National Bank on or before the 28th April 1927. On the 28th April the guardian appeared and stated that he had not brought the money as the mother of the minor did not wish it to be deposited in a bank. She submitted an application that it should be lent out at a higher rate of interest with the help of the minor who had reached the age of 18 years. This obviously was not a contumacious refusal to carry out the Court's order. The Court, however, at once fined the guardian Rs. 50 for not having carried out its orders and it further directed that he would be fined Rs. 10 a day until he deposited the money. Against this decision this appeal has been preferred,

The appeal must obviously be accepted. In the first place the Court had no power under S. 45 (1) (b) to impose the fine in question. That only authorizes a Court to impose a fine on a guardian if the guardian fails to pay into Court on a requisition under S 34 (d) the balance due on the account exhibited by him in compliance with a requisition under S. 34 (c) and not for failure to deposit other moneys, *Jaganath Panja* v. *Mahesh Chandra Pal* (1). In the present case there was no requisition under S. 34 (c) and the order of the Court was illegal.

In any case the action of the guardian was not contumacious, and when the Court passed its order he at once deposited the money that very day, namely, on the 28th April 1927, in the Imperial Bank. He had no intention of keeping the money and his action was taken in the interest of the minor and at the request of the mother of the minor. For this reason also I accept this appeal.

There is still a third reason. He was given time up to the 28th April 1927 to deposit the money and he did deposit the money on the 28th April 1927. The Court's action in fining him was, therefore, premature and the appeal must be accepted for that reason also.

For the reasons given I accept this appeal, set aside the order of fine passed by the Court upon the appellant and direct that it shall be refunded to him if it has been paid.

S.J. *Appeal accepted.*

(1) [1916] 25 C. L. J. 149=36 I. C. 286=21 C. W. N. 688.

A. I. R. 1928 Lahore 539

ADDISON, J.

Munshi Ram — Decree-holder — Petitioner.

v.

Amin Chand—Judgment-debtor—Respondent.

Civil Revn. Petn. No. 286 of 1926, Decided on 18th January 1928, from order of the Third Class Sub-Judge, Jullandar, D/- 2nd January 1926.

Specific Relief Act, S. 9 — Order in execution of decree under S. 9—Appeal.

No appeal lies from an order made in execution proceedings in a suit under S. 9 : 45 *Cal* 519, *Foll.*

[P 539 C 2]

Fakir Chand—for Petitioner.

R. C. Soni—for Respondent.

Judgment.—The plaintiff under S. 9, Specific Relief Act, sued the defendant for possession of two sites, namely, the site *J* on which the defendant had built a wall and the site *A* on which the defendant had built a portion of a kotha. It was asked that possession should be given by demolition of the wall on *J* and of the portion of the kotha on site *A*. The suit was decreed, but in revision it was held by this Court that the plaintiff was only entitled under S. 9, Specific Relief Act, to a decree for possession of the sites and that it could not be ordered that the structures upon them should be demolished. Execution was applied for. The decree-holder admittedly has got possession of the site under the wall *J*. The Executing Court has refused to give him possession of the site *A* on two grounds. The first ground is that the site *A* is not sufficiently defined by the decree and the second that possession of the site *A* could not be given as it was enclosed with walls and roofed and thus physical entry for that purpose was not possible. Against this decision the plaintiff-decree-holder has put in this revision in this Court.

A preliminary objection was taken that the revision should be dismissed on the ground that an appeal lay to the District Judge. This is incorrect. Under the last clause of S. 9, Specific Relief Act, no appeal lies in proceedings in a suit under that section. It was held in *Kandi Lal Ghose* v. *Jatindra Nath Chandra* (1) that no appeal lies from an order made in execution proceedings in a suit under S. 9, Specific Relief Act. With this decision I respectfully agree and follow it.

The only question is as to site *A*. Counsel for the petitioner stated before me that the walls round the site *A* have now fallen down and that physical possession can be given. This is a question which can be better gone into by the executing Court. In any case it is clear that symbolical possession of the site *A* can be given by fixing a copy of the warrant of possession at the site *A* in a conspicuous place and proclaiming by beat of drum the substance of the decree.

(1) [1918] 45 Cal. 519=26 C. L. J. 325=42 I. C. 711=22 C. W. N. 446.

This should be done by the executing Court if physical possession cannot be given. That would amount to possession under the decree.

The other objection taken by the executing Courts is obviously wrong. The site *A* is clearly given in the plan which is to the scale. The exact area can be found from the plan and it is useless to say that the boundaries are indefinite and unknown. In a plan which is to scale this is impossible. The boundaries are perfectly definite and that is all that matters. It was the site *A* on the plan which was decreed and it can be ascertained definitely.

I accept the petition for revision with costs of this Court, set aside the order of the executing Court, and direct it to proceed with the execution of the decree in accordance with law and on the principles laid down above.

N.K. *Petition accepted.*

A. I. R. 1928 Lahore 540

SHADI LAL, C. J.

Ghanya Lal and *another*—Accused—Petitioners.

v,

Municipal Committee, Montgomery—Respondent.

Criminal Case No. 232 of 1928, Decided on 13th April 1928, reported by Sessions Judge, Montgomery, on 23rd January 1928.

Punjab Municipal Act (3 *of* 1911, *amended* 1923), *S.* 197 (*a*)—*The section does not authorize a Municipal Committee to frame a by-law prohibiting the sale by auction of fresh fruits and vegetables at any place other than a particular place.*

Clause (a) of S. 197, as amended by the Municipal Act of 1923, does not authorize a Municipal Committee to frame a by-law prohibiting the sale by auction of fresh fruits and vegetables at any place other than a particular place. Therefore where a Municipality had framed a by-law that the sale should take place at a particular place under S. 197 (d) of the Act, which authorized the framing such a by-law but which sub-section had since been repealed by Act of 1923,

Held: that no person could be prosecuted for the breach of the by-law under old S. 197 (d) when the alleged offence was committed after passing of the Municipal Act of 1923.[P 541 C2]

Madan Chand—for Petitioners.

Order of Reference.—The facts in these cases are not in dispute, and the only point which really arises is the validity of the by-laws for the breach of which the petitioners have been convicted. This is a legal point which is common to all the five revision applications and can be dealt with in one reference. The Punjab Government Notification No. 21744, dated 7th September 1920, sanctioned by-laws passed by the Montgomery Municipal Committee which lay down the place in which fresh fruits and vegetables may be auctioned as the site of the pakka tank to be known in future as Ladha Singh chauk. The second by-law is to the effect that fresh fruits and vegetables shall not be auctioned in any other part of the Municipality, and the third by-law lays down the penalty for the breach. These by-laws were framed and sanctioned under S. 197 (d), Municipal Act, 1911, which allowed the Committee to fix by by-laws the places in which any specified article of food or drink may be sold or exposed for sale or the place in which it may be sold or exposed for sale. It is however admitted that the offences now in question were committed after the passing of the new Municipal Act of 1923 by which S. 197 was considerably altered. The old sub-S. (d) was omitted and sub-S. (a) was altered. In the old Act sub-S. (a) ran :

> May by by-laws prohibit the manufacture or preparation for sale of any specified articles of food and drink in any premises not licensed by the Committee.

In the New Act it was:

> May by by-laws prohibit the manufacture, sale or preparation for sale of any specified article, etc.

Now the learned counsel for the petitioners has attacked the validity of these by-laws on three grounds : The first ground is that they are ultra vires because they institute a new form of taxation without the previous sanction of the Local Government. Now here there is some conflict of thought. The Secretary for the Municipal Committee appeared before me and admitted that acting under the colour of these by-laws the Municipal Committee, by a resolution, had appointed a sole contractor for the auctioning of fresh fruits and vegetables and had permitted him to charge certain fees for auction, in

exchange taking from him a lump sum amount which was credited to the revenues of the Municipal Committee. This certainly appears to me to be a new form of taxation, particularly when any competition is stifled and people are forced either to pay the fees demanded by the auctioneer or not to sell their produce at all. It is equivalent to the committee itself levying a tax on anybody who wishes to sell his produce by auction. But it is not these by-laws which have established this new form of taxation. They are perfectly innocent and it is the resolution of the committee to which the Secretary has alluded which is ultra vires and invalid. In the same way the second objection can be disposed of. This is to the effect that under these by-laws the Municipal Committee have established a monopoly of a public service and that such a monopoly is contrary to public policy. Here again it is not the by-laws which have established any monopoly but the resolutions passed by the Municipal Committee. The third objection, however, to the validity of the by-laws seems to me to be more cogent and this is that they are not authorized by S. 197 of the new Act. It has been argued on behalf of the Municipality that S. 197 (d) of the old Act has been merged into S. 197 (a) of the new Act, and that therefore the by-laws can be validly continued under S. 197 (a) of the new Act. This does not seem to me to be a tenable proposition. S. 197 (a) allows the committee to prohibit the sale of any specified articles of food in any premises which is not licensed by the committee. Now, the by-laws which are attacked say nothing whatever about any license. They merely say that fresh fruits, etc., shall not be auctioned in any other part of the Municipality except the Ladha Singh Chauk. They therefore restrict the liberty of action of the subject to a far greater extent than any by-laws which could be passed under S. 197 (a)

It therefore remains to be seen whether in spite of this these by-laws made under the old Act can be deemed to be continued under the new Act. S. 2 (2) of the Act of 1923 lays down that all by-laws made under the Act repealed shall, so far as may be deemed to have been made under this Act. In the commentary to Hari Chand's Manual the words "so far as may be" are explained as meaning that the by-laws in existence must also be consistent with the provisions of the new Act. Now this condition does not seem to me to be fulfilled in these cases. As I have shown above, these by-laws which have been made under the old S. 197 (d) are much more stringent than any which could possibly be made under the new S. 197 (a). It seems to me therefore that in view of the repeal of S. 197 (d) these by-laws must be held to be invalid and any conviction under them bad. I accordingly report these cases to the Honourable High Court, with the recommendation that the convictions be set aside.

Order of the High Court

There is no appearance on behalf of the Municipal Committee, Montgomery; but after considering the arguments before me by the learned counsel for the petitioners I am of opinion that the view taken by the learned Sessions Judge is correct. It will be observed that Cl. (d), S. 197, Municipal Act, has been repealed, and Cl, (a) of that section does not authorize the Municipal Committee to frame a by-law prohibiting the sale by auction of fresh fruits and vegetables at any place other than the Ladha Singh Chauk.

I accordingly accept the recommendation made by the learned Sessions Judge and, setting aside the conviction and sentence, direct that the fine, if realized, be refunded to the petitioners.

N.K. *Reference answered.*

A I. R. 1928 Lahore 541

HARRISON, J.

Alam and *others* — Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1757 of 1927, Decided on 6th January 1928: case reported by the Dist. Magistrate, Gujrat, with his No. 1550 of 1927.

Criminal P. C., S. 204—Complaint case—Issuing process piecemeal for the various accused persons is not irregular or illegal.

In a complaint case under S. 363, Penal Code; the Magistrate examined the complainant

and issued a bailable warrant for one accused only who was the principal offender. On the date fixed for hearing that warrant was found to have been returned with the report that the accused had disappeared with the girl. The Magistrate thereupon ordered warrants to issue for the other three accused.

Held: that there was nothing irregular or illegal for a Magistrate to issue process piecemeal for the various accused persons.

[P 542 C 2]

Muhammad Amin—for Petitioners.

Abdul Rashid—for the Crown.

Report.—Alam, Sardara, and Mt. Baima, applicants, file an application against the order of Chaudhri Ranjha Khan, Magistrate, First Class, dated 30th August 1927, summoning them as accused to answer a complaint filed by one Mahanda under S 363, I. P. C., in which complainant stated that Mt. Fatima aged 13-14 years is his daughter, that two months previously the accused kidnapped her from his guardianship and are keeping her for illicit intercourse. That a report was made to the police and the accused promised to give back the girl but subsequently declined. After recording the complainant's statement the Court issued process against Raja accused alone under 363, I. P. C., on 15th August 1927. On the next day of hearing (30th August 1927) Raja accused did not appear in Court and the Court ordered warrants to issue against the other three accused.

So far as I can see the order of the Magistrate was not justified by any evidence before him. When he issued the order summoning the present applicants he had no further evidence than the statement of complainant which had been made before him on 15th August 1927. On that date (15th August 1927) the Magistrate saw cause only to summon one of the accused. The Magistrate has given, as his reason, for issuing the summonses against the other accused that it appears that they are abetting Raja accused, but this reason is not based on any evidence. The action of the Magistrate in first summoning one accused only on 15th August 1927, and later on 30th August 1927, summoning three others without recording any further evidence against them, seems arbitrary and not in accordance with the procedure laid down is S. 204, Criminal P. C. I cannot find any definite provision in the Code prohibiting a Magistrate from summoning accused persons at any stage in the case, but it is desirable that a ruling should be obtained on this point, as the procedure in the present case seems objectionable. I therefore accept the application for revision and under S. 438, Criminal P. C., forward the case to the Honourable Judges of the High Court for their orders.

Order.—A complaint was lodged under Ss. 363, 363/109, I. P. C., against four persons. The Magistrate examined the complainant and issued a bailable warrant for one accused only namely, Raja, who was said to be the principal offender. On the date fixed for hearing that warrant was found to have been returned with the report that the accused had disappeared with the girl. The Magistrate thereupon ordered warrants to issue for the other three accused.

The case has been referred by the District Magistrate of Gujrat on the ground that the second order appears to him to be arbitrary, and inasmuch as no further note was recorded after the first order had been passed the procedure was not that contemplated in S. 204, Criminal P. C. As I understand it the view taken by the District Magistrate is that it is irregular or illegal for a Magistrate to issue process piecemeal for the various accused persons in a complaint case unless he has taken some further evidence before issuing the second order. I do not think there is anything either irregular or improper in a Magistrate first issuing process for one and then changing his mind and issuing process for all the accused, and here the Magistrate gives his reason, which may be good or bad, but anyhow is a reason. He thought the disappearance of the principal accused pointed to the truth of the whole story as told by the complainant and without any further waste of time he proceeded against all the accused.

I do not think any reason has been shown for interference, and I dismiss the application for revision.

N.K. *Application dismissed.*

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A. I. R. 1928 Lahore 543

JAI LAL, J.

Mt. Sarfraz Begam—Petitioner.

v.

Miran Bakhsh—Respondent.

Criminal Revn. Appln. No. 1152 of 1927, Decided on 14th November 1927, from order of Sess-Judge, Lahore, D/- 22nd March 1927.

Criminal P. C., S. 488 — Application for maintenance by a Mahomedan infant daughter living with her legal guardian, the mother, against her father — Father willing to maintain the child if given into his custody— Order of maintenance cannot be refused.

Where an application was filed under S. 488, by a Mahomedan infant daughter through her mother, her legal guardian, against her father who was willing to maintain the child if her custody were given to him:

Held : that the child was entitled to an order for maintenance against her father while living with her legal guardian : 22 *P. R. (Cr.)* 1917 and 18 *P. R. (Cr.)* 1894, *Dist.* ; 25 *M. L. J.* 355 and 8 *Bur. L. T.* 134, *Rel. on.* [P 544 C 1]

Ahmad Bakhsh—for Petitioner.

Ganga Ram—for Respondent.

Judgment.—Mt. Sarfraz, aged 8 or 9 months, applied through her mother Mt. Iqbal Begam, for an order of maintenance under S. 488, Criminal P. C., against her father Miran Bakhsh. It appears that Mt. Iqbal Begam, and her husband have quarrelled with each other and are living separately and that Mt. Iqbal Begam also applied for an order under S. 488 in her favour, but her application was dismissed. The learned Magistrate has dismissed the application of Mt. Sarfraz also on the ground that she was living with her mother and was not therefore entitled to any maintenance when "she was living apart from her father," who had offered to maintain her if her custody be given to him. In support of this view the Magistrate has relied upon *Sardar Muhammad* v. *Mir Muhammad* (1) and *Man Singh* v. *Mt. Dharmon* (2).

This is a petition for the revision of the order of the Magistrate presented by Mt. Iqbal Begam on behalf of her minor child.

In *Man Singh* v. *Mt. Dharmon* (2), the parties were Sikhs. The ages of the minor petitioners in that case do not appear from the judgment but it is probable that the learned Judges were influenced by the fact that the father, who offered to maintain his children if they came and lived with him, was their legal guardian in preference to the mother who represented them in the proceedings under S. 488. In the present case it is admitted by counsel for the respondent that Mt. Iqbal Begam is the legal guardian of her minor daughter, and thus entitled to her custody in preference to the respondent. The condition imposed by the latter therefore was calculated to deprive the mother of her undoubted right. In *Sardar Muhammad* v. *Mir Muhammad* (1), in which the parties were Mahomedans, it appears that the minor, on whose behalf the application was made, was a boy aged 9 years. The father offered to maintain him if the boy went to live with him. The following remarks made by the learned Judge in the concluding portion of his judgment sum up his view of the case :

> There is nothing to show that Mt. Karam Bibi (mother) or anyone else on behalf of Sardar Muhammad (minor) ever asked Nur Muhammad (father) for assistance until this application was filed and there is no reason why he should now be compelled to pay for his son's maintenance while living separately from him. The friends of the minor can move the proper Courts for an order appointing someone, other than Nur Muhammad, guardian of the boy, and if they succeed they would be entitled to claim maintenance from Nur Muhammad on his behalf.

It will thus be observed that the learned Judge considered that the father was entitled to decline to maintain his children if they refused to live with him without reasonable cause when he was entitled to their custody as their guardian, and that if another person had been appointed guardian of the minors, then the father was liable to maintain them while they were living with such guardian. The cases cited therefore do not support the view of the Magistrate on the admitted facts of this case.

It is not seriously contended before me that the father has not refused to maintain his daughter and the only ground on which the order of the Magistrate is sought to be supported is that the minor is not entitled to claim any maintenance because she is living separately from her father. This position cannot be sustained and I hold that if a minor is living with the legally constituted guardian other than the father, then an order for main

(1) [1917] 22 P.R. Cr. 1917=41 I.C. 331=16 P.W.R. Cr. 1917.

(2) [1894] 18 P.R. 1894 Cr.

tenance under S. 488 cannot be refused merely on the ground that the offer of the father to maintain the child, if the latter lives with him, is not accepted. *In re Parathy Valappil Moideen* (3) and *Murgesan Mudaliar* v. *Sodiamma* (4), support this view.

In the case before me, it being admitted that Mt. Iqbal Begam is the legal guardian of the petitioner, it follows that the child is entitled to an order for maintenance against her father while living with her legal guardian.

The Magistrate appears to consider that the minor needs maintenance, but he has not fixed the amount of such maintenance. Under the circumstances I accept this petition, set aside the order of the Magistrate and send the case back to him for disposal.

A.L./R.K. *Order set aside*

(3) [1913] 25 M.L.J. 355=21 I.C. 469=(1913) M.W.N. 997.
(4) [1913] 8 Bur. L.T. 134=30 I.C. 480=16 Cr. L.J. 656.

A. I. R. 1928 Lahore 544

SHADI LAL, C. J., AND BHIDE, J.

Ibrahim—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 892 of 1927, Decided on 21st December 1927, from order of Sess-Judge, Montgomery, D/- 1st August 1927.

Penal Code, S. 300, *Excep.* 1—*Husband asking his wife to sever connexion with her lover—On her refusal quarral breaking out and ending in death of wife—Case does not come under Excep.* 1 *to S.* 300, *but extreme penalty is not called for.*

Where the husband asked the wife to sever her connexion with her paramour but she declined to give up her lover, thereupon there was a quarrel between the husband and the wife in the course of which he lost his temper and killed his wife,

Held: that the accused did not receive any grave and sudden provocation, which would bring his case within the ambit of Excep. 1 to S. 300, but that the wife's persistent immorality coupled with her refusal to sever her connexion with the lover provoked the husband and prompted the assault which resulted in her death and that the extreme penalty of the law should not be exacted.

Balkishan Mehra—for Appellant.
Des Raj Sawhney—for the Crown.

Judgment.—The appellant Ibrahim has been convicted of the murder of his wife Mt. Nur Bibi, and has been sentenced, under S. 302, I.P.C., to suffer the penalty of death. There is ample evidence on the record that, on the afternoon of 1st June 1927, at about 6 p. m., the prisoner attacked his wife with a hatchet and inflicted upon her three wounds including one on the neck, which resulted in the death of the victim immediately afterwards. Indeed, he himself admits that he did assault his wife with a hatchet and thereby caused her death. He, however, seeks to reduce the offence of murder to one of culpable homicide not amounting to murder by invoking the plea of grave and sudden provocation. He states that his wife had contracted an illicit intimacy with one Ismail, and that on the afternoon in question when he (prisoner) returned to his house from his fields he found the paramour embracing and kissing the woman. Thereupon he lost his self-control and assaulted the erring wife with an axe and caused her death. The paramour, however, managed to make good his escape.

The question for determination is whether the culprit upon whom the onus rested has succeeded in establishing his plea. Now, it may be conceded that Mt. Nur Bibi was on terms of illicit intimacy with Ismail, and that her husband had asked her to give up her immoral relations with the paramour. There is, however, not a scintilla of evidence that Ismail was found on that afternoon embracing Mt. Nur Bibi or that he did any other act which would amount to grave and sudden provocation. The witness Ranga Singh, who lives in the same compound as the prisoner, was an eye-witness of the whole affair. He deposes, that on the afternoon in question when he saw the husband attacking his wife he shouted out to Ismail, who was at that time coming from his own house, and asked him to come in and render help in rescuing the woman. He also describes the immediate cause which led to the assault. He says that the husband asked the wife to sever her connexion with her paramour Ismail, but that she declined to give up her lover.

Thereupon, there was a quarrel between the husband and the wife in the course of which the prisoner appears to have lost his temper and committed the assault in a fit of anger.

While we cannot hold that the accused received any grave and sudden provocation which would bring his case within the ambit of Excep. 1 to S. 300, I. P. C., we are of opinion that the wife's persistent immorality coupled with her refusal to sever her connexion with the lover provoked the husband and prompted the assault which resulted in her death. In these circumstances we do not think that the extreme penalty of the law should be exacted in this case. While upholding the conviction we accept the appeal so far as to reduce the sentence of death to one of transportation for life.

R.D. *Sentence reduced.*

A. I. R. 1928 Lahore 545

DALIP SINGH AND ZAFAR ALI, JJ.

Narain Das and *another* — Defendants —Appellants.

v.

Waryam Singh and *others* — Plaintiffs and Defendants—Respondents.

Second Appeal No. 2155 of 1924, Decided on 26th April 1928, from decree of Dist. Judge, Ferozepore, D/- 30th June 1924.

(a) *Hindu Law—Reversioner—Suit for declaration that certain decrees shall not affect his reversionary interest—Decree enures for all reversioners although it is obtained ex-parte.*

A decree in a suit for a declaration that certain mortgage-deeds and previous decrees obtained by a person shall not affect the plaintiff's reversionary rights does enure for all reversioners who may be entitled to succession when the succession opens out whether they were or were not in existence at the time the decree was obtained irrespective of the decree being ex parte : *A. I. R.* 1915 *P. C.* 124 ; *A I. R.* 1916 *P.C.* 117 ; *A. I. R.* 1922 *All.* 301 (*F. B*); and 41 *Mad.* 659, *Foll.* [P 546 C 2]

(b) *Hindu Law—Reversioner—An ex-parte decree obtained without contest is binding upon an alienee from the reversioner.*

Although a reversioner can plead that another reversioner who brought a previous suit did not represent him because he did not contest the suit bona fide, such a plea is not open to an alienee : 33 *M. L. J.* 471 ; *A. I. R.* 1922 *All.* 301 (*F. B.*); *A. I. R.* 1922 *All.* 342 ; *A. I. R.* 1917 *P. C.* 196; and 84 *P. R.* 1898, *Dist.* [P 546 C 2]

Nand Lal and *Mehr Chand Mahajan*— for Appellants.

Moti Sagar and *W. Chandra Dutta*— for Respondents.

Dalip Singh, J.—The facts of this case are given in the judgment of Kundan Lal dated 9th March 1922, and the following is an excerpt from the judgment :

"Ganda Singh and his brother Mehtab Singh owned ¾ths of 4,890 kanals 8 marlas of land. Mehtab Singh died before 1882 leaving behind a widow Mt. Gujri. On 12th April 1882, Ganda Singh mortgaged the whole of the above land for Rs. 4,000 to Hazari Lal (Ex. P. 4)."

"On 13th May 1881, Tara Chand, father of Hazari Lal, etc., executed a mortgage-deed in favour of one Nihal Singh. On the strength of that deed Nihal Singh sued Tara Chand, etc., and obtained a decree for Rs. 3,401-8-0 on 6th August 1885 (Ex. P. 5). In execution of this decree Nihal Singh got the rights of Hazari Lal under the above mortgage-deed (executed by Ganda Singh in favour of Hazari Lal on 12th April 1882) attached. Hazari Lal objected to the attachment and his objection was allowed. Nihal Singh then filed a suit to establish his right to the attachment and obtained a decree on 18th December 1886 (Ex. P. 6). After this he got the mortgage rights of Hazari Lal sold in execution of his decree which he purchased himself. In this way Nihal Singh became a mortgagee of Ganda Singh in place of Hazari Lal. Nihal Singh then sued Ganda Singh on the basis of the mortgage-deed dated 12th April 1882 and obtained a decree for Rs. 8,853 on 20th April 1889 (P. 7). In execution he attached the land mortgaged i. e., ¾ths of 5008 kanals 13 marlas the difference in area being due to re-measurement. Mt. Gujri objected to the attachment of her half-share which was released from attachment. Out of the rest 1,076 kanals 19 marlas of land were sold on 24th November 1896 and were purchased by Nihal Singh's sons. On 30th October 1897 Nihal Singh's sons obtained possession of 1,056 kanals 19 marlas although the land sold was 1076 kanals 19 marlas. This is the only land in dispute in this case."

"On 28th March 1894 Nihal Singh mortgaged his rights, under mortgage-deed dated 12th April 1882 and the subsequent decree thereon to Kishore Chand Kanshi Ram for Rs. 4,000. On 30th March 1897, Kishore Chand Kanshi Ram sued the sons of Nihal Singh (who was dead) for recovery of Rs. 6,571-9-6 on the basis of the above mortgage-deed and got a

decree on 13th July 1897 for the full amount claimed by them with an order that the money would be realized by sale of the property mortgaged (file 37) which included the land now in dispute. In execution of this decree, Jaimal Singh, father of defendants 1 and 2 purchased 515 kanals 9 marlas of land for Rs. 1,612 on 21st November 1904 and the sale was confirmed on 6th January 1905.

"On 7th May 1918 Asa Singh, son of Ganda Singh, sued for a declaration that the mortgage-deed dated 12th April 1882, and the mortgage rights acquired by Nihal Singh on the strength thereof, the decree dated 20th April 1889 in favour of Nihal Singh and the order dated 24th November 1896 sanctioning sale of the land shall not affect his reversionary rights (vide file 42). On 11th August 1900 he obtained an ex-parte decree (Ex. P. 8). Asa Singh died in 1903, Ganda Singh died on 5th June 1916. Plaintiff was born on 28th June 1916. He now sues for possession of 972 kanals 16 marlas of land on the allegations that Asa Singh died without issue; that since the decree obtained by Asa Singh on 11th August 1900 the son of Nihal Singh delivered possession of the land in suit to defendants 1 and 2who hold themselves out as vendees on behalf of the sons of Nihal Singh and that the alienation, if any, has no effect against the plaintiff."

The trial Court framed various issues most of which need not concern us now as they are concluded by findings of fact, but the net result was that the learned District Judge on appeal decreed the plaintiff's suit holding that he was entitled to immediate possession of 457 kanals 7 marlas out of the land in suit without any payment and that he was entitled to redeem the remaining land 515 kanals 9 marlas on payment of charges due provided his suit for redemption was competent. In second appeal before us it has been contended by counsel for the appellant-defendants, the sons of Nihal Singh, that the decree which was obtained by Asa Singh on 11th August 1900 could not enure to the benefit of the present plaintiff Waryam Singh, who was born after the decree had been obtained and after the death of Asa Singh. With this proposition of law we are not able to agree, and we hold in view of the rulings of their Lordships of the Privy Council reported in *Venkata Narayana Pillai* v. *Subbammal* (1) and *Janaki Ammal* v. *Narayanaswami Aiyar* (2) as well as the Full Bench judgments of the Allahabad High Court reported in *Kesho Prasad Singh* v. *Shiv Prasad Ojha* (3) and the Madras High Court in *C.Varumma* v. *M. Gopala Dasayya* (4), that such a decree does enure for all reversioners who may be entitled to succession when the succession opens out whether they were or were not in existence at the time the decree was obtained. The next point urged by counsel for the appellant was that as the decree obtained by Asa Singh was an ex-parte decree obtained without contest, therefore, it was not binding on the alienees. With this proposition we are also unable to agree. The learned counsel has cited *Ramalinga Mudali* v. *Arumuga Mudali* (5) in support of this contention and also *Kesho Prasad* v. *Shiv Prasad* (3). It is obvious, however, that while a reversioner can plead that another reversioner who brought a previous suit did not represent him because he did not contest the suit bona fide, such a plea is not open to the alienee. The learned counsel has also cited *Bhup Kunwar* v. *Balbir Sahai* (6), *Saudagar Singh* v. *Pardip Narayan Singh* (7) and *Harvans Singh* v. *Harnam Singh* (8), but we are unable to see the bearing of these particular rulings on the point before us. We, therefore, see no force in this appeal, which is dismissed with costs.

N.K. *Appeal dismissed.*

(1) A.I.R. 1915 P.C. 124=38 Mad. 406=42 I.A. 125 (P.C.).
(2) A I.R. 1916 P.C. 117=39 Mad. 631=43 I. A. 207 (P.C).
(3) A.I.R. 1922 All. 301=44 All. 19 (F.B.).
(4) [1918] 41 Mad. 659=35 M.L.J. 57=8 M.L. W. 62=46 I.C. 202=(1918) M.W.N. 461.
(5) [1917] 33 M.L.J. 471=42 I.C. 512.
(6) A.I.R. 1922 All. 242=44 All. 190.
(7) A.I.R. 1917 P.C. 196=45 Cal. 510=45 I.A. 21 (P.C.).
(8) [1898] 84 P.R. 1898.

A. I. R. 1928 Lahore 546

ADDISON AND COLDSTREAM, JJ.

Natha and *others* — Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1055 of 1927, Decided on 22nd December 1927, from order of Sess. Judge, Lahore, D/- 7th September 1927.

(a) Criminal Trial—Identification parade—Witness identifying accused in parade but denying it at trial—Identification is admissible in evidence.

Where a witness picked out the accused at the identification parade held by the Magistrate, as two of the assailants, but stated in trial that they were shown to him before and that he did not see them amongst the persons who took part in the attack:

Held: that though the value to be attached to his previous identification is of course very little, if any, the fact that he had said that he did identify them is, however, admissible: *A. I. R.* 1927 *Oudh* 369, *Foll.* [P 549 C 2]

(b) Criminal P. C., S. 439, *Penal Code, Ss.* 147, 149, 302, 324 *and* 326—*Communal riots—Attack by Mahomedans on two Hindus resulting in one's death and injury to the other—Assembly convicted under Ss.* 147, 149 *and* 324, *Penal Code, and not under S.* 302—*Revision for enhancement of sentence—View of the case taken by the lower Court though favourable to the accused, not clearly wrong—High Court will not interfere.*

Where the lower Court considered that the common object of the assembly was to assail and beat Hindus and Sikhs and not to commit murder and that murder was not an offence such as the members of the assembly knew to be likely to be committed in prosecution of that object or would be committed and where, therefore, the lower Court refused to convict the assailants of murder, but held them all guilty of causing grievous hurt with a sharp weapon under S. 326 read with S. 149, Penal Code, in connexion with death and of an offence under S 324/149, Penal Code, in connexion with the other person's injuries, while it also held them all guilty of rioting under S. 147, Panal Code,

Held: that though the lower Court had taken the view most favourable to the accused, still the view cannot be said to the clearly wrong, and the High Court would decline to interfere. [P 550 C 1]

Mian Muhammad Shafi—for Appellants.

Ram Lal—for the Crown,

Addison, J.—The communal riots in Lahore City originated on the evening of 3rd May last when four Mussalmans were killed and others injured by a mob of Sikhs and Hindus in Haveli Kabli Mal. Next day there was a big funeral procession which caused further ill-will. As a result the same evening between 7 or 8 o'clock a number of Sikhs and Hindus were attacked in the Delhi Gate Bazar and three persons were killed at that place. These assaults took place within a short time of each other. This appeal is concerned with the assault in which Makhan Lal was killed and his brother, Atma Ram, severely injured. The six appellants are Natha Changar, Gaman, Fajia, Mahandu Toti and Mitta. They were found guilty of rioting under S. 147, I. P. C., and sentenced to one year's rigorous imprisonment each. They were convicted under S. 326 read with S. 149, I.P.C., in connexion with the death of Makhan Lal and sentenced to seven years' rigorous imprisonment and a fine of Rs. 100 each while they were also convicted under S. 324 read with S. 149, I. P. C., in connexion with the injuries caused to Atma Ram, and sentenced to one year's rigorous imprisonment together with a fine of Rs. 50 each. The sentences of imprisonment were directed to run concurrently. It must also be noted that the same appellants were convicted under Ss. 147 and S. 326/149, I. P. C., in connexion with an assault which took place immediately after and in which one Sharm Singh was killed, In that case they were given the same sentences, which, however, were ordered to run concurrently with the sentences in Makhan Lal and Atma Ram's case on the ground that the two assaults formed part of the same transaction. In this way, the appellants have only been sentenced to seven years' rigorous imprisonment in the two cases.

It has been clearly established that the deceased Makhan Lal and his brother Atma Ram got into the back seat of a tonga at the railway station. The Mahomedans were in the front seat. When the tonga had gone through the Delhi Gate into the old city, the tonga was surrounded by a gang of Mahomedans. The front seat passengers were allowed to go as they were of the same religion. The driver was beaten but left alone when it was seen that he was a Mahomedan. The two Hindus were, however, attacked. Makhan Lal jumped into the front seat as he was being beaten. He was there stabbed in the back of the neck. According to the medical evidence the sharp weapon used to inflict this injury cut right through the trachea and œsophagus and death must have been instantaneous. As the wound started at the back of the neck, it was a deep one. There was one other injury on the deceased, namely, a vertical incised would, 1¼ inches long on the back of his head. This might have been caused by a shovel as alleged by some of the witnesses. Atma Ram had a contused wound in the vertex of his head, an incised wound on the left parietal region and a punctured wound

on the left side of the abdomen. The doctor was so busy attending to other injured persons that he did not look for other injuries.

The tonga was led outside the Delhi Gate by one or two constables who arrived on the scene and from there the driver was directed to lead it to the kotwali. Every body was very busy there also. As Atma Ram was only injured he was sent at once to the hospital, while the dead body of Makhan Lal remained lying in the tonga till approximately 9-30 p. m. when a Sub-Inspector of Police questioned the tonga driver and prepared the inquest report. It was not possible for the police to start the investigation of the case till 10th May when things had quieted down a little and some degree of confidence had been restored. This explains why no relative went specially to report this or the other crimes and why no witnesses went to give information. Conditions were abnormal, people were thinking only of their own safety and the city was in a state of terror. Besides, it was known to all concerned that a note had been kept by the police of the persons killed and that enquiries would start in due course. These considerations sufficiently explain any delay on the part of witnesses in coming forward in the present case.

This delay was, however, very slight. The first day the police could take the case up, Atma Ram was searched for and his statement taken. On 12th May, the tonga driver Muhammad Amin (P. W. No. 9) was found and he identified at a parade held by a Magistrate two of the appellants Natha and Gaman. The 13th was spent in questioning the shopkeepers in the Delhi Gate Bazar. On the 14th the two eyewitnesses, Sadhu Singh and Labh Singh (P. W. Nos. 7 and 8) were found. The approver, Muhammad Din (P. W. No. 14) was arrested on the 15th and made a statement to the police on the 18th May. The witness Labhu Mal (P. W. No. 6) was discovered the same day. A pardon was later obtained for the approver and he was examined by a Magistrate of the First Class on 25th May. In view of the numerous cases under investigation and the state of the city at the time, I am of opinion that the witnesses in the present case were discovered in a very short time.

Muhammad Din, the approver, implicated all the appellants and stated that it was Gaman who thrust a knife through the neck of the deceased and Mitta who struck him on the head with a shovel. According to him, he and the appellants along with three persons said to be absconding gathered at Toti's shop and arranged to beat Sikhs and Hindus. They then attacked the passengers in the tongas this being the first assault he saw. Mitta was armed with the shovel, Natha had a stick. The others had bamboos. The approver picked up a fly-whisk. He did not see the knife in Gaman's hand till it was used. The approver has stated that after this assault he and a person, said to be absconding, joined temporarily another group which was responsible for the third murder, that of Jiwan Singh. The approver has explained that he was induced to make a full statement by talking to other approvers in the lock-up. He and his father are butter-sellers, while they are also employed by the Hindu Merchants in the Abkari Mandi. That is, however, not a sufficient reason why he should implicate falsely the appellants, who are Mahomedans like himself. He has stuck to the same statement throughout. As he is an approver, his statement by itself would not be sufficient for the conviction of the appellants and it has to be seen to what extent they are implicated by other testimony.

Atma Ram, brother of the deceased, was only able to identify out of the appellants, Natha and Gaman, whom he knew before. No enmity has been established between him and the appellants and this remark applies to all the eyewitnesses. There may have been communal ill-feeling at the time, but that would not explain why the Hindu witnesses should give false evidence against the appellants. Atma Ram was still in bed when the Inspector of Police found him on 10th May. He told nobody about what he knew before this except Uttam Chand, his cousin, who removed him from hospital. This was only to be expected for the reasons already given by me.

The tonga driver (P. W. No. 9) who picked out Natha and Gama at the parade held by the Magistrate two as of the assaillants has now stated that they were shown to him before and that he did not see them amongst the persons who took part in the attack. He also said that he was

kept at the kotwali till 31st May when he made his statement before the committing Magistrate. I do not believe either of these statement but, the value to be attached to his previous identification is of course very little, if any, now that he has said that he did not see Natha and Gaman amongst the assailants. The fact that he did identify them is, however, admissible : see *Ram Prasad* v. *Emperor* (1). His denial in Court seems to be best explained on the ground that he does not wish to implicate his co-religionists.

Labhu Mal is an eye witness who watched the proceedings from a balcony of his house. Of those sitting at the shop of Toli appellant he recognized Natha Mitta, Fajia and Gaman, appellants, the approver and two persons said to be absconding, and he saw them taking part in the attack. He too has said that Gaman struck the deceased with a knife in the neck. His story is the same as that of the approver apart from details which no one could remember and apart from certain exaggerations of small importance. He was living in a house from which he could see what was happening and I can see no reason to reject his evidence.

The other two eyewitnesses are cousins, Sadhu Singh and Labh Singh, who lived in an ihata behind one of the lines of shops in the Delhi Gate Bazar. Hearing a noise in the bazar, they climbed on to the roof of their house and from there by way of other roofs reached the shop of Muhammad Hussain on the Delhi Gate Bazar. Sadhu Singh saw the appellants, the approver and certain others at Toti's shop and also witnessed the attack by them upon the tonga. He stated that Gaman stabbed Makhan Lal. Labh Singh only knew before Natha Fajia, Toti and Mitta out of the appellants, but he also identified Gaman in Court as the person who stabbed Mukhan Lal. The story of these witnesses agrees with that told by the approver, except that they said Fajia as well as Gaman had a knife. Sadhu Singh stated in the Court of the committing Magistrate in the case of Mukhan Lal, Atma Ram, that it was Fajia who stabbed Mukhan Lal and that it was Gaman who stabbed Sharm Singh (the second person assaulted by these appellants), whereas it should have been the other way about. Before the committing Magistrate; however, in the case of Sharm Singh' he said that it was Fajia who stabbed Sharm Singh. This contradiction may have been due to a temporary confusion when he was being examined before the committing Magistrate in Makhan Lal's case and in my opinion is not important. It was contended that these witnesses would never have gone over the roofs of houses to the bazar and that they must be held to be false witnesses. This does not follow. It is just the sort of thing that frightened persons might have done partly out of curiosity and partly because they thought that they could escape more easily from the roofs if anything were to happen. They made their statements to the police on 14th May. They are tailors working in shops in this bazar and would thus have known the appellants.

The appellants called no witnesses in their defence and, in my opinion, the evidence establishes beyond doubt that they were the assailants of Makhan Lal and Atma Ram. All the assessors held it proved that Gaman stabbed Makhan Lal and that the approver was there. The two Muhammoden assessors did not think the guilt of the other appellants established while the two Hindu assessors did. The learned Sessions Judge thought it doubtful whether the approver and the other witnesses could in the prevailing excitement and confusion have been certain that it was Gaman who stabbed Makhan Lal. He also considered that the common object of the assembly was to assail and beat Hindus and Sikhs and not to commit murder and that murder was not an offence such as the members of the assembly knew to be likely to be committed in prosecution of that object or would be committed. He, therefore, refused to convict the assailants of murder but held them all guilty of causing grievous hurt with a sharp weapon under S. 326 read with S. 149, I. P. C, in connexion with Makhan Lal's death and of an offence under Ss. 324 and 149 I. P. C in connexion with Atma Ram's injuries, while he also held them all guilty of rioting under S. 147, I. P. C.

The Crown has preferred a revision petition to the effect that the appellants should be found guilty of murder under S. 302 read with S. 149, or that the sentences under Ss. 326 and 149 should be

(1) A. I. R. 1927 Oudh 369=2 Luck. 631.

enhanced or, in any case, that the sentences under Ss 147, 326/149 and 324/149, I. P. C., should be consecutive and not concurrent. After careful consideration, I am not prepared to hold in this case that the convictions should be under S. 302 read with S. 149, I. P. C. It may be the case that the learned Sessions Judge has taken the view most favourable to the appellants, but as the view cannot be said to be clearly wrong, I would decline to interfere.

I would, therefore, maintain the convictions of the appellants and the sentences passed upon them, that is, I would dismiss both the appeal and the revision petition. The sentences will run concurrently with the sentences of transportation for life passed on the same appellants in Criminal Appeal No. 1056 and Criminal Revision No. 1796 of 1927.

Coldstream, J.—I agree.

S.J. *Appeal dismissed.*

A. I. R. 1928 Lahore 550

JAI LAL, J.

Neba Ram—Plaintiff—Petitioner.

v.

Khota Ram and *another*—Defendants—Respondents.

Civil Revn. Petn. No. 737 of 1927, Decided on 18th April 1928, from decree of 4th Cl. Sub-Judge, Bhakkar, D/- 9th February 1927.

(a) *Civil P. C., Sch 2, para. 15 (1) — Any unusual powers to be given to the arbitrators should be expressly mentioned in the agreement —Private inquiry by the arbitrators makes the award illegal where the agreement does not provide for such a private inquiry.*

Any unusual power which is intended to be given to the arbitrators should be expressly menticned in the agreement. [P 550 C 2]

An award based upon private enquiry by arbitrators in the absence of parties is illegal and unenforceable in the absence of a power to that effect in the agreement. [P 550 C 2]

(b) *Civil P. C., S. 115 — Misinterpretation of agreement to refer to arbitration—Objection can be taken to the award on the ground that arbitrators made private inquiry when the agreement did not intend to give any such powers.*

Where the ground for revision was the misinterpretation by the Court of the document referring the dispute to the arbitrators,

Held : that as regards power of arbitrators to make private enquiries objection could be taken to the award on the ground that the arbitrators made private inquiries in the absence of the parties and based their award on such inquiry in the absence of a power to that effect in the agreement : 78 *P. R.* 1916, *Dist.* [P 551 C 1]

✲ (c) *Civil P. C., S. 115 — Previous petition for revision dismissed for default — Fresh petition lies*

A fresh petition for revision can lie where the previous petition is dismissed for default : *A. I. R.* 1923 *Pat.* 514, *Dis'.* [P 551 C 1]

S. R. Laul—for Petitioner.

Madan Gopal—for Respondents.

Judgment. — This is a petition for revision of the order of the Subordinate Judge of Bhakkar, who directed that an award be filed. An objection was taken to the award on the ground that two out of the three arbitrators made private enquiry from several persons in the absence of the parties and based their award on such enquiry This is admitted by the arbitrators. But the Court below has held that this did not amount to a misconduct because the agreement to refer gave power to the arbitrators to make p ivate enquiry. He has followed *A. I. R.* 1922 *All.* 69. That case, however, does not support the conclusions of the Subordinate Judge because it appears from the report of that case that the agreement expressly provided that the arbitrators could make private enquiry. So far as the agreement in this case is concerned, it does not expressly confer any such power, nor does it do so impliedly. The passage in the agreement relied upon by the Subordinate Judge is to the effect that whatever award the arbitrators shall give after investigation and examination of the books, relating to the facts mentioned above shall be binding on the parties.

This certainly pre-supposes that all enquiry and examination of the books shall take place in the ordinary manner, i. e., in the presence of the parties. Any unusual power which is intended to be given to the arbitrators should have been expressly mentioned in the agreement. The arbitrators not only held the enquiry in the absence of the parties but also in the absence of each other.

I am, therefore, unable to agree with the Court below that the agreement provided for a private enquiry by the arbitrators and must, therefore, hold that they were guilty of misconduct and that the award given by them under these circumstances was illegal and unenforceable.

Counsel for the respondent, however, contended that such an objection could

not be taken on revision and in support of his contention relies upon *Parama Dutt* v *Bipju* (1). That case, however, is distinguishable from this case because here, the ground for revision is the misinterpretation by the Court of the document referring the dispute to the arbitrators.

An objection was also taken by the respondent that this revision did not lie. What happened was this : a previous petition for revision was dismissed in default in the presence of the respondent. The present petition was filed soon after its dismissal and a prayer is added that if it be held that fresh petition for revision does not lie, the present petition be treated as an application for restoration of the former petition, which was dismissed by default. I am satisfied that there was good reason for previous default by the petitioner and would, in any case, treat this application as an application for restoration of the previous petition and grant the same, though I am inclined to think that a fresh petition for revision lies. This view is supported by *Suraj Deo Narayan Singh* v. *Pratap Rai* (2) read with S. 141, Civil P C.

I accept this petition, set aside the order of the Court below and set aside the award with costs throughout.

N.K. *Petition accepted.*

(1) [1916] 78 P. R. 1916=40 P. L. R. 1917=35 I. C. 887=124 P. W. R. 1916.
(2) A. I. R. 1923 Pat. 514=2 Pat. 739.

A. I. R. 1928 Lahore 551

ADDISON AND COLDSTREAM, JJ.

Emperor—Appellant.

v.

Shib Charan—Accused—Respondent.

Criminal Appeal No. 292 of 1928, Decided on 9th May 1928, from acquittal order of 1st Class Magistrate, Gurgaon, D/- 19th December 1927.

Penal Code, Ss. 420 and 511—An attempt to commit an offence is punishable under S. 511 though the final act short of actual commission of that offence has not been accomplished.—A asking Currency Office for payment for two halves of two currency notes—Currency Office making payment already to L—Non-execution of an indemnity bond by A—A prosecuted under Ss. 511 and 420—A was held to have committed an offence of an attempt to cheat though he did not execute an indemnity bond as is usually the practice in the currency office.

An attempt to commit an offence is punishable under S. 511 though the final act short of actual commission of that offence has not been accomplished.

A informed the Currency Office that he had lost two halves of two currency notes of Rs. 100 during a journey and after getting instructions received in reply to his enquiries, he forwarded to the Currency Office the halves of these two notes still in his possession with the prescribed application forms and affidavits testifying that he was the owner of the notes. The Currency Officer had however already paid the value of these notes to a firm on representation by that firm that the halves of the notes had been stolen from *L*, one of the partners who was carrying them from Delhi to Ahmedabad. *A* was prosecuted under S. 511 read with S. 420, Penal Code. The trying Magistrate, without recording any clear finding as to the dishonest intention of the accused in endeavouring to recover the value of the currency notes, acquitted him on the ground that it was the practice of the Currency Offices not to make payment in such cases until the claimant had executed an indemnity bond, and as no such indemnity bond had been executed by *A*, his conduct had not amounted to an attempt to cheat but had remained within the stage of preparation for the offence.

Held: that acquittal was bad as the execution of the bond of indemnity was not a portion of the application and was an act which would ordinarily take place before the act of cheating is completed. The applicant would be willing to take the money without an indemnity bond and by his making a false attempt in asking for the money the offence would be just as complete, whether an indemnity bond was or was not insisted upon: 15 *All.* 173 and 16 *Cal.* 310, *Foll.*: 16 *All.* 409 and 14 *P.R.* 1914 *Cr.*, *Ref.*: 8 *All.* 303 and 45 *P.R.* 1882 *Cr.*, *Dist.* [P 553 C 2]

Carden Noad—for the Crown.
Rama Nand—for Respondent.

Judgment.—This is a Crown appeal against the acquittal of an accused Shib Charan who was tried on a charge under S. 511 read with S. 420, I. P. C., for having attempted to cheat by dishonestly and fraudulently attempting to recover the value of two currency notes from the Currency Offices at Bombay and Madras.

The story for the prosecution was that, in October 1925, in a letter, Ex. P F, Shib Charan informed the Currency Office, Madras, that he had lost one-half of the Rs. 100 currency-note No. DE/42-31436 during a journey to Delhi on the 10th September 1925, and asked to be informed of the procedure for recovery of the value of the note. He addressed the Bombay Currency Office in the same manner in the letter Ex. P B in respect of the Rs. 100 currency-note No. SD/92-90321.

In compliance with instructions received in reply to his enquiries he forwarded to the Madras and Bombay Offices the halves of these two notes still in his possession with the prescribed application forms and affidavits testifying that he was the owner of the notes.

The Currency Officer had, however, already paid the value of these notes to the firm Amba Lal-Gobind Lal on representation by that firm that the halves of the notes had been stolen from Lal Bhai, one of the partners who was carrying them from Delhi to Ahmedabad.

Shib Charan was prosecuted under S. 511 read with S. 420, I. P. C. His defence was that one Johri Mal, the writer of the two letters, Exs. P B and P F had taken his signatures upon two, three or four blank papers. He was unable to identify his signatures on those two documents without spectacles which he had not brought with him. His signatures on the subsequent communications with the Currency Office had also been made upon blank papers. The affidavits (Exs. P E and P K) had been produced for attestation before the Tahsildar of Nuh by Johri Mal at whose instance he had signed them before when the forms had been filled up. He denied that he had attempted dishonestly to recover the value of the currency notes sent to Madras and Bombay.

The Magistrate, without recording any clear finding as to the dishonest intention of the accused in endeavouring to recover the value of the currency notes, acquitted him on the ground that it was the practice of the Currency Offices not to make payments in such cases until the claimant had executed an indemnity bond, and as no such indemnity bond had been executed by Shib Charan his conduct had not amounted to an attempt to cheat, but had remained within the stage of preparation for the offence. He cited *Queen-Empress* v *Dhundi* (1) and *Data Ram* v. *Empress* (2).

On behalf of the Crown the learned Government Advocate has contended that the evidence in the case, if believed, was sufficient to establish clearly the charge of cheating as defined in S. 511, I. P. C. He has referred us to the *Government of Bengal* v. *Umesh Chunder Mitter* (3), a case which appears to be virtually on all fours with the one now before us.

After hearing what Mr. Rama Nand has to say in opposing the appeal, I find myself in no doubt that the Magistrate's view of the law was incorrect.

The intention of S. 511, I. P. C., was fully discussed by the Allahabad Court in *MacCrea's* case (4), where Blair, J., remarked that S. 511, I. P. C., appeared to use the word "attempt" in a very large sense, making punishable any one act of a series of acts conducive to the commission of an offence and excluding the notion that the final act short of actual commission is alone punishable, the definition of what is punishable as an "attempt" under the Indian Penal Code being thus markedly differentiated from what is a criminal attempt according to the accepted English doctrine. The same view was expressed emphatically by Knox, J., in the same case. After a review of a number of Indian rulings on the point he held, without hesitation, that

> S. 511 was never meant to cover only the penultimate act towards completion of an act and not acts precedent, if those acts are done in the course of the attempt to commit the offence, are done with the intent to commit it and done towards its commission * * * *. The question is not one of mere proximity in time or place * * * *. Again, the attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted, does not cease to be a criminal attempt, because the person committing the offence does or may repent before the attempt is completed.

MacCrea's case came ultimately before the Privy Council [*Ma Crea Ex-parte* (5)]: where the correctness of the interpretation put upon S.511 by the Allahabad Court was questioned. In refusing leave to appeal the Lord Chancellor remarked that their Lordships saw no reason to believe that there was any misdirection on the part of the learned trial Judge who had laid down in his charge to the jury that in order to convict the prisoner they must be satisfied not only that he intended to cheat but that he had done an act towards that cheating.

> The learned Judge (to quote the words of the Lord Chancellor) clearly had in view the distinction between preparation to commit an offence and acts done towards the commission of the offence.

(1) [1886] 8 All. 303=(1886)=A.W.N. 125.
(2) [1882] 45 P.R. 1882 Cr.
(3) [1889] 16 Cal. 310.
(4) [1893] 15 All. 173=(1893) A.W.N. 71.
(5) [1893] 15 All. 310=20 I.A. 90=(1893) A.C. 346=6 Sar. 344 (P.C.).

In *Queen-Empress* v. *Kalyan Singh* (6), Burkitt, J., citing *MacCrea's* case held that an accused at whose instance a petition writer had commenced the writing out of a fraudulent and fictitious bond in favour of the accused upon a stamped paper purchased by the accused under the name of the person by whom the bond was to be payable, had been rightly convicted of an attempt to commit the offence defined in S. 467, I. P. C.

In the *Government of Bengal* v. *Umesh Chunder Mitter* (3), referred to by the learned Government Advocate the accused against whose acquittal the Crown had appealed had, as here, sought to recover from a Currency Office, upon the halves of two currency notes, the value of the notes, declaring that the halves not in his possession had been lost by him. In reply to a communication from the Currency Office, who were aware that the amount of the notes had been paid to the holder of their other halves, he had submitted a formal claim applying for the payment of the money and stating that he was the proprietor of the entire notes. The application by the accused was dishonest. It was argued for the accused, as it has been argued before us for Shib Charan that his act at the most amounted to preparation to commit an offence and that, as the officer in charge of the Currency Officer, knew that the matters stated by the accused in his application were untrue and would not have paid the money, the offence of cheating could not be completed and therefore the attempt to cheat could not have been committed. The Court in rejecting this proposition pointed out that a man may attempt to cheat, although the person when he attempts to cheat is forewarned and is, therefore, not cheated. In that case also, as here, it was further argued on behalf of the accused that as it was usual to take a bond of indemnity from applicants before payment of the value of currency notes of which halves had been lost, the attempt had not been completed because such an indemnity bond had not been executed. It was, however, held that the application for the money was the attempt, or at any rate sufficient to constitute an attempt:

> The execution of the bond of indemnity, the learned Judge went on to remark is not a portion of the application and is an act which would ordinarily take place before the act of cheating is completed. As far as the applicant is concerned he would be willing to take the money without an indemnity bond and by his making a false attempt in asking for the money the offence would be just as complete, whether an indemnity bond was or was not insisted upon.

The question how far preparation for an offence must be carried to be punishable as an attempt under S. 511 came before the Punjab Chief Court in *Abdulla* v. *Emperor* (7). There, after referring to certain suggested definitions of the word "attempt" to be found in legal commentaries the learned Judges expressed their opinion that cases can and do arise in which the offence of "attempt" to commit an offence has been committed even though, in order to the completion of the offence, something more remained to be done by the offender. The attention of the learned Judges had been drawn to *Queen-Empress* v. *Dhundi* (1), which, as already stated, was relied upon by the Magistrate in acquitting Shib Charan. The facts in *Queen-Empress* v. *Dhundi's* case (1), are not on all fours with the one before us for, as pointed out in the judgment by the Allahabad Court in *MacCrea's* case, the person upon whom the fraud had to be perpetrated had not been approached in any way by the accused.

The facts in *Data Ram* v. *Empress* (2) were also entirely different from those of the present case. There, the Punjab Chief Court, remarking that mere preparation was not sufficient to complete the offence of an attempt, held that the mere act of bringing a sword was not an act of such an approximate nature as would amount to an attempt to commit murder or grevious hurt.

Following the interpretation of S. 511 adopted by the learned Judges in *MacCrea's* case and in *Re The Government of Bengal* v. *Umesh Chander Mitter* (3). I am satisfied that the view that an attempt to commit an offence is not punishable under S. 511 unless the final act short of actual commission of that offence has been accomplished, is an erroneous one.

Holding that the judgment appealed against is manifestly wrong, and being of opinion that the interests of justice require a re-decision of the case, I would

(6) [1894] 16 All. 409=1894 A.W.N. 150.

(7) [1914] 14 P. R. 1914 Cr.=36 P.L.R. 1914 =22 I.C. 473=13 P.W R. 1914 Cr.

accept this appeal, set aside the acquittal, order the respondent to surrender to his bail bond and return the case to the Magistrate for re-decision upon the merits in view of the interpretation of the law set forth above. The Magistrate has, of course, still to decide upon the evidence whether, in acting as the Magistrate finds it proved that he acted, the accused had a fraudulent or dishonest intention.

Addison, J.—I agree.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 554

TEK CHAND AND BHIDE, JJ.

Mul Raj—Defendant—Appellant.

v.

Indar Singh and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 597 of 1927, Decided on 8th February 1928, from decree of District Judge, Ludhiana, D/- 2nd February 1927.

(a) *Punjab Land Alienation Act, S. 12—Lease for 20 years—Option to tenant to occupy further on certain conditions does not ipso facto convert it into a lease for a longer period.*

When the lease was in the first instance only for a period of 20 years the mere fact that option is given to the tenant to remain in occuprtion thereafter, if he chooses to do so, on certain conditions cannot ipso facto convert it into a lease for a longer period: 17 *Cal.* 548, *Foll.* [P 555 C 1]

(b) *Landlord and Tenant—Land leased for building purposes—Permanency of tenure cannot be assumed in the absence of a clear contract*

Where the land has been leased for building purposes, it cannot be assumed, in the absence of any clear recital in the lease to that effect, that the landlord intended to allow the tenant to remain in permanent occupation at a small rent. The mere fact that valuable buildings were allowed to be constructed on the land cannot be taken as any indication of the intention of the parties to create a permanent tenancy. [P 555 C 1]

(c) *Landlord and Tenant — Standard of damages for holding over—Double the rent may be fitting standard—Circumstances of tenancy and sufficiency of notice should be considered.*

In considering what sum should be allowed for use and occupation, or for damages for contumacious holding over, the whole circumstances of the tenancy and the sufficiency in point of time of the notice may properly be taken into consideration Double the rent may sometimes be taken as a fitting standard: 5 *P. R.* 1904, *Foll.* [P 555 C 2]

Jagan Nath Aggarwal—for Appellant.

Faqir Chand—for Respondents.

Bhide, J. — On 11th January 1904 Banarsi Das a Khatri (father of defendant 1 and brother of defendant 2) took on lease 2 biswas and 5 biswansis of land from Kahan Singh, father of plaintiff. The land was admittedly agricultural at the time though it was leased for building purposes. The lease purported to be for a period of 20 years at an annual rental of Rs. 16, but contained a clause giving the tenant option to continue in occupation after the expiry of that period on the same rent. This condition is now the chief bone of contention between the parties and ran as follows:

Agar muzhar bad bis sal ayanda ko arazi apne qabze men rakhana chahega to is sharat lagan se hasab ..... razamandi malik rakhunga.

At the time of mutation the Collector cancelled this condition as contravening the provisions of the Punjab Land Alienation Act, as no lease of agricultural land for a period of over 20 years by a member of an agricultural tribe in favour of a non-agriculturist is permissible under that Act. After the expiry of the period of 20 years the landlord gave notice to the defendants to vacate the land, but as they failed to comply with the terms of the notice he instituted the present suit for ejectment and damages for contumacious holding over at the rate of Rs. 2 per diem. Defendant 2 who contested the suit pleaded that by virtue of the condition quoted above he was not liable to be ejected, that the Collector had no authority to cancel the condition, and that in any case the plaintiff was estopped by his conduct from asking for ejectment inasmuch as he had permitted valuable buildings to be erected on the land.

The trial Court upheld these contentions and dismissed the suit.

On appeal the learned District Judge disagreed with the trial Court and granted a decree for ejectment and also for damages at the rate of Rs. 100 per annum. From this decision defendant 2 has filed a second appeal.

The only points urged on behalf of the appellant before us were:

1. That the Collector's action in cancelling the condition in the lease quoted above was ultra vires, that the condition was still binding on the parties and that the defendants were, therefore, not liable to ejectment.

2. That the amount of damages awarded is excessive.

As regards the first point: the contention that the Collector had no power to cancel the condition in the lease referred to above, appears to me to be sound. The lease was in the first instance only for a period of 20 years and the mere fact that option was given to the tenant to remain in occupation thereafter, if he chose to do so on certain conditions, could not ipso facto convert it into a lease for a longer period: vide inter alia *A. C. Boyd* v. *A. Kreig* (1). But assuming this condition to be binding on the parties, it does not appear to me to support the appellant's contention that he is not liable to be ejected. According to the plain interpretation of the language used, *hasab razamandi malik*, the tenant could only continue in occupation with the consent of the landlord. It was argued that these words merely recited that the consent of the landlord had been obtained and were equivalent to "according to the consent of the landlord already obtained."

This interpretation seems to me to be a very far-fetched one. If the consent of the landlord was not needed for further occupation there was no point in inserting these words at all in the condition. The trial Court remarked that as the rent for the subsequent period of occupation had been fixed there was nothing left for which the consent of the landlord could be necessary. But there might be obviously other conditions of the tenancy, e. g., period of further occupation, etc., for which landlord's consent would be essential. The land had been leased for building purposes, and it cannot be assumed, in the absence of any clear recital in the lease to that effect that the landlord intended to allow the tenant to remain in permanent occupation at the trifling rent of Rs. 16 per annum. The mere fact that valuable buildings were allowed to be constructed on the land cannot be taken as any indication of the parties to create a permanent tenancy, as it was clearly provided in the lease itself that, in the event of ejectment, the tenant was to remove the materials of the buildings. The decree for ejectment passed by the learned District Judge appears to me to be amply justified by the terms of the lease.

As regards damages: the learned District Judge has fixed the rent at Rs. 100 per annum. It was argued that the rent for "contumacious holding over" should not have exceeded Rs. 32 per annum, i. e, double the rent reserved by the lease. 33 *P. R.* 1898 and *Pirbhu Dial* v. *Ram Chand* (2) were cited as authorities. But these authorities do not lay down any such hard-and-fast rule. It was remarked in the latter ruling that double the rent may sometimes be taken as a fitting standerd, but that, in considering what sum should be allowed for use and occupation, or for damages for contumacious holding over, the whole circumstances of the tenancy and the sufficiency in point of time of the notice may properly be taken into consideration: vide *Pirbhu Dial* v. *Ram Chand* (2). In the present instance, notice was given on 27th June 1923 i. e., about six months before the expiry of the period of the lease, and yet the defendants failed to vacate the land even up to 6th February 1926, when the present suit was instituted. After the expiry of the period of the lease the defendants appear to have had no legal justification for remaining in occupation of the land and seem to have done so merely on account of the substantial income they were deriving from the buildings which are now situated apparently in the midst of a flourishing mandi. The plaintiff has produced evidence to the effect that the land in dispute would now fetch a rent of Rs. 700 to Rs. 1,000 per annum which stands unrebutted. Although this may be an exaggerated estimate of the rent, the amount fixed by the learned District Judge at Rs. 100 per annum does not appear to be excessive for a building site situated in a mandi.

I would accordingly dismiss this appeal with costs. The defendants are given a further period of three months from this date to remove the materials of the building.

Tek Chand, J.—I concur.

N.K. *Appeal dismissed.*

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(1) [1890] 17 Cal. 548.

(2) [1904] 5 P. R. 1904=42 P. L. R. 1904

A. I. R. 1928 Lahore 556

ADDISON, J.

Ghani Muhammad and *others*—Appellants

v.

Dina Nath Puri (*Official Receiver*) and *others*—Respondents.

Misc. First Appeal No. 1798 of 1927, Decided on 25th January 1928, from order of Dist. Judge, Gurdaspur, D/- 6th June 1927.

(a) *Provincial Insolvency Act,-S. 75—Claim to insolvent's property in Receiver's hands allowed—Appeal lies without leave of the Court.*

Where property is seized by a Receiver as belonging to an insolvent and a claim is preferred under S. 68 by a third party to such property and the claim is allowed an appeal lies under S. 75 without leave of the Court: 40 *Mad.* 752, *Ref.* [P 556 C 2]

(b) *Provincial Insolvency Act, S. 4 (1)—A question of title under S. 4 (1) must be tried like a regular suit.*

A question of title under S. 4 (1) Insolvency Act must be tried like a regular suit after having all the parties before the Court, taking their pleadings, admitting their documents and hearing their evidence. [P 556 C 2]

Ghulam Rasul—for Appellants.

Hem Raj—for Respondents.

Judgment.—One Jhanda was adjudicated an insolvent on 7th February 1927, and the record was handed over to the Official Receiver to deal with the case. Amongst other things the Official Receiver came to the conclusion that a mortgage for Rs. 99 in the name of Barkat, the minor son of the insolvent, which was effected on 10th February 1927, was not an asset of the insolvent, but that the transaction was in really entered into for the benefit of one Karam Chand who, being a non-agriculturist, could not take a mortgage in his own name and, therefore, took it benami in the name of the minor Barkat. The Official Receiver also held that a mortgage for Rs. 299 effected on 9th February 1927, in the name of Ghani Muhammad, another minor son of the insolvent, was really an asset of the insolvent. An application against the recommendation of the Official Receiver as regards the mortgage in Barkat's name was put in by the creditors presumably under S. 68, Insolvency Act, while Ghulam Muhammad, the maternal uncle of Ghani Muhammad, put in an application against the recommendation made in the case of the second mortgage. The District Judge has held that both the mortgages were mortgages of the insolvent and has directed the Official Receiver to dispose of them as the assets of the insolvent. Against this decision (1) Ghani Muhammad through Munshi, and (2) Barkat through Munshi and Karam Chand have preferred this appeal.

It is objected that no appeal lies without leave. This is not correct. Where property is seized by a Receiver as belonging to an insolvent and a claim is preferred under S. 68 by a third party to such property and the claim is allowed an appeal lies under S. 75: see notes at p. 406 of Rustomji's Insolvency and Bankruptcy 2nd edn. and *Allapichai* v. *Kuppai Pichai Rowther* (1). In any case it is perfectly clear that this is a decision of the District Judge finally holding that the title of these two mortgages is in the insolvent. The case is, therefore, one under S. 4, sub-Cl. (1) of the Act and an appeal lies from the decision of the District Judge on the point.

It is clear that all the proceedings have been without jurisdiction and illegal. The Official Receiver, when enquiring into the matter, had not before him the two minors or Karam Chand as parties. Before the District Judge also the minor Barkat and Karam Chand were not parties. Ghani Muhammad seems to have been a party before the District Judge as he, through his maternal uncle, put in an application that the mortgage was his and had been acquired for him by his maternal uncle and that it was not his father's He, however, was not a party before the Official Receiver. The District Judge proceeded to dispose of the matter before him without recording any evidence. The whole proceedings have, in my opinion, been misconceived. As the decision of the District Judge purports to be one under S. 4 (1), Insolvency Act, it was necessary for him to try the matter like a regular suit after having all the parties before him, taking their pleadings, admitting their documents and hearing their evidence. It is not possible to decide a question of title in the manner adopted in the present case. I, therefore, accept this appeal and remand the proceedings to the District Judge for re-decision, in accordance with law, of the question of title arising in the case of the two mortgages. I make no order as to costs of this Court.

N.K. *Appeal accepted.*

(1) [1917] 40 Mad. 752=39 I. C. 429=32 M. L. J. 449.

** A. I. R. 1928 Lahore 557

SHADI LAL, C. J., BROADWAY AND FFORDE, JJ.

Mrs. Lydia Agnes Waller—Petitioner.

v.

Samuel James Waller—Respondent.

Civil Ref. No. 6 of 1926, Decided on 11th April 1928, made by Dist. Judge, Lahore, on 8th February 1926.

** *Divorce Act* (1869 *amended* 1926)—*Parties resident in India but domiciled in England—Decree for dissolution cannot be passed—Divorce Jurisdiction Act*, 1926, (*Indian and Colonial* 16 *and* 17 *Geo.* 5, *Ch.* 40), *S.* 3.

As under the Indian Divorce Act (1869) amended by Act (25 of 1926), the Courts in India cannot pass a decree for divorce in cases of persons resident in India but not domiciled therein, and as the Indian and Colonial Divorce Jurisdiction Act passed by the British Parliament in 1926 validates only decrees passed and confirmed under the Indian DivorceAct prior to 15th December 1926, the Indian Courts cannot confirm, after the passing of the English statute and the amendment of the Indian Act, where the parties are residents in India but domiciled in England, a decree nisi though the decree nisi may have been passed prior to the passing of the English statute. A decree of dissolution of marriage confirmed or made absolute after 25th March 1926, the date when the amendment of the Indian Act came into force, would be a nullity, as the order of confirming or making absolute is itself a decree of dissolution, and the making of it is prohibited by the Indian Act of 1925 in cases where the parties to the marriage are not domiciled in India at the date of presentation of the petition. As such a decree cannot be made under the provisions of the Indian Divorce Act, as amended by Act No. 25 of 1926, it would not be rendered valid by S. 3, Indian and Colonial Divorce Jurisdiction Act. [P 560 C 2]

Norman Edmunds—for Petitioner.

C. H. Carden Noad—for Respondent.

Shadi Lal, C. J.—On 27th January 1926, the District Judge of Lahore granted a decree dissolving the marriage of Mrs. Lydia Agnes Waller with Samuel James Waller. On 4th October 1926, the wife made an application praying that the decree of the District Judge be confirmed by the High Court. This application came before a Bench of three Judges who made an order, at the request of the counsel for the petitioner, that the matter be kept pending until the passing of the statute by the British Parliament known as the Indian and Colonial Divorce Jurisdiction Act, 1926. That Act has now come into force, and the petitioner has again applied for the confirmation of the decree granted by the District Judge.

The parties, who profess the Christian religion, were married and resided in India, but they were domiciled in England. The question arises whether this Court has jurisdiction to confirm the decree. Now, there was a divergence of judicial opinion on the question of whether under the Indian Divorce Act, 1869 mere residence within the forum conferred jurisdiction upon the Indian Courts to grant a decree for the dissolution of a marriage between persons who were not domiciled in India. The question was answered in the affirmative by this Court in *Lee* v. *Lee* (1), and the same rule was subsequently adopted by the Calcutta High Court in *Isharani Nirupoma Devi* v. *Victor Nitendra Narain* (2). It was, however, pointed out in my judgment in *Lee* v. *Lee* (1), that, while the Indian Courts had no alternative but to exercise jurisdiction in divorce on the ground of mere residence, the Courts in England would not give recognition to the decree granted by the Indian Courts to parties not domiciled in India. As observed in that case,

> this conflict of laws is bound to lead to the scandal that a man and a woman are held to be man and wife in one country and strangers in another. The scandal is not confined to their own personal relations, but affects also the validity of a subsequent marriage entered into by either of the parties, the legitimacy of the issue of that marriage, and succession of the property owned by the parties to the second marriage. Indeed, the second marriage could be treated by the English Courts as a bigamous marriage and the parties could be arraigned before a criminal Court. These and other consequences, which must result from a conflict between the two systems of law, are very serious matters; and, while they cannot influence the decision of the Courts, they must receive due consideration from the authorities who are responsible for amending the law.

The British Legislature accordingly put an end to this conflict of laws by passing the Indian and Colonial Divorce Jurisdiction Act, 1926, 16 and 17 Geo. 5, Ch. 40. But, before the enforcement of this statute, the Indian Divorce Act of 1869 had been amended by the Indian Legislature, by which the Indian Courts were prohibited from making a decree of the dissolution of a marriage,

> except where the parties to the marriage are domiciled in India at the time when the petition is presented.

This Act, which was promulgated on 25th March 1926, definitely laid down

(1) A. I. R. 1924 Lah. 513=5 Lah. 147 (F. B.).

(2) A. I. R. 1926 Cal. 871=53 Cal. 282.

that jurisdiction in the matter of divorce depended upon domicile and not upon residence, and thereby assimilated the law in India to that obtaining in England.

The learned counsel on both sides admit that the marriage in this case could not be treated as having been dissolved until the confirmation of the decree granted by the District Judge, and that the rule enacted by the Indian Divorce (Amendment) Act of 1926 prevents this Court from confirming that decree, though it was made before the date of the enforcement of the Act. There can, therefore, be no doubt, when the application for confirming the decree came up originally before a Bench of this Court it was bound to be dismissed on the ground of want of jurisdiction.

It is, however, urged that the Indian and Colonial Divorce Jurisdiction Act, 1926, has since invested the High Court with the jurisdiction to confirm the decree. Now. a perusal of that statute shows that the primary object of the legislature was to confer on the High Courts in India jurisdiction

to make a decree for the dissolution of a marriage, and as incidental thereto to make an order as to damages, alimony or maintenance, custody of children, and costs, where the parties to the marriage are "British subjects domiciled in England or in Scotland, in any case where a Court in India would have such jurisdiction if the parties to the marriage were domiciled in India.

The reason for this legislation was that a person, who, owing to official duty, poverty or any other sufficient cause, is unable to take proceedings in the Court of the country in which he or she is domiciled, should be allowed to obtain in India the same relief as might have been granted to him or her by the Court of domicile. This is the provision for the future. But the legislature also desired to give validity to decrees and proceedings which, validly taken under the Indian Divorce Act, would be invalid under the English law. To achieve this purpose S. 3 was enacted by which it was provided that:

Any decree granted under the Act of the Indian Legislature known as the Indian Divorce Act, 1869, and confirmed or made absolute under the provisions of that Act, for the dissolution of a marriage the parties to which were at the time of the commencement of the proceedings domiciled in England or in Scotland, and any order made by the Court in relation to any such decree shall, if the proceedings were commenced before the passing of this Act, be as valid and be deemed always to have been as valid in all respects as though the parties to the marriage had been domiciled in India.

It is argued that, while the High Court could not, after the commencement of the Indian Divorce (Amendment) Act, 1926, confirm the decree, it has now authority to do so under the aforesaid section of the British statute. But shortly, the contention amounts to this: proceedings, which would be invalid even under the Indian law, have been rendered valid by the statute of the British Parliament. To this contention I am unable to accede. I have no hesitation in holding that S. 3 contemplates only cases of this description. Proceedings have been taken under the Indian law and are valid under that law. But they cannot be treated as valid by the British Courts. The section lays down that such proceedings shall be deemed to be valid even by the British Courts. I do not think that the British Legislature ever intended to legalize an act which could not be validly done under the Indian law.

So far as the present application is concerned the short answer is that the third section of the statute, which is the only law invoked on behalf of the petitioner, lays down in express terms that the decree for the dissolution of marriage must be granted under the Indian Divorce Act and "confirmed or made absolute under the provisions of that Act" ; and that the decree in question was not confirmed and could not be confirmed under the Indian Divorce Act as amended by the Act of 1926. For the aforesaid reasons I hold that this Court has no jurisdiction to confirm the decree of the District Judge. The application is accordingly dismissed.

Broadway, J.—On 4th June 1925, one Mrs. L. A. Waller instituted a suit against her husband. S. J Waller, for dissolution of marriage on the usual grounds and obtained a decree nisi on 27th January 1926.

After the expiry of six months Mrs. L.A. Waller filed a petition in this Court under S. 17, Indian Divorce Act 4, 1869, which came up for hearing before a Special Bench on 17th December 1926, and 21st January 1927, when it was discovered that the parties were domiciled in England. Having regard to the provisions of Act 25 of 1926, amending the Indian Divorce Act 4 of 1869, it was held

that this Court had no jurisdiction to confirm the decree. Instead of refusing to confirm it, however, the case was adjourned at the request of the counsel for Mrs. Waller to await the enactment of a Bill which was said to be before the English Legislature and which, it was alleged, dealt with this matter.

The petitioner has moved this Court again, and it has been urged both by her counsel and by the learned Government Advocate who appeared for the King's Proctor, that S. 3, Indian and Colonial Divorce Jurisdiction Act, 1926 (16 and 17 Geo. 5, Ch. 40) gave this Ccurt jurisdiction to confirm the decree.

It is, I think, clear that subsequent to the passing of the amending Act 25 of 1926 the Courts in this country had no jurisdiction in matrimonial suits which related to persons domiciled in England or Scotland. The question is whether the Indian and Colonial Divorce Jurisdiction Act 1926, passed by the British Parliament, gives the Courts in this country the jurisdiction claimed on behalf of the petitioner. After giving due weight to the arguments advanced by the learned counsel, in my judgment the answer must be in the negative S. 3 of the English Act deals with the validity of certain decrees passed by the Indian Courts, but to my mind it only validates such decrees or orders as the Indian Courts could, under Act 4 of 1869, have passed or made. The Amending Act 25 of 1926 came into force in March 1926, and after that date the Courts in this country had no jurisdiction whatever either to grant or confirm a decree in a case like the present. In these circumstances, however hardly this view may operate on the petitioner, I consider that it is impossible for this Court to confirm the decree and that we must, therefore, decline to do so.

Fforde, J.—This is an application brought under the provisions of S. 17, Indian Divorce Act 1869, for the confirmation of a decree of dissolution of marriage made by the District Judge of Lahore on 27th January 1926.

The application first came before a Bench of three Judges of this Court on 17th December 1926, and by an order of 21st January 1927, the Court gave liberty to the petitioner to renew her application after the passing of the Indian and Colonial Divorce Jurisdiction Act, which it was stated was then before Parliament. This course was adopted by reason of the fact that on 25th March 1926 an Act of the Indian Legislature had been promulgated which prohibited the making of decrees of dissolution of marriage when the parties to the marriage were not domiciled in India at the time when the petition was presented. It is conceded that the parties to the present suit were not domiciled, though resident, in India at the date of the presentation of the petition. The Court was inclined to the view that the prohibition in the Act of 1926 applied as much to the confirming of a decree already made as it did to the making of a decree by the trial Judge, but gave no definite decision on that question.

The question which now arises for determination is whether or not this Court has jurisdiction to confirm a decree of a District Court made before the Indian Act of 1926, came into force, in cases where the parties to the proceedings are not of Indian domicile.

Section 10 of the Act of 1869 gives a District Judge, and the High Court jurisdiction to entertain a suit for the dissolution of marriage; and S. 14 confers power upon either Court to pronounce a decree declaring the marriage to be dissolved. Where the decree of dissolution is pronounced by the District Judge the marriage is not dissolved until the decree has been confirmed by the High Court in accordance with the provisions of S. 17, Divorce Act; and where the decree has been made by the High Court it is a decree nisi which can only be made absolute under the provisions of S 16 of the Act. S. 16 commences with these words:

> Every decree for a dissolution of marriage made by a High Court not being a confirmation of a decree of a District Court shall in the first instance, be a decree nisi,

which makes it clear, if there could be any doubt in that regard, that a confirmation of a decree of a District Court is a decree for a dissolution of marriage. That being so, the Act of 1926 obviously prohibits the confirmation by the High Court of a District Court's decree. It follows that when this application came before the High Court in December 1927, the Court had no jurisdiction to confirm the decree of the District Judge.

The sole question which remains is, has jurisdiction to confirm this decree since been conferred upon the Courts in India? Mr. Elmunds for the petitioner who is supported by the Government instructed by the King's Proctor, contends that this jurisdiction is given by S. 3, Indian and Colonial Divorce Jurisdiction Act 1926, which became law on 15th December 1926. The section runs as follows:

> Any decree granted under the Act of the Indian Legislature known as the Indian Divorce Act 1869, and confirmed or made absolute under the provisions of that Act, for the dissolution of a marriage the parties to which were at the time of a commencement of the proceedings domiciled in England or in Scotland, and any order made by the Court in relation to any such decree shall, if the proceedings were commenced before the passing of this Act, be as valid and be deemed always to have been as valid in all respects as though the parties to the marriage had been domiciled in India.

It seems to me clear that this section confers no new jurisdiction upon the Courts in India, but only validates a decree granted under the Divorce Act of 1869, which has been confirmed under the provisions of S. 17, or made absolute under S. 16, in cases where the proceedings commenced before the passing of the Indian and Colonial Divorce Act. The learned Government Advocate has argued that unless this latter Act was intended to validate all decrees for dissolution of marriage, whether made before or after the Act came into force, the words "if the proceedings were commenced before the passing of the Act" would be meaningless, as in cases where the decree was made before the Act was passed the proceedings must necessarily have been commenced before that date. The real application of this anomaly, however, appears to be that the Parliamentary draftsmen had not in mind the effect of the Indian Act of March 1926, when the Indian and Colonial Divorce Jurisdiction Bill was prepared. Had the Act of March 1926, been delayed until the English statute had become law the situation would have presented no anomalies. The difficulty we are confronted with has arisen from the fact that the Indian Legislature took away from the Indian Courts the jurisdiction which some of the Courts claimed to possess, to dissolve marriages of persons resident but not domiciled in India, some nine months before the English Parliament passed an Act to validate the decrees passed by Courts in India which has assumed that jurisdiction.

Shortly summarized the law stands thus: A decree of dissolution of marriage confirmed or made absolute after 25th of March 1926, would be a nullity as the order of confirming or making absolute is itself a decree of dissolution, and the making of it is prohibited by the Indian Act of 1926, in cases where the parties to the marriage are not domiciled in India at the date of presentation of the petition. As such a decree would not have been made under the provisions of the Indian Divorce Act, as amended by Act 25 of 1926, it would not be rendered valid by S. 3 Indian and Colonial Divorce Jurisdiction Act.

The net result of this recent divorce legislation, therefore, is that, whereas the English Legislation intended to validate all decrees of dissolution of marriage made in India where the proceedings were commenced before 15th of December 1926, the Act passed to effect this object does not, owing to the Indian Act, touch decrees which were not confirmed or made absolute prior to the 25th March 1926.

With the greatest reluctance I am forced to the conclusion that the present application cannot be granted.

S.J./D.D. *Application dismissed.*

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* A. I. R. 1928 Lahore 560

HARRISON AND DALIP SINGH, JJ.

Godha Mal and *others*—Plaintiffs—Petitioners.

v.

Prem Singh and *others*—Defendants—Respondents.

Civil Misc. Appl. No. 634 of 1926, and Civil Appeal No. 86 of 1924, Decided on 22nd March 1928, for leave to appeal to Privy Council, from judgment of Campbell and Dalip Singh, JJ., D/- 13th July 1926, in Civil Appeal No. 634 of 1926.

* *Civil P. C., S.* 110—*"Substantial question of law" is between parties—Exercise of discretion by Court in refusing to extend time for putting in Court-fees—Question is not between parties but one between Court and party—Question is not substantial question of law.*

The question of law need not be one of importance, but must be a substantial question of

law between the parties to the case, where the trial Court, in the exercise of its discretion, refuses to extend the time for putting in Court-fees, it can hardly be said that the question is a substantial question of law arising between the parties to the case. It is more a question between the Court and the plaintiff: *A. I. R.* 1927 *P. C.* 110, *Foll.*; 5 *Lah.* 260, *not Foll.*

[P 561 C 2]

Fakir Chand—for Petitioners.

Har Gopal—for Respondents.

Dalip Singh, J.—The petitioners in this case apply for leave to appeal to the Privy Council in appeal No. 86 of 1924. The facts of this case are given in the referring order of Mr. Justice Campbell dated 27th May 1924. The appeal which was dismissed by this Court purported to be under S. 47, Civil P. C. The trial Court in a suit brought by the present petitioners for pre emption decreed the suit and passed a decree in the usual form in pre-emption suits. It has also ordered that

all the decrees are made conditional on payment of the additional Court-fees as ordered. If the deficiency is not made good in any suit within the time allowed the plaint in that suit shall be deemed to be rejected.

A fortnight was allowed to the plaintiffs to put in the deficient Court-fees. The plaintiffs were admittedly one day late in putting in the stamps for the additional Court-fees. Thereupon the Court passed the following order:

According to the decree the time allowed expired on 23th November 1923. After expiry of the time the Court-fee stamp now filed cannot be accepted. Hence it be returned.

This was the order against which an appeal was lodged in this Court on a Court-fee stamp of Rs. 4 purporting to be under S. 47, Civil P. C. A preliminary objection was taken that the order by itself was not appealable and if read with the original order of the trial Court it amounted to an order rejecting the plaint as insufficiently stamped and, therefore, a Court-fee Rs. 4 only was insufficient. It was contended by counsel for the appellants that the order was appealable because it fell within S. 47, Civil P. C., and was a decision of a question arising between the parties to the suit in which the decree was passed and related to the execution, discharge or satisfaction of the decree. This contention was rejected by this Court and it was held that the order was not by itself an appealable order and that it did not fall within S. 47, Civil P. C. An application for review of this order was filed but was dismissed and now the petitioners seek for leave to appeal to the Privy Council and again raise the contention that this Court was incorrect in deciding that the order did not fall within S. 47, Civil P. C., and secondly, that no sound judicial discretion was exercised by this Court in not extending the time for the appellant to make up the deficiency in the Court-fees. It has not been contended before us that the second ground can possibly be said to be a substantial question of law within the meaning of S. 110, Civil P. C. It is, however, contended that ground 1 is a substantial question of law within that section. The exact meaning of the words "substantial question of law" has been the subject of various and divergent decisions. Before us both sides have relied upon the ruling reported as *Gokal Chand* v. *Sanwaldas* (1) which follows an Allahabad ruling which lays down that the test is that the question of law is such that in respect thereof there may be a difference of opinion. The proposed test seems to me somewhat unsatisfactory because it would tend to vary with different Judges who might or might not think a question was open to difference of opinion. The latest ruling of their Lordships of the Privy Council, of which I am aware, namely, *A. I. R.* 1927 *Privy Council* 110 lays down that the question of law need not be one of importance, but must be a substantial question of law between the parties to the case.

This decision of their Lordships overrules the decisions which had laid down that the question of law must be one of importance. The only other meaning of substantial question of law that I can think of, is that the question must be one affecting the substance of the case and not a question which merely arises incidentally to the case. Now, in this case it cannot be contended, and was not contended, that the trial Court had not discretion to extend or not to extend the time for putting in Court-fees. If in the exercise of that discretion it refused to extend time for putting in Court-fees, it can hardly be said that this was a substantial question of law arising between the parties to the case. As a matter of fact in this case the plaintiff had succeeded in his suit and the decree was made conditional on his putting in the Court-fees. It is difficult to see how

(1) A. I. R. 1924 Lah. 473=5 Lah. 260.

a question of Court-fees can be a question between the parties to the case at all. It is more a question between the Court and the plaintiff. I am, therefore, of opinion that this particular case does not involve any substantial question of law nor do I think that there is really any room for difference of opinion if this is the correct test. The order was not one under S. 47, as S. 47 only comes into play where there is a decree. In this case the existence of the decree itself was conditional on payment of Court-fee and when no Court-fee was paid the plaint stood rejected as insufficiently stamped.

The order rejecting a plaint is no doubt appealable, but then the Court-fees would not be a Court-fee of Rs. 4 alone nor did the appeal actually lodged purport to be from an order rejecting a plaint. I am, therefore, of opinion that in the circumstances of the case no substantial question of law arises between the parties and I would, therefore, dismiss the application with costs.

Harrison, J.—I agree.

S.J. *Application dismissed.*

** A. I. R. 1928 Lahore 562

TEK CHAND AND BHIDE, JJ.

Dewa Singh and *another*—Defendants—Appellants.

v.

Fazal Dad and *others*—Plaintiff and Defendants—Respondents.

First Appeal No. 1205 of 1925, Decided on 25th May 1923, from decree of Sr. Sub-Judge, Gujrat, D/- 27th February 1925.

** *(a) Civil P. C., S. 9—A civil suit for restoration of property sold under Ss. 87 and 88, Criminal P. C. is barred even though there have been irregularities in sale—Criminal P.C. S. 89.*

A "proclaimed" person, whose immovable property has been attached and sold by a Criminal Court in proceeding under Ss. 87 and 88, Criminal P. C., has no right to maintain an ordinary civil action for the restoration of the property sold, even though the procedure laid down for issuing the proclamation and attachment have not been strictly followed: 8 *W. R.* 207; 5 *Pat. L. J.* 321 and *A. I. R.* 1923 *Bom.* 198, *Dist.*; 27 *All.* 572, *Diss. from* and *Dist.*; 39 *P. R.* 1917; 32 *P. R.* 1919 and *A.I.R*, 1926 *Lah.* 662, *Rel. on.* [P 566 C 1]

A civil suit for the purpose of setting aside such a sale is impliedly barred by the provisions of Criminal P. C.

(b) Interpretation of statutes—Power given by legislature causing injury to an individual—Mode of redress also specified in the statute—Civil suit is barred—Civil P. C., S. 9.

It is an established principle of law that when an act of Legislature gives power to any person for a public purpose from which an individual may receive an injury, then if the mode of redress is also specified in the statute jurisdiction of ordinary Courts will be ousted. [P 564 C 2]

Jagan Nath Aggarwal, Ram Chand Manchanda and *V. N. Sethi*—for Appellants.

Zafarullah Khan and *Bashir Ahmad*—for Respondents.

Bhide, J.—Fazal Dad along with nine other persons was prosecuted for the murder of one Amira. When the challan was sent up, Fazal Dad was reported to be absconding. Proceedings were taken under S. 87/88, Criminal P. C. and the land which is the subject-matter of this appeal was sold by auction on the 20th December 1918 to different persons for Rs. 6,650. The sale was confirmed on 10th April 1919.

In October 1919 Fazal Dad was arrested. He was then tried for the murder but acquitted on 7th February 1920. On 13th March 1920 Fazal Dad applied under S. 89, Criminal P. C., for restoration of the property which had been sold. The application was rejected by the Magistrate. The Sessions Judge on appeal ordered the restoration of the property to Fazal Dad. On the case coming up before this Court in revision it was pointed out by Campbell, J. that under S. 89, Criminal P. C., only the net proceeds of the sale and not the property itself could be restored to the applicant. The order of the Sessions Judge was modified accordingly and it was directed that the applicant should be given the net proceeds of the sale.

Not satisfied with this order Fazal Dad instituted the present suit on 10th May 1924 for

a declaration to the effect that the sale by auction of the land in dispute made on 20th December 1918 and confirmed on 10th April 1919 is invalid and void and shall not affect the plaintiff's rights.

The pleas on the basis of which Fazal Dad sought this relief briefly were that he had not "absconded", that he was unaware of the proceedings under S. 87/88 Criminal P. C., and lastly, that those proceedings were not in accordance with law. The Secretary of State as well as the vendee were impleaded as defendants.

The defendants traversed the above pleas and the vendees also pleaded that a civil Court had no jurisdiction to entertain such a suit. The learned Senior Subordinate Judge decided the issues in favour of the plaintiff and decreed the suit. From this decision two of the vendees, namely, Dewa Singh and Bahawal Bakhsh have appealed.

The points at issue have been argued at length before us and after giving my careful consideration to them I am of opinion that this appeal should succeed on the question of jurisdiction.

Before proceeding to discuss the law on the subject it may be stated at the outset that it was not denied on behalf of the respondent that the Magistrate had jurisdiction to take proceedings under S. 87/88, Criminal P. C., and that a civil Court would have no jurisdiction to entertain a suit of this kind if the sale had been carried out according to the provisions of S. 87 or 88, Criminal P. C. It was, however, contended that in the present instance those provisions had not been complied with inasmuch as 30 days time was not given for the absconder's appearance on a specified date and no warrant of attachment was issued according to law in connexion with the land in dispute. Assuming that the sale was irregular in these respects, the question for decision is whether a civil Court has jurisdiction to declare it to be null and void.

The case law on the subject seems to be rather meagre. A number of rulings were cited on behalf of the appellants but none of them appears to be directly in point. The only rulings on which some stress was laid and which need be referred to are *Bhukhooree Singh* v. *Government* (1), *Secy. of State* v. *Lown Karan Marwadi* (2), and *A. I. R.* 1923 *Bom.* 198. In the first ruling it was laid down that a civil action will not lie to reverse a sale of property carried out under S. 185, Criminal P. C. (corresponding to S. 87/88, Criminal P. C. 1898). But the sale in that case was apparently carried out "legally" and the effect of irregularities in procedure was not considered. In *Secy. of State* v. *Lown Karan Marwadi* (2), the question for decision was whether a suit would lie to contest an order of disposal passed by a Magistrate under S. 524, Criminal P. C. with respect to property suspected to be stolen. It was pointed out that the question whether a civil action would or would not lie would depend upon the nature of the provisions of the Code in respect of the disposal of such property. The learned Judges were of opinion that a civil suit would lie in respect of an order passed under S. 524, Criminal P. C. as such order could not be taken to be conclusive as regards the owner's title. On the other hand, they expressed the opinion that Ss. 88/89, Criminal P. C., would debar an absconder from suing for recovery of his property. These remarks are of course only 'obiter' and the effect of irregularities in the proceedings was not considered. In the last ruling, namely, *A. I. R.* 1923 *Bom.* 198 also the question of the effect of the irregularities in procedure on a sale conducted under S. 87/88, Criminal P. C. was not raised.

On behalf of the respondent reliance was placed on *Mian Jan* v. *Abdul* (3). The ruling is certainly in his favour but with all respect I must say that I am unable to follow the reasoning underlying it. It appears that the proclamation in that case was irregular inasmuch as it failed to state the time within which and the place at which the absconder was to appear to save the sale of his property, it was held by Blair, J., that the proclamation and therefore the sale also was a nullity. As regards S. 89, Criminal P. C. which enables a proclaimed offender to ask for the restoration of the attached property within two years of the attachment Blair, J. observed as follows:

> There is a provision in the Code of Criminal Procedure by which an absconder returning or being brought to the Court by which the attachment was made is entitled to prove that he did not abscond or conceal himself to avoid the execution of the warrant, and also that he had no such notice of the proclamation as to enable him to attend within the time specified therein. Under these circumstances he can claim some sort of restitution of his property. But that section has no bearing whatever in the case when the proclamation of sale is an absolute nullity in point of law. If then there is no provision in the Code of Criminal Procedure for restitution under the circumstances of this case, and no section except S. 89 is suggested to me, then, if I were to follow the ruling of the Court below, I should be holding that there was no remedy left to the man whose property had been seized and sold under the thinnest and

(1) [1867] 8 W. R. 207.
(2) [1919] 5 Pat. L. J. 321=53 I. C. 507.
(3) [1905] 27 All. 672=2 A. L. J. 318=(1905) A. W. N. 102.

most indefensible colour of law. I have no hesitation in saying that the law is not so and the plaintiff had a right to maintain the suit.

It appears from the above that the decision of Blair, J. assumes (1) that a person aggrieved by sale proceedings under S. 87/88, Criminal P. C, in which the "proclamation is a nullity in point of law" has no remedy under the Criminal Procedure Code, and (2) that when there is no remedy provided by the Criminal Procedure Code a civil suit ought to be maintainable. As regards the first point, it is true that S. 89, Criminal P. C. is somewhat limited in its scope. It enables the absconder to seek relief on two grounds only, namely, (1) that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and (2) that he had not such notice of the proclamation as to enable him to attend within the time specified therein. He cannot as of right ask for restitution on any other ground. Probably this was done deliberately by the legislature as it may not have thought it fit to give an absconder the right to ask for restitution of the property merely on the basis of irregularities where no substantial injustice was involved. At the same time, I do not see that there is no remedy at all under the Code of Criminal Procedure for cases not coming within the four corners of S. 89. The revisional powers of the High Court under S. 439, Criminal P. C., are very wide and I do not see why it should not be possible to find a remedy in a fit case in the provisions of that section. The High Court has besides "inherent powers" to pass such orders as may be necessary to prevent abuse of processes of Courts and to secure the ends of justice which has been now expressly recognized by S. 561-A, Criminal P. C. In *Jahangiri Mal* v. *Kanshi Ram* (4), it was held by a division bench of the Punjab Chief Court that the Chief Court could interfere in revision even in cases not falling within the scope of S. 89, Criminal P. C. A similar view was taken by another division bench of the Punjab Chief Court in *Bahadur Singh* v. *Ram Singh* (5), in which it was held that the proclamation was not in accordance with law and it was directed that

> so much of the property moveable or immovable as has not been sold be restored to him (applicant) and the proceeds of the sale of any property which has taken place be refunded to him.

In a more recent case *Butta Singh* v. *Emperor* (6), a single bench of this Court (Harrison, J.) exercised its "inherent power" to set aside an illegal attachment of land, as the case did not come directly within the scope of S. 89, Criminal P. C.

It will thus appear that a person who is unable to apply on the ground specified in S. 89, Criminal P. C. is not altogether without a remedy. Secondly the assumption of Blair, J., that when the Code does not expressly provide a remedy except for certain cases falling within the scope of S. 89, Criminal P. C., the remedy for other cases must be found in a civil suit, is also not easy to understand. It is true that all suits of civil nature are ordinarily cognizable by a civil Court but S. 9, Civil P. C. makes an important exception to this rule, namely, suits of which cognizance is either expressly or impliedly barred. It seems to me that the present case is one in which cognizance by civil Courts is impliedly barred. It is an established principle of law that when an act of legislature gives power to any person for a public purpose from which an individual may receive an injury, if the mode of redress is also specified in the statute the jurisdiction of ordinary Courts will be ousted (cf. Maxwell's Interpretation of Statutes, sixth edition pp. 708-9). In the present instance the Criminal Procedure has vested criminal Courts with certain power for enforcing the attendance of persons and among these powers is that of attaching and selling their property. This power may cause injury to the person concerned and the Code itself specifies the remedy open to such persons, namely, that provided in S. 89, Criminal P. C. The Code further allows a right of appeal from an order passed under that section. These facts seem to point to the conclusion that the legislature intended this to be the proper ramedy open to persons aggrieved by an order under Ss. 87 and 88, Criminal P. C., in ordinary cases. The Code, however, confers ample revisional powers on High Courts to rec-

(4) [1917] 39 P.R. 1917=123 P. L. R. 1917=41 I.C. 64=112 P.W.R. 1917.

(5) [1919] 32 P. R. 1919=57 P. L. R. 1910=6 1,C. 655=50 P.W.R. 1910.

(6) A.I.R. 1926 Lah. 632.

tify injustice in other cases also. I do not see any good ground in the circumstances for holding that in cases where the proclamation is a nullity a man aggrieved by the result of such proclamation would be without a remedy and, therefore, a civil action must be maintainable.

I have so far dealt with the two grounds on which the decision of Blair, J., is based and with which the Division Bench, which heard the Letters Patent appeal from his judgment, apparently agreed. As regards the possible hardship on the vendees in such cases the learned Judges of the Letters Patent Bench remarked that the purchaser should have safeguarded his position by taking the ordinary precaution of ascertaining whether a Court had issued a statement in writing to the effect that the proclamation had been duly published : vide S. 87 (3), Criminal P. C. The Code, however, does not appear to impose any such duty on the auction purchaser. In an ordinary criminal prosecution, the Crown is the prosecutor. The Code prescribes the procedure which is to be followed by Courts in selling the property of an absconder. The auction purchaser is a stranger to these proceedings and it is difficult to understand why the auction purchaser should be held liable for failure on the part of the Court to follow the procedure prescribed by law.

I have tried to show above that the Criminal Procedure Code itself provides suitable remedies to a person aggrieved by proceedings under Ss. 87 and 88, Criminal P. C. There is, however, one thing I would like to add. I am doubtful whether the Code contemplates that a sale once effected under Ss.87 and 88, Criminal P. C., should be set aside at all even by a criminal Court. The provisions of S. 89, Criminal P. C., are noteworthy in this connexion. Even when the applicant proves under that section that he was neither "absconding" nor had any notice of the sale (the strongest case imaginable on grounds of equity) the Court can only give him the net proceeds of the sale. If the legislature had intended any restoration of the property after the sale it is difficult to see why such restoration should not have been allowed under S. 89 itself. I am, therefore, inclined to think that the legislature intended the sale effected under Ss. 87 and 88, Criminal P. C., to be final. This is in keeping with the general policy of the law which aims at making the title of a purchaser at a Court sale as safe as possible. The result in the present case is no doubt more drastic than in the case of sales by civil Courts, but it must be remembered that the provisions of Ss. 87 and 88, Criminal P.C., are of a penal character. According to these provisions the property of an absconder is not sold for six months after attachment. If a person is not "absconding" to evade justice, he can scarcely fail to learn about the attachment through his agent or relations in charge of the property during the period. On the other hand, if he is absconding to evade justice he must take the consequences of his own failure to comply with the process of the Court.

However, whether a criminal Court should or should not set aside a sale in the exercise of its powers in revision, I am of opinion that a civil suit for the purpose is impliedly barred by the provisions of the Code. To allow a civil suit in such cases would create an intolerable position. For there would be nothing to prevent a person from resorting to a civil Court at any stage to challenge the irregularity of proceedings of criminal Courts and to obstruct or nullify their action. On course there are instances in which the decision of criminal Courts is intended to be only provisional and in such cases the Code itself has laid down that the decision will be subject to final adjudication in civil Courts. Such a provision occurs for instance in S. 87, Criminal P. C, itself in respect of claims by third persons to attached property. For other instances of the same type reference may be made to Ss. 145 to 147 and 522, Criminal P. C. These exceptions have apparently been made only in cases where a criminal Court has to pass orders summarily in the interests of peace, etc, without any elaborate enquiry into questions of title. Criminal Courts are of course not the proper forum for adjudication of questions of title to property ; but the question involved in the present case is not of title but that of the right of a criminal Court to exact a penalty for an absconder's failure to attend in obedience to a warrant issued by that Court to answer a criminal charge. If a civil suit were

maintainable in the present case a suit might as well lie for refund of fine or forfeited property on the ground that the trial in which the order of fine or confiscation was passed was wholly illegal—a proposition which, so far as I am aware is not supported by any authority.

The plaintiff has already got an order for the refund of the net proceeds of the sale of his property from the criminal Court. He has, in my judgment no right to agitate the question in a civil Court. I would accordingly accept the appeal and dismiss the plaintiff's suit with respect to the property sold to the appellants. Parties should bear their own costs.

Tek Chand, J.—I agree with the conclusions arrived at by my learned brother and have very little to add.

After carefully considering the provisions of Ss. 87-89 Criminal P. C. I have no doubt that a "proclaimed" person, immovable property belonging to whom has been attached and sold by the criminal Court, has no right to maintain an ordinary civil action against the auction purchaser for its restoration even though the procedure laid down for issuing the proclamation and attachment had not been strictly followed. It seems to me that Ss 87-89 form a "complete Code" by themselves and the remedies provided therein to afford relief to a person, who considers himself aggrieved by orders passed under any of these sections are exclusive, subject of course to the right of appeal (wherever expressly given) or any orders that the High Court may choose to pass, in the exercise of its revisional jurisdiction under S. 439 or its inherent powers.

It is no doubt an elementary principle of law that every presumption shall be made in favour of the jurisdiction of civil Court and that it shall not be taken away except by express words or by necessary implication : see S. 9, Civil P. C., and *Winter* v. *Attorney-General* (7) But it seems to me that the present case clearly falls within the exception and that once the attached property has been placed at the disposal of the Government, the remedies open to the "proclaimed" person are limited to those provided for in the Code of Criminal Procedure. If he appears before the Court within two years of the attachment and satisfies it: (1) that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and (2) that he had no notice of the proclamation, the attached property, if it has not been sold already, shall be returned to him. But if it had been sold, then the only relief to which he is entitled is that the net proceeds realized at the sale shall be made over to him. It is clear that the intention was to lay down that a sale, if once completed, cannot be set aside, even if the proclaimed offender appears within two years and satisfies the conditions laid down in S. 89. In these circumstances, it will be absurd to suppose that the legislature intended to allow the same person to institute and maintain a civil action within twelve years for the restoration of the property from the auction purchaser on grounds which would not have entitled him to claim even the sale proceeds within a period of two years. Any other interpretation would lead to serious anomalies and defeat the very object which the legislature had in view in enacting Ss. 87-89 to the Code.

My learned brother has examined at length the reasoning of the decision in *Mianjan* v. *Abdul* (3) and has given good grounds for dissenting from it. It may also be mentioned that the case was decided in 1905 when the Civil Procedure Code (14 of 1882) was in force. Under S. 11 of that Code civil Courts had jurisdiction to try all suits of a civil nature, excepting those of which the cognizance was barred "by any enactment for the time being in force," and in *Kishori Mohun* v. *Chunder Nath* (8) and other rulings, these words were held to mean "expressly barred." In the Code, as amended in 1908 the exception has been enlarged by the substituiton of the word "excepting suits of which their cognizance is expressly or impliedly barred". It is possible that the Allahabad case might have been differently decided if it had come before the Courts after 1908.

In my opinion the appeal should be accepted and the plaintiff's suit dismissed. But having regard to all the circumstances of the case I leave the parties to bear their own costs in both Courts.

A.L./R K. *Appeal accepted.*

(7) [1876] 6 P. C. 378=44 L. J. P. C. 65=24 W. R. 327.

(8) [1887] 14 Cal. 644.

A. I. R. 1928 Lahore 567

TEK CHAND AND AGHA HAIDAR, JJ.

Thiraj—Complainant—Petitioner.

v.

Emperor and *another*—Opposite Party.

Criminal Revn. Petn. No. 1631 of 1927, Decided on 25th May 1928, from order of Sess. Judge, Layallpur, D/- 16th January 1926.

Criminal P. C., S. 520—Trial Court omitting to pass an order under S. 517—Appellate Court can do so under S. 520 or 423 (1) (d)—Criminal P. C., 423 (1) (d).

Under S. 520 as well as under S. 423 (1) (d) the appellate Court has the power to pass appropriate orders for the disposal of the property produced at the trial in a case under S. 411, Penal Code even though the trial Magistrate has omitted to do so : *A. I. R.* 1923 *Mad.* 324, and 3 *A. L. J.* 770, *Foll* [P 567 C 2]

Muhammad Amin Khan—for Petitioner.

Sundar Das—for the Crown.

I. C. Chopra—for Respondent 2.

Tek Chand, J.—The information given by Thiraj, petitioner, that two of his mares had either been stolen or gone astray, the police took up the investigation and eventually succeeded in capturing a mare from the field of Mehtab Singh, respondent. On enquiry Mehtab Singh stated that he had purchased the captured mare in good faith and for valuable consideration from one Hazara Singh, who, in turn, declared that his brother Pal Singh had bought it from one Bahawala. The police did not believe Hazara Singh's story and prosecuted him. He was convicted under S. 411, I. P. C., but the Magistrate omitted to pass any order as to the disposal of the mare. On appeal the Sessions Judge acquitted Hazara Singh holding inter alia that the description of the captured animal did not tally with that of any of the two mares as given by Thiraj in the first information report. At the close of his judgment the learned Judge directed that "the mare be returned to Mehtab Singh from whose possession it was captured." This order was passed on the 16th January 1926.

About 17 months later, Thiraj preferred a petition for revision to this Court urging that as the trial Court had not passed any order for the restoration of the animal under S. 517, Criminal P. C., the learned Sessions Judge on appeal had no jurisdiction to direct its return to Mehtab Singh. This petition was heard by Jai Lal, J., but as the rulings bearing on the point were conflicting and the question was one of general importance the learned Judge referred the case to a Division Bench.

After considering the relevant sections of the Code, I am of opinion that under S. 423 (1) (d), as well as under S. 520, of the Code, the appellate Court has the power to pass appropriate orders for the disposal of the property produced at the trial, even though the trial Magistrate had omitted to do so. Under Cl. (d), S. 423, an appellate Court while deciding an appeal against an acquittal or conviction is expressly authorized to make "any consequential or incidental orders that may be just and proper." It seems to me that an order disposing of property produced at the trial is an order "consequential" on its findings on the merits. It is not denied that such an order, if passed by the Court of first instance at the termination of the trial is "consequential" on its decision discharging, convicting or acquitting the accused. If this be so in the case of the trial Court, I do not see why a different view should be taken when the appellate Court, while disposing of an appeal against a conviction or acquittal, passes an order in similar terms ; and it seems to me wholly immaterial that the appellate Court passes such an order for the first time, or it does so while affirming, modifying or cancelling the order that had been passed by the trial Court in this behalf. This was expressly held by Stanley, C. J., in *Gopi Nath* v. *Emperor* (1) and by the Madras High Court in *Arunachala Thavan* v. *Vellachami Thevan* (2), though in each of these cases the question came before the Court in a somewhat different way.

In the former case the trial Court had passed an order for restoration of only a portion of the property in respect of which the crime was alleged to have been committed. On appeal the learned Sessions Judge upheld the conviction and directed that the remaining property with regard to which no order had been passed by the Magistrate should also be restored

(1) [1906] 3 A. L. J. 770=(1906) A. W. N. 256
(2) A. I. R. 1923 Mad. 324=46 Mad. 162.

to the complainant. On revision it was contended before the High Court that the Sessions Judge had no power to order the restoration of the property which had not been included in the order of disposal passed by the trial Magistrate. This contention was repelled by the learned Chief Justice, who observed under S. 423 (d) :

> The appellate Court was entitled in an appeal from a conviction, and in other cases, to make any amendment or any consequential or incidental order that may be just or proper. The order directing restoration of the property which was found to have belonged to the complainant was clearly a consequential or incidental order within the meaning of that section.

Similarly in the Madras case Krishnan, J., remarked :

> In fact it is the common practice in this Presidency for such Magistrates to pass orders under S. 520, if necessary, when disposing of the appeal. I see no reason to interfere with this practice. Objection has never been taken to such orders as having been passed without jurisdiction. It will also be noticed that S. 423 (d) authorizes appellate Magistrates to pass consequential orders, and orders under S. 520 are usually consequential orders based on the findings in the appeal.

I am not unmindful of the fact that a Full Bench of the Calcutta High Court in *Mehi Singh* v. *Mangal Khandu* (3), where the question for decision was whether an appellate Court can for the first time award compensation under S. 250, Criminal P. C., has put a narrow interpretation of the words "consequential or incidental order" in S. 423 (d) and this view is now accepted as correct by all the Courts so far S. 250 is concerned. But I am of opinion that the restrictive meaning placed on the expression "consequential or incidental orders" in that ruling must not be applied to orders relating to disposal of property. In *Bhagabat Shaha* v. *Sadique Ostagar* (4), the same Court extended the rule laid down by the Full Bench to cases falling under S. 522 and held that an appellate Court deciding an appeal against a conviction under S. 448, I. P.C., cannot pass an order restoring possession of immovable property to the person who had been unlawfully dispossessed and the same view was taken in a similar case by the Punjab Chief Court in *Hari Chand* v. *Emperor* (5). But it is significant that the legislature soon intervened and by the amending Act 18 of 1923, a clause was added to S. 522, providing that an order under that section might be made by any Court of appeal, confirmation, reference or revision. In my opinion orders for disposal of property produced before a criminal Court in course of the trial are clearly "consequential or incidental orders" within the meaning of S. 423 (1) (d) and on principle I cannot see any reason why the Court of appeal or revision should possess the power to pass such order when the property concerned is immovable but not have it when it is moveable. After fully considering the matter I have reached the conclusion that the view taken in the Allahabad and Madras cases above cited, is sound and must be followed so far as the question now before us is concerned.

The other section bearing on the question is S. 520, which runs as follows :

> Any Court of appeal, confirmation, reference or revision may direct any order under S. 517, S. 518 or S. 519, passed by a Court subordinate thereto, to be stayed pending consideration by the formal Court and may modify, alter or annual such order and make any further orders that may be just.

It may be noted that the words "and make any further orders that may be just" were not to be found in the Codes of 1872 and 1882, but were added by Act 5 of 1898. Now there cannot be any doubt that the language used in the amended section is not quite happy and might have been more explicit. Accordingly it is urged on behalf of the petitioner that the power given to the Court of appeal, confirmation, reference or revision to pass "further orders that may be just" is limited to orders passed as a consequence of the modification, alteration or the amendment of orders passed by the trial Magistrate under S. 517, Criminal P. C. On the other hand, it was contended for the respondent that the added words must be given a liberal interpretation and be taken as authorizing the appellate or the revisional Court to pass all orders relating to disposal of property, which it might think fit, regardless of the fact whether the trial Magistrate had taken action under S. 517 or not. In this connexion counsel referred us to *Kanshi Ram* v. *Emperor* (6), *Abdul* v. *Ghulam Muhammad* (7) both of which had been

(3) [1912] 39 Cal. 157=14 C. L. J. 437=12 I. C. 297=16 C. W. N. 10 (F.B.).
(4) [1912] 39 Cal. 1050=16 I. C. 176=16 C. W. N. 811.
(5) [1919] 16 P. R. 1919 Cr.=51 I. C. 472=20 Cr. L. J. 488.
(6) A.I.R. 1924 Lah. 75=4 Lah. 49.
(7) A.I.R. 1924 Lah. 261=4 Lah. 460.

decided by the same learned Judge sitting singly. It is conceded by both counsel that these rulings contain remarks which are not easy to reconcile, but I do not think it is necessary to pursue the matter further and the question did not directly arise in either of these cases and the remarks relied upon by both counsel are in the nature of obiter dicta which are not of any real assistance to us.

Coming now to S. 520 we find that here also the view taken by the Allahabad High Court supports the respondent. The question directly arose in *Emperor* v. *Azmat Shah Khan* (8) and it was held that S. 520 of the Code gave to an appellate Court the same power as the Court which originally tried a case to pass orders under S. 517. Similary in *Onkar* v. *Emperor* (9), Sulaiman, J., upheld the order of the appellate Court under S. 520 directing restoration of property to the complainants, even though the trial Court had refused to do so and had referred them to a civil Court.

This view also receives support from certain remarks in *Ma Wet* v. *Mg Po Taik* (10) and *Badrul Hasan* v. *Mt. Chamela* (11), to the effect that S. 520 authorises the Court of appeal, reference or revision to order restitution when and if justice so requires. The only ruling to the contrary, which has been brought to our notice is a decision of the Madras High Court *Locanada Aiyar* v. *Seethal* (12), decided in 1903 in which it was held that the appellate Court had no such power. The question was not, however, discussed at any length and no reasons for the conclusion are given. After fully considering the matter I am inclined to the view that the words added to S. 520 by Act 5 of 1898 should be liberally construed as has been done by the Allahabad Court in the rulings above cited.

I would, therefore, hold that the order of the learned Sessions Judge directing return of the captured mare to the respondent was not passed without jurisdiction and I would dismiss the petition for revision.

Agha Haidar, J.—This is a reference made by a learned Judge of this Court to a Bench of two Judges The facts are given in the judgment of our learned brother and may briefly be stated as follows :

One Thiraj lost his mare. A mare was found in the possession of one Mehtab Singh. The prosecution treated this mare as the stolen property of Thiraj and prosecuted one Hazara Singh from whom Mehtab Singh had purchased the mare, under S. 411, I. P. C. The defence of Hazara Singh was that his brother Pal Singh had purchased it from one Bahawala for consideration and in good faith that it was not the mare which had been stolen from the possession of Thiraj. His defence was not accepted by the trial Magistrate who convicted Hazara Singh under S. 411, I. P. C., and sentenced him to one years' rigorous imprisonment. No order was made by the trial Magistrate under S. 517, Criminal P. C., as to the restoration of the mare to the complainant, Thiraj. Hazara Singh appealed to the Sessions Judge, who allowed his appeal and acquitted him on the ground that there was no satisfactory evidence to prove the identity of the mare as the animal which had been stolen from Thiraj's house. He further held that, even if this identity were to be established, there was no proof on the record that Hazara Singh knew that his brother Pal Singh had purchased the mare from Bahawala knowing it to be stolen. In conclusion the learned Sessions Judge made an order that the mare should be returned to Mehtab Singh from whose possession it was captured.

An application in revision was filed on behalf of Thiraj in this Court on the ground that, as the trial Court had not passed any order under S. 517, Criminal P. C, the Sessions Judge in appeal was precluded from making an order as to the disposal of the property. The learned Judge of this Court in his order of reference referred a number of authorities which clearly indicate that there is a certain amount of conflict of opinion on the question. The case was argued by the counsel for the petitioner, Mr. Muhammad Amin Khan, who in effect contended that the Sessions Judge had no jurisdiction to make the order as to the disposal of the mare. Mehtab Singh was represented by Mr. I. C. Chopra, and the Crown was represented by Mr. Sundar Das.

The main contention on behalf of the applicant was based upon a case *Locanada Aiyar* v. *Seethal* (12). It is a short order

(8) [1913] 35 All. 374=20 I.C. 1006=11 A.L. J. 452.
(9) A.I.R. 1924 All. 213.
(10) A.I.R. 1925 Rang. 183.
(11) [1918] 19 Cr. L.J. 995=43 I.C. 175.
(12) 2 Weir 674.

by a single Judge of the Madras High Court and lays down that, if an order had been made by a trial Magistrate under S. 517, Criminal P. C., as regards certain stolen property, it would have been competent to the Magistrate in appeal to make an order as regards the person to whom the stolen property should be handed over. But the learned Judge goes on to say that, as no order under S. 517, Criminal P. C., had been passed by the trial Magistrate, S. 520 of the Code can have no application and the order passed by the appellate Court directing that the property be handed over to the complainant was made without jurisdiction. There is no discussion of any principles of law or of any rule of procedure and no authority is quoted.

The next case relied on by the applicant is *Muhammad Din* v. *Emperor* (13). This case lays down that the appellate Court was not competent to make an order under S. 522, Criminal P. C., directing the restoration of possession of immovable property to the person entitled to it when the trial Court had for some reason or other refrained from taking any action under the said section. But this case and *Bhagabat Shaha* v. *Sadique Ostagar* (4), on which it is based, can hardly be treated as authorities in the present case which depends upon the construction of Ss. 517 and 520, Criminal P. C., and in any case, having regard to the subsequent amendment of the Criminal Procedure Code, these cases may be treated as obsolete now.

Reliance was also placed on *Abdul* v. *Ghulam Muhammad* (7), where a learned single Judge of this Court held that an order under S. 517, Criminal P. C., for the disposal of the property regarding which an offence had been committed must be made upon the conclusion of an enquiry or a trial before any criminal Court and not on the application of a person after the conclusion of the trial and that any such order directing delivery of the property to a party on a date subsequent to the conclusion of the trial must be treated as passed without jurisdiction. This case was not followed by another learned Judge of this Court in *Kishanchand* v. *Nanakchand* (14), and is moreover in conflict with an earlier decision given by the same learned Judge in *Kanshi Ram* v. *Emperor* (6) which is printed at p. 49 of the same volume of the Indian Law Reports Lahore series. In that case a person had been convicted under S. 411, I. P. C., for being in possession of certain currency notes. He filed an appeal and his conviction was set aside by the Sessions Judge who acquitted him. The Sessions Judge did not make any order as regards the currency notes which had been recovered by the police from the possession of the accused person and had been handed over to the complainant under the orders of the Magistrate who had convicted the original offenders. Several months after the appeal had been decided by the Sessions Judge an application was made to him by the successful appellant for the restoration of the currency notes to him. The Sessions Judge dismissed the application on the ground that it was barred by limitation. On revision the learned Judge of this Court held that the Sessions Judge had overlooked the provisions of S. 520, Criminal P. C., which gave him very wide powers to pass such orders as may be just. He further held that the concluding words of S. 520, Criminal P. C., namely, "and make any further orders that may be just" were intended to cover cases of this nature so as to enable superior Courts to pass suitable orders where property had been erroneously disposed of by the trial Court under S. 517, Criminal P. C. In this case the trial Court had made no order under S. 520, Criminal P. C., but it was held that under S. 520, Criminal P. C., it was competent to the appellate Court, namely, the Sessions Judge, not only to modify, alter or annul an order passed under S. 517, Criminal P. C., but to make any other order which may be just. The case, therefore, supports the contention of the respondent Mehtab Singh in that it lays down that the concluding nine words of S. 520, Criminal P. C., should receive liberal construction which would operate in furtherance of justice.

Arunachala Thevan v. *Vellachami Thevan* (2), is a case in which an order had been passed by the trial Magistrate under S. 517, Criminal P. C., who had convicted the accused and had ordered the stolen property, namely, certain bullocks, to be made over to the complainant. On appeal the conviction was set aside, but

(13) [1919] 14 P.R. 1919 Cr.=33 P.L.R. 1919=48 I.C. 510=1 P.W.R. 1919 Cr.

(14) A.I.R. 1926 Lah. 9.

the appellate Magistrate did not pass any orders regarding the disposal of the bullocks. A month afterwards an application was made and the appellate Magistrate passed an order that the bullocks should be handed over to the complainant. On this an application in revision was filed in the High Court and it was held that the order should be treated as part of the proceedings in the appeal itself and, therefore, the appellate Magistrate could make an order under S. 520 for the disposal of the property concerned. So far, this case is not an authority in favour of the respondent ; but the learned Judge further goes on to say that S. 423, Cl. (d) authorises the appellate Court to pass consequential orders and that orders under S. 520 are in the nature of such consequential orders. This reasoning seems to be correct, and in my opinion in any event the Sessions Judge as a Court of appeal was perfectly competent to make the order as regards the disposal of the mare which formed the subject-matter of the prosecution.

The case, which is directly in point and supports the contention of the respondent, is *Emperor* v. *Azmat Shah Khan* (8). In this case certain persons were convicted of having caused wrongful restraint to the opposite party. On appeal the Sessions Judge maintained the conviction but reduced the sentence. The appellate Court made an order as to certain property which was the subject of dispute between the parties. An objection was taken in revision before the High Court that such an order was ultra vires, and that under S. 517, Criminal P. C., it could only have been passed by the Court trying the case and not by the appellate Court for the first time. This contention was not accepted by the learned Judge Ryves, J., who, on the authority of *Baloram Gogai* v. *Chinta Ram* (15), held that under S. 520, Criminal P. C., the appellate Court had full power to pass such an order. In this connexion it may be noted that in the Code of Criminal Procedure of 1882 (Act 10 of 1882) S. 520 did not contain the words "and make any further orders that may be just." These words were added to it for the first time in the Criminal Procedure Code (Act 5 of 1898) and this must undoubtedly have been done with some object. We may take it, therefore, that the legislature was aware of the ruling *Emperor* v. *Azmat Shah Khan* (8), while the amending Act 18 of 1923 was on the legislative anvil. And if the wide and liberal interpretation put upon S. 520, Criminal P. C., by Ryves, J., was not justified, there cannot be any doubt that the amending Act of 1923 would either have omitted the concluding words of the section or would at any rate have introduced some restrictive phraseology therein. But the words have been allowed to remain as they were. This clearly indicates that the legislature accepted the interpretation placed upon the section by Ryves, J., as correct and fully borne out by its general context. The policy of law seems to be, that in the absence of any clear statutory provisions to the contrary, an appellate Court should dispose of once and for all, every outstanding matter in controversy between the parties. Several other cases were cited, but as they had no direct bearing upon the point under consideration I need not discuss them.

In my opinion, the order passed by the Sessions Judge as regards the mare was correct, and the learned Judge was competent to pass such an order. I would, therefore, dismiss the application.

I may further observe that if the application had come up before me for preliminary hearing I would have rejected it in limine on the ground of being stale, having been filed in this Court more than 17 months after the order sought to be revised, had been passed by the Sessions Judge.

A.L./R.K. *Petition dismissed.*

(15) [1905] 9 C.W.N. 549.

A. I. R. 1928 Lahore 571

DALIP SINGH, J.

Shiv Ram and *others*—Defendants—Appellants.

v.

Atma Ram and *others*—Plaintiffs and Defendants—Respondents,

Mis. Second Appeal No. 1203 of 1927, Decided on 24th January 1928.

Custom (Punjab)—Pre-emption.

The custom of pre-emption exists in the town of Naraingarh. [P 573 C 1]

Durga Das—for Appellants.

Shamair Chand—for Respondents.

Judgment.—The sole question in this appeal is whether the custom of pre-emption exists in the town of Naraingarh or not. The facts are admittedly fully and correctly stated in the judg-

ment of the learned District Judge and need not be recapitulated. The learned Judge held that the custom was proved by Ex, P-4 and the two judgments mentioned in it of 1897 and 1901 together with the admission of the existence of the custom in Ex. P-6, and he further held that the existence of a judgment, Ex. D-2, in which it was held that the custom had not been proved where the first three cases were not produced in evidence and only Ex. P-6 was produced, was not sufficient to rebut the presumption raised by the existence of the four judgments taken together. I do not see that this view is in any way incorrect and I, therefore, dismiss the appeal with costs.

N.K. *Appeal dismissed.*

** A. I. R. 1928 Lahore 573 Full Bench.

SHADI LAL, C. J., BROADWAY, TEK CHAND, JAI LAL AND AGHA HAIDAR, JJ.

Sant Singh and *another*—Appellants.

v.

Gulab Singh and *others*—Respondents.

First Appeal No. 2206 of 1922, Decided on 3rd April 1928,

** (a) *Civil P. C., O. 22, R. 4—One of several respondents dying and legal representatives not joined in time—Granting relief against surviving respondents possible—Whole appeal does not abate*: **18 I. C. 182=62 P. R. 1913, overruled.**

X sold immovable property to *A*, *B*, *C* and *D*. In the sale-deed it was stated that the property had been sold to the vendees in equal shares. The reversioners of the vendor instituted a suit for a declaration that the sale should not affect their reversionary rights after the vendor's death. The suit was dismissed and the plaintiffs appealed. During the pendency of the appeal *A*, one of the vendees, died and his representatives were not brought on the record within time; the appeal abated as against *A*:

Held: that the abatement of the appeal as against *A* did not result in a dismissal of the appeal in its entirety; *A. I. R.* 1927 *Lah.* 851; *Lah. L. P.* 42 *of* 1925; 231 *P. L. R.* 1912; *A. I. R.* 1928 *All.* 172, *Appr.*; *A. I. R.* 1925 *Lah.* 381; 23 *P. R.* 1917, *Foll.*; *A. I. R.* 1925 *Bom.* 122, *Disc.* **18 I. C. 182=62 P. R. 1913, overruled.** [P 575 C 1, 2]

The death of one of the respondents does not necessarily result in the abatement of the appeal in its entirety. It would depend entirely upon the nature of the suit, and if the suit, having regard to its frame and character, could proceed in the absence of the deceased defendant, there is no reason why the appeal should not ordinarily proceed against the surviving respondent or respondents. [P 582 C 1]

(b) *Practice — Relief — Infructuous decree should not be passed.*

Jailal, J.—It is a well-recognized rule of law that no Court shall pass an infructuous and ineffective decree—a decree which it cannot enforce. [P 579 C 1]

(c) *Decree—Construction— Decree should be drafted in elastic form so as to make substantial justice to all parties to the litigation.*

Agha Haidar, J.—Decrees, as a rule, should not be drawn up on the model of a steel-frame and it is always desirable that the Court, under its inherent powers and in order to give full effect to its decision, should frame its decree in such an elastic form as would define the respective rights and liabilities of the several parties to the suit and thus to do substantial justice between all those who are concerned with the result of litigation. [P 592 C 2]

Nanak Chand Pandit, Mukand Lal Puri and *Shambu Lal Puri*—for Appellants.

Gokal Chand Narang, Shamsher Chand and *Mehr Chand Mahajan*—for Respondents.

Tek Chand and Fforde, JJ.—By a registered deed of sale dated 19th July 1920, Kharak Singh, defendant 5, sold for an alleged consideration of Rs. 14,000 his one-half share in four shops and a house situate in the town of Lyallpur to defendants 1 to 4 Gulab Singh, Rattan Singh, Mehr Singh and Karam Singh, sons of Pritam Singh, in equal shares. On 13th May 1921 the vendor's sons, Sant Singh and Ishar Singh, plaintiffs instituted a suit for a declaration to the effect that the aforesaid sale shall not affect their reversionary rights after the death of Kharak Singh. The trial Court dismissed the suit and the plaintiffs have preferred a first appeal to this Court.

During the pendency of the appeal, one of the vendees, Gulab Singh, defendant 1, died on 15th April 1923, but no application to bring his representatives on the record was filed within time. The result was that on the expiry of 90 days the appeal automatically abated against Gulab Singh. On 19th May 1926, an application was filed by the plaintiffs to have the abatement set aside on the ground that the plaintiffs being residents of a village in the Sialkot District were ignorant of the death of Gulab Singh defendant who resided and died in the town of Lyallpur.

After hearing both counsel we are of opinion that sufficient cause has not been shown for condoning the delay in filing this application. It is no doubt true that the plaintiffs lived in a village in the Sialkot District but their uncle Budh Singh, defendant 6, is a joint owner of the shops in dispute with the vendees. He

must have been going to Lyallpur to collect the rents and looking after his share of the joint property. We cannot believe that for a period of three years the plaintiffs could remain ignorant of the death of one of the vendees. We, therefore, see no valid ground to set aside the abatement so far as Gulab Singh vendee defendant-respondent 1 is concerned.

Dr. Narang, on behalf of the respondents, contends that the appeal cannot proceed against the surviving defendants respondents and must be dismissed in its entirety. He argues that the sale which is impugned by the plaintiffs was joint in favour of the four vendees, and in case the appeal is accepted against defendants 2 to 4, there would be two contradictory decrees on the record of the Court with regard to the same sale. He relies on *Khuda Bakhsh* v. *Mathra Dass* (1) the facts of which were very similar to those of this case.

Mr. N. C. Pandit for the appellants replies that the shares of the four vendees are specified in the sale deed in which it is stated that the four had bought the property in equal shares. He argues that the vendees were tenants-in-common of the property, the share of each being well defined, and therefore the appeal as a whole cannot be dismissed. This contention is, however, opposed to the view taken in *Khuda Bakhsh* v. *Mathra Dass* (1) where it was ruled that the appeal cannot proceed even in those cases in which in the deed of sale the area which each of the vendees is to take is specified but not the proportion in which the sale-money was paid by the vendees. This ruling has been followed in a number of cases see inter alia *Hadu* v. *Lala* (2), *Inayat* v. *Ganga* (3), *Akbar Hussain* v. *Ali Ahmad* (4) and *Jamna* v. *Sarjit* (5). It was, however, distinguished in *Mt. Zainab Bibi* v *Rohila* (6) and *Raghbhir Saran* v. *Mt. Sohan Devi* (7), where it was held that the suit or appeal could under somewhat similar circumstances proceed against the surviving defendants or respondents. We, however, cannot see any distinction in principle between the two groups of cases. The facts in *Raghbir Saran* v. *Mt. Sohan Devi* (7) were almost identical with those in *Khuda Bakhsh* v. *Mathra Das* (1) and with all deference to the learned Judges we are unable to appreciate the grounds on which the latter ruling was distinguished. *Mt. Zainab Bibi* v. *Rohila* (6) was followed by a Division Bench in *Nandoo Singh* v. *Baljit Singh* (8) and more recently in *Jalal* v. *Bahawali* (9). The test laid down in *Hadu* v. *Lala* (2) does not appear to have been followed in *Devi Das* v. *Muhammad* (10) and some other cases. The view taken in *Nazir Khan* v. *Manjli* (11) is also in conflict with *Khuda Bakhsh* v. *Mathra Das* (1).

In a recent Allahabad case *Darshan Dass* v. *Bikramajit Rai* (12), *Khuda Bakhsh* v. *Mathra Das* (1) was cited with approval, but seems to have been given a meaning different from its accepted interpretation in this Court.

The Bombay High Court has consistently taken a view contrary to the rule laid down in *Khuda Bakhsh* v. *Mathra Das* (1). The latest ruling of that Court is *Shankarbhai Manorbhai* v. *Moti lal Ramdas* (13), which follows *Chandarsang* v. *Khimabhai* (14) where it was held that the appeal should proceed against the surviving defendants.

In the Madras and Calcutta Courts the rulings are not uniform but the prevailing view seems to be as laid down in *Sarat Kamni Dasi* v. *Chaitanya Chandra* (15)

that the suit or appeal will not abate in its entirety, if the interests of the several defendants can be discriminated.

This does not go so far as *Khuda Bakhsh* v. *Mathra Das* (1).

It seems to us that the law on the subject is at present in a state of some confusion, and as the point is frequently arising, it is necessary that the question be examined by a larger Bench and it be authoritatively decided whether in such circumstances the appeal can or cannot proceed against the surviving respond-

(1) [1913] 62 P. R. 1913=85 P. L. R. 1913=18 I. C. 182=39 P. W. R. 1913.
(2) [1915] 41 P. R. 1915=15 P. L. R. 1914=21 I. C. 951=16 P. W. R. 1914.
(3) [1916] 3 P. R. 1916=32 I. C. 829=260 P. W. R. 1915.
(4) [1916] 116 P. R. 1916=38 I. C. 712.
(5) [1919] 67 P. R. 1919=52 I. C. 510.
(6) [1917] 23 P. R. 1917=39 I. C. 277.
(7) A. I. R. 1925 Lah. 381=6 Lah. 233.
(8) A. I. R. 1924 Lah. 93.
(9) A. I. R. 1927 Lah. 783.
(10) [1919] 1 L. L. J. 26.
(11) [1912] 231 P. L. R. 1912=14 I. C. 535=220 P. W. R. 1912.
(12) A. I. R. 1926 All. 128=48 All. 81.
(13) A. I. R. 1925 Bom. 122=49 Bom. 118.
(14) [1898] 22 Bom. 718.
(15) A. I. R. 1928 Cal. 289.

ents. We, therefore, refer the following question to a Full Bench:

X sells immovable property to *A*, *B*, *C* and *D*. In the sale-deed it is stated that the property has been sold to the vendees in equal shares. The reversioners of the vendor institute a suit for a declaration that the sale shall not affect their reversionary rights after the vendor's death. The suit is dismissed and the plaintiffs appeal. During the pendency of the appeal *A*, one of the vendees, dies and as his representatives are not brought on the record within time the appeal abates as against *A*. Can the appeal proceed against *B*, *C* and *D*, the surviving vendees-respondents, or must the abatement of the appeal as against *A* result in a dismissal of the appeal in its entirety.

The appers will be laid before the learned Chief Justice for constituting a Full Bench to hear the reference.

Opinion.

Shadi Lal, C. J.—The question of law upon which we are asked to pronounce our opinion, is in these terms :

X sells immovable property to *A*, *B*, *C* and *D*. In the sale-deed it is stated that the property has been sold to the vendees in equal shares. The reversioners of the vendor institute a suit for a declaration that the sale shall not affect their reversionary rights after the vendor's death. The suit is dismissed and the plaintiffs appeal. During the pendency of the appeal *A*, one of the vendees, dies and as his representatives are not brought on the record within time the appeal abates as against *A*. Can the appeal proceed against *B*, *C* and *D*, the surviving vendees-respondents, or must the abatement of the appeal as against *A* result in a dismissal of the appeal in its entirety ?

Now O. 22, R. 4, sub-R. (3), read with O. 22, R. 11, Civil P. C., provides that where within the time prescribed by law no application is made to implead the legal representative of the deceased respondent the appeal shall abate as against the deceased respondent. It is true that, so far as the statute is concerned, the appeal abates only *qua* the deceased respondent, but the question whether the partial abatement thus caused leads to an abatement of the appeal in its entirety depends upon general principles. If the case is of such a nature that the absence of the legal representative of the deceased respondent prevents the Court from hearing the appeal as against the other respondents, then the appeal abates in toto. Otherwise, the abatement takes place only in respect of the interest of the respondent who has died.

Whether the appeal can, or cannot, proceed the absence of the legal representative of the deceased respondent must depend upon the nature of each case ; and it is not possible to formulate a rule of general application. It is obvious that if the action, which has given rise to the appeal, could have been brought without impleading the person who has died, his death affects only the interest if any, which he had in the litigation, but it cannot prevent the determination of the rest of the claim. This rule does not, however, solve the problem in every case The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same litigation with respect to the same subject-matter. It is a matter of common sense that the Court should not be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole. If, on the other hand, the success of the appeal would not lead to such a result, there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties who are before it.

Now, in the present case, though there is one conveyance in favour of four persons, the share taken by each vendee is clearly specified in the deed. On principle there is no real distinction between one deed transferring the whole of the immovable property in equal shares to *A*, *B*, *C* and *D*, and four deeds, each conveying one-fourth share in the property, to the four vendees respectively. The death of *A* pending the appeal undoubtedly debars the Court of appeal from dealing with his share, but his absence does not prevent the Court from determining the controversy with respect to the shares of the remaining three vendees. There might be one decree as to *A*'s share, and another decree of an inconsistent character governing the shares of the other vendees ; but as these decrees do not affect the same property, there is no legal difficulty in giving effect to them. We are here not dealing with a case in which one decision settles the dispute one way, and another decision determines it in an entirely another way, with respect to the same matter, so that it becomes impossible for the Court to carry out both the decisions at the same time.

The learned counsel for the parties have invited our attention to a large number of judgments, but it is unnecessary to examine them here at length. Suffice it to say that there is a considerable divergence of judicial opinion on the subject. A distinction must, however, be made between the cases, in which there is a specification or definition of shares or interests, and those in which there is no such specification or definition. The latter class of cases can have little or no bearing upon the issue arising in this case which, as stated above, is one of ascertained shares. There are no doubt some decisions which lay down the proposition that, even in the case of ascertained shares, the death of one respondent causes, not only a partial abatement, but a total abatement, vide inter alia, *Khuda Bakhsh* v. *Mathra Das* (1). But the balance of the authority favours the view that in such a case the appeal abates only in respect of the interest of the deceased respondent and not as a whole; vide *Mt. Zainab Bibi* v. *Rohila* (6), *Raghbir Saran* v. *Mt. Sohan Devi* (7), *Darshan Das* v. *Bikramajit Rai* (12) and *Sarat Kamini Dasi* v. *Chitanaya Chandra* (15). Indeed, the Bombay High Court has gone so far as to hold that in either case the appeal abates only against the deceased respondent, and that it should be heard on the merits in so far as the other respondents are concerned: vide *Chandarsang Verasbhai* v. *Khimabhai Raghabhai* (14) and *Shankerbhai Manorbhai . Patel* v. *Motilal Ramdas Shah* (13).

There is no real difficulty in adopting in the present case the rule against total abatement, which has the advantage of enabling the Court to adjudicate upon the merits of the case and does not compel it to dismiss it upon a technical ground. The Courts exist for determining the merits of the dispute between litigants, and it is their duty to avoid, if they can legally do so, a result which causes hardship.

My answer to the question, therefore, is that the appeal in this case does not abate in toto but can proceed against *B*, *C* and *D*.

Broadway, J.—I concur with the Chief Justice.

Tek Chand, J.—I have had the advantage of reading the judgments prepared by the learned Chief Justice and my brother Jai Lal and agree with them that our answer to the reference should be, that on the facts stated the abatement of the appeal against *A* does not result in the automatic dismissal of the appeal in its entirety and that it can proceed against *B*, *C* and *D*. As pointed out by the learned Chief Justice the relevant statutory provision relating is to be found in Cl. (3), R. 4, O. 22, which runs as follows:

> (3) Where within the time limited by law no application is made under sub-R. (1), the suit shall abate as against the deceased defendant.

This clause was added to the Code in 1908 with a view to set at rest the conflict of judicial opinion in respect of the corresponding provision in S. 368 of the Code of 1882, the material portion of which was in these terms:

> When the plaintiff fails to make such application within the period prescribed therefor, the suit shall abate.

It will be seen that S. 368 did not state that the abatement was only as against the deceased defendant. Some Courts interpreted this section literally and held that the suit abated in its entirety irrespective of the fact that the shares of the various defendants were separate or separable, and in one or two cases the suits were dismissed in toto even when the deceased was a pro forma party. Other Courts, however, took the contrary view and ruled that the section contemplated abatement of the suit in respect of the deceased party alone and if the interests of the defendants could be separated the abatement was partial. The legislature preferred the latter view and in 1908 amended the section by enacting that in such circumstances "the suit shall abate as against the deceased defendant."

The amendment, however, has not put an end to the controversy and a large volume of case law has grown up, which it is not always easy to reconcile. The conflict of opinion now is not as to the interpretation of the newly added clause, which is definite and explicit enough, but as to the effect of the partial abatement on the suit itself. It is admitted that the suit abates as regards the deceased person only but the absence from the record of his heirs might result in the suit becoming imperfectly constituted and consequently liable to dismissal on that ground. If the suit is of such a nature that it cannot proceed without the representatives of the deceased per-

son (e. g.. suit relating to partnership) the Court will find itself powerless to deal with it any further and must necessarily dismiss it. If, however, the rights of the surviving defendants in the subject-matter of dispute can be determined, without affecting the rights of the deceased person, the suit shall proceed. Again if the question arises in appeal, another principle has to be borne in mind. In such a case the Court has to see that it does not pass a decree, which it may find itself incapable of executing, owing to the circumstance that the lower Court's decree in favour of the deceasd respondent has become final in consequence of the partial abatement of the appeal against him. If the result of the acceptance of the appeal is to have on the rolls of the Court two absolutely contradictory decrees relating to the same subject matter, it will stay its hands and refuse to proceed with the hearing of the appeal, but if the rights of the deceased and the surviving respondents are separate or separable and there is no real likelihood of a conflict between the decrees passed as to their respective rights the appeal shall be heard. There is no dispute as to the soundness of these propositions but it is in their application to particular cases that the Courts have materially differed. Let us now apply these rules to the case before us.

The leading decision of the Chief Court on the subject, the facts of which were almost similar to those of the present case, is *Khada Bakhsh* v. *Mathra Das* (1). In that case the property in dispute had been sold to seven persons by one deed in which the area to be taken by each vendee was specified, but there was no specification made as to the proportion in which the vendees had paid the sale-money. On the death of the vendor his son instituted a suit for possession on the allegation that the land was ancestral and his father had sold it without necessity. The suit was dismissed by the lower appellate Court and the plaintiff preferred a further appeal to the Chief Court. During the pendency of the appeal, one of the vendees died and no application to bring his legal representatives on the record was made within time. The appeal accordingly abated as against that respondent. At the hearing an objection was taken on behalf of the respondent that in view of the fact that the representatives of the deceased respondent were not on the record, the appeal could not proceed against the surviving respondents. This objection was sustained and the appeal dismissed, the learned Judges (Shah Din and Chevis, JJ.) holding that as the land was still joint in the hands of the surviving vendees and the representatives of the deceased the liability of the cosharers was joint and not several. It will be noticed that in the sale-deed the area purchased by each vendee was specified and yet the learned Judges held that the appeal could not proceed against the six surviving vendees. The first ground given for this conclusion was that the proportion in which the sale price was paid by each vendee to the vendor was not specified in the deed.

With all deference to the learned Judges, I fail to see the bearing of this fact on the maintainability of the appeal against the various vendees. That fact is, no doubt, of great importance in suits for pre-emption, but it appears to me to be wholly foreign to constitution of the appeal in cases like the one before us, which are governed by entirely different consideration. Nor do I see the force of the other argument that because the land was still joint in the hands of the various vendees and the liability of the cosharers was joint and not several the appeal became imperfectly constituted. It must be borne in mind that the vendees in that case were not "joint tenants" but were "tenants-in-common" having purchased the land in certain specific shares and the mere fact that partition by metes and bounds had not taken place does not seem to me to affect the matter. The deed, though apparently joint in favour of the seven vendees, was in reality equivalent to seven different sales in favour of each vendee, written on one piece of paper. The interests of the various vendees were well defined and separate and the plaintiff could prosecute the appeal against six of them leaving the seventh vendee alone. I cannot see how the acceptance of the appeal in the case by the Chief Court would have militated against any of the principles which furnish the basis of the rule for total abatement. In that event the decree of the Chief Court (if in favour of the appellant) would not have been ineffective or infructuous nor

would it have been in any way inconsistent with that part of the lower Court's decree, which had become final in consequence of the death of one of the vendees and the failure of the appellant to bring his representatives on the record. The acceptance of the appeal would have resulted in setting aside the sale to the extent of the shares of the six surviving vendees only, the share of the deceased being left untouched. The appellant and the heirs of the deceased would become co-owners in the property in the same proportion in which the surviving vendees and the deceased had held it before, and any of them could, by taking appropriate proceedings, have had the property actually partitioned. In short he would, in the event of his appeal being successful, step into the shoes of the surviving vendees and would hold the property along with the heirs of the deceased vendee in the same way as the former held it at the time of the suit.

Dr. Gokal Chand for the respondent was unable to urge any valid argument to the contrary. In fact he frankly conceded that if one of the vendees had died before the decision of the suit in the Court of the first instance the abatement would be partial and the suit could have proceeded against the other defendants but he contended that the position was different in a case where the death took place after the vendees had been successful in the trial Court and had obtained a joint decree in their favour. In my opinion, this circumstance ought not to make any difference, as the decree of the trial Court merely affirmed the pre-existing rights of the defendants, both in relation to the plaintiff and as between them inter se. It did not, and could not, convert a tenancy-in-common into a joint tenancy, nor did it affect the shares in which they held the property.

In my opinion the rule which governs such cases, has been correctly and succinctly stated by my learned brother Addison in the following terms in the recent case of *Karam Khan* v. *Mast Ali Khan* (16):

> Whether a suit or an appeal abates, in whole or in part, depends on whether the interests of the respondents are or are not separately defined. If they are separable, the suit or appeal will abate only as regards the interest of the deceased. If they are joint, the proceedings will abate as regards the whole of the joint interests.

This decision is in accord with the conclusion arrived at by the learned Chief Justice and LeRossignol, J., in *Letters Patent Appeal No.* 42 *of* 1925 *Chet Ram* v. *Mt. Illaicho*, decided on 7th April 1926 [reversing the single Bench judgment of Campbell, J., in *Chet Ram* v. *Mt. Illaicho* (17)], where it was held that

> from the authorities cited at the bar the principle which emerges is that when the different defendants have separate rights either ascertained or ascertainable in the property in suit, the suit can proceed against those defendants, who are made parties and does not necessarily fail because some of the defendants have not been joined.

To the same effect is the earlier decision of *Nazir Khan* v. *Mangli* (11), decided in 1911, but which was not noticed in *Khuda Bakhsh* v. *Mathra Das* (1).

Applying this test it must be held that *Khuda Bakhsh* v. *Mathra Das* (1) was wrongly decided and must be overruled. I am not unmindful of the fact that this ruling has been followed in a large number of cases decided by the Punjab Chief Court and the Lahore High Court, but it must not be forgotten that in several other decisions the learned Judges while trying to distinguish it, have really refused to apply the principle underlying it to cases the facts of which were substantially similar. Reference may, in this connexion be made to *Mt. Zainab Bibi* v. *Rohila* (6), *Raghbir Saran* v. *Mt. Sohan Devi* (7), *Nandoe Singh* v. *Baljit Singh* (8) and *Jalal* v. *Bahawali* (18).

I do not think it necessary to discuss in detail the numerous rulings of the other High Courts, bearing on the point. It is, I think, sufficient to point out that the view prevailing in the Bombay High Court has been uniformly against that taken in *Khuda Bakhsh* v. *Mathra Das* (1). See *Shankerbhai Manobhai Patel* v. *Motilal Ramdas Shah* (13), which follows the earlier decision in *Chandarsang Verasabhai* v. *Khimabhai Raqhabhai* (14), and at Allahabad the question may be taken to have been set at rest in favour of the appellant, by the recent F.B. judgment in *Faqira* v. *Hardewa* (19).

For the foregoing reasons, I am of opinion, that on the facts as stated in

(16) A. I. R. 1927 Lah. 851.

(17) [1924] 26 P. L. R. 797.
(18) A. I. R. 1927 Lah. 783.
(19) A. I. R. 1928 All. 172.

the reference, the appeal can proceed against *B*, *C* and *D*.

Jai Lal, J.—I have read the judgment of his Lordship the Chief Justice and agree with him that the answer to the first part of the question referred to this Court must be in the affirmative and to the second part in the negative.

It would be observed that so far as the express provisions of the Civil Procedure Code are concerned, they are against the contention of the respondent that the appeal abates in its entirety. O. 22, R. 4, clearly states that where no application is made to substitute the legal representatives of the deceased defendant within the time limited by law the suit shall abate as against the deceased defendant. The same law applies to appeals and instead of "the suit" and "the deceased defendant," "the appeal" and the "deceased respondent" have to be read when dealing with the case of an appeal. Reference may then be made to O. 1, R. 9, Civil P. C., which provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. No statutory provision of the law of procedure laying down a contrary rule applicable to the present case has been referred to by the counsel for the respondent; there is, therefore, no sanction in the Civil Procedure Code for ordering the abatement of the appeal in its entirety.

This, however, does not conclude the matter. The question still remains whether there is any substantive law, statutory or otherwise, which is a bar to the hearing of the appeal against the surviving respondents. An instance of a statutory provision making the presence of all the interested parties necessary before relief can be granted by the Court is to be found in S. 45, Contract Act which provides that when a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests as between him and them, with them during their joint lives, and, after the death of any of them with the representative of such deceased person jointly with the survivor, or survivors, and after the death of the last survivor, with the representatives of all jointly. It follows from this that in a suit on a joint promise made to two or more persons jointly if one of such persons dies and his legal representatives are not brought on the record within the time fixed by law the suit must abate as against the person so dying and the necessary consequence thereof is that the suit abates in its entirety because it cannot proceed in the absence of his legal representatives, it having been expressly laid down by law that in such a case, unless the right to enforce the promise is expressly given to them, some of the joint promisees cannot enforce the same. The same rule applies to appeals, and therefore an appeal by the promisor against a decree granted against him in favour of the promisees jointly would abate in its entirety if one of the promisee-respondents dies and his legal representative is not properly substituted in his place. Similar instances can possibly be cited from other statutes, but no statutory provision applicable to the facts of the present case was cited by Dr. Gokal Chand Narang on behalf of the respondents. I am unable to hold that such a provision exists prohibiting the Court from proceeding with the appeal as against the surviving defendants, the respondents in this appeal.

It is next to be seen whether any principles of the substantive law are violated if under the circumstances the appeal is allowed to proceed as against the surviving respondents. In this connexion the learned counsel for the respondents contended that two principles of law would be violated if the appeal is allowed to proceed. The first objection of the counsel was that such a course if adopted by the Court would result in contradictory decrees in the same suit. Applying this test to the facts mentioned in the question referred to this Court the counsel contended that the appeal must be deemed to have been dismissed as against *A* and the decree of the trial Court affirmed so far as he is concerned, and that if the appellate Court proceeds with the hearing of the appeal as against the remaining respondents and finally accepts it and sets aside the decree of the trial Court, then there will be two decrees arising out of the same suit, one in favour of *A* dismissing the suit and the other against *B*, *C* and *D*, accepting the appeal and decreeing the suit.

I am unable to see that there is any real force in this objection. It must be remembered that the decree in favour of *A* has been allowed to stand by this Court not as a result of any adjudication on the merits in his favour but by virtue of the operation of a provision of law due to the default of the appellants. There is not, therefore, in this case a contradictory finding or adjudication by this Court to which any reasonable objection could be taken. Moreover, the existence of contradictory decrees in some cases is legally possible. For instance, supposing there had been four sale-deeds, each with regard to a one-fourth share in the property in suit, and four different suits had been instituted by the plaintiff in the trial Court. It was open to the trial Court in some of them to come to the conclusion that the property was ancestral and in the others to hold that the property was not ancestral because each case had to be decided on the evidence produced therein, and it is conceivable that some of the vendees were able to produce convincing evidence as to the nature of the property and the rest were not equally fortunate. I see no legal objection to the so-called contradictory decrees or findings in such cases. To give another instance suppose a suit is instituted against *A* and *B* the joint executants of a bond and *A* confesses judgment but *B* pleads that the bond was executed for an illegal consideration. If the Court finds the plea of *B* established and dismisses the suit as against him but decrees it as against *A* on his own confession, can there be any valid objection to such a decree? I think not. There is, therefore, no force in this contention of the learned counsel.

The second objection of the learned counsel was that if as a result of the hearing of the appeal this Court set aside the decree of the trial Court and decreed the suit as against *B*, *C* and *D*, the decree so passed would be infructuous and ineffective. This is certainly an answerable objection to the hearing of the appeal as against *B*, *C* and *D* if it can be established that the decree against *B*, *C* and *D* would be infructuous, because it is a well-recognized rule of law that no Court shall pass an infructuous and ineffective decree—a decree which it cannot enforce. I do not, however, consider that the decree passed against *B*, *C* and *D* will be infructuous or ineffective. One test is whether it will be open to the legal representatives of *A* to contend successfully, if after obtaining his decree against *B*, *C* and *D* with regard to their interest in the property in suit, the plaintiff, decree-holder seeks to execute it, that they have obtained such an indefeasible right in the entire property, that is to say, both in the share of *A* and in those of *B*, *C* and *D*, as to make it impracticable for the plaintiff, decree-holder, to reap the fruit of the decree obtained by him against *B*, *C* and *D*. I do not see how the legal representatives of *A* can raise such an objection which will amount to a claim that the shares of *B*, *C* and *D* have also vested in them. I consider that the plaintiff can, in spite of the dismissal of the suit against *A*, get an effective relief against the others by obtaining a declaration that the title of the latter will be displaced by him when the limited interest of their vendor expires and then in proper proceedings and on the proper occasion the Court will put the plaintiff in joint possession of the shares of *B*, *C* and *D* along with *A's* legal representatives with the result that the plaintiff will step into the shoes of these men and if necessary will be able to get separate possession of their shares in the property in dispute by means of partition proceedings against *A's* legal representatives. I am, therefore, unable to see why in the present suit the Court is unable to declare that the sale with regard to the shares of *B*, *C* and *D* is invalid and will not affect the reversionary rights of the plaintiff while the sale of the one-fourth share in favour of *A* remains unimpeached. I am consequently unable to hold that the decree, if one is passed in favour of the plaintiff against *B*, *C* and *D* as a result of the present appeal, will be infructuous or ineffective.

Nor do I think it makes any difference, as was urged at the Bar, in the consequences that, in my opinion, must follow as already indicated when the shares of the vendees are actually ascertained and specified in the sale-deed and when they are not so specified but are ascertainable. I see no distinction between the two cases for the purpose of applying the rule as to the abatement of suits or appeals as in both cases the guiding factor is the real nature of the

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interest of the deceased party and not necessarily what appears or does not appear in the document evidencing the title of such party.

Agha Haidar, J.—In order to understand the reference which has been made to the Full Bench, it is necessary to state briefly a few facts out of which it has arisen. On 19th July 1920 one Kharak Singh, defendant 5, by a registered sale-deed, sold his half-share in four shops to Gulab Singh, Rattan Singh, Mehr Singh and Karam Singh, sons of Prem Singh, in equal shares, the consideration being a lump sum of Rs. 14,000. On 18th May 1921 Sant Singh and Ishar Singh, the sons of Kharak Singh, instituted a suit in the Court of the Senior Subordinate Judge, Lyallpur, for a declaration that the sale-deed in respect of the ancestral property executed by defendant 5 in favour of defendants 1 to 4 on 19th July 1920 shall, on the death of defendant 5, be null and void and ineffectual as against the plaintiffs' reversionary rights. The Subordinate Judge dismissed the plaintiffs' claim. The plaintiffs filed an appeal to this Court on 2nd October 1922. On 15th April 1923 defendant 1, Gulab Singh, died. No application, however, was made within the period prescribed by the law of limitation for bringing the legal representatives of the deceased Gulab Singh on the record. The inevitable result was that the appeal abated automatically as against Gulab Singh, defendant-respondent 1, vide *Churya* v. *Baneshwar* (20). When the appeal came up for final hearing an application was made on the 19th May 1926 under O. 22, R. 9, Civil P. C., praying that on certain specified grounds the abatement may be set aside. This application was rejected by the learned Judges who were hearing the appeal. At this stage counsel for the remaining respondents took the preliminary objection that as a result of the abatement of the appeal against defendant-respondent 1, the whole appeal had become infructuous and could not proceed against the surviving defendants-respondents and must, therefore, abate and be dismissed in its entirety. On the other hand counsel for the appellants contended that the appeal abated only against the deceased respondent and could proceed against the remaining respondents for decision on the merits. A number of cases were cited on behalf of the parties and the learned Judges, in view of the undoubted conflict of authorities on the subject, directed that the question may be referred to a larger Bench so that an authoritative pronouncement may be made on it once and for all, as the point involved was of considerable importance in daily practice. The terms of the reference are as follows :

> *X* sells immovable property to *A*, *B*, *C* and *D*. In the sale-deed it is stated that the property has been sold to the vendees in equal shares. The reversioners of the vendor institute a suit for a declaration that the sale shall not affect their reversionary rights after the vendor's death. The suit is dismissed and the plaintiffs appeal. During the pendency of the appeal *A*, one of the vendees, dies and, as his representatives are not brought on the record within time, the appeal abates as against *A*. Can the appeal proceed against *B*, *C* and *D*, the surviving vendees-respondents, or must the abatement of the appeal as against *A* result in the dismissal of the appeal in its entirety?

Before I proceed to discuss the conflicting mass of case-law on the subject it is desirable to approach the question referred to the Full Bench as an abstract proposition of law and to try to find out the proper solution according to the general principles of law, without being hampered by the judicial decisions of the various High Courts in India.

The sale-deed is in favour of four different persons. It is true they are brothers, but their shares are clearly specified and each is entitled to a one-fourth share only. This being so it was open to the plaintiffs to bring four separate suits at one and the same time against each of these four defendants. And while these four parallel suits were proceeding, if one of the defendants in one of these suits had died and his legal representatives had not been brought on the record with the result that the suit abated as against him, it cannot be argued with any show of reasoning that the three other suits against the three other defendants would have also abated. This being so, I fail to understand what difference does it make if the plaintiff brings one suit against these four persons, the extent of whose interest in the sale of 19th July is clearly defined. The same principles would apply to the present appeal, having regard to the provisions of O. 22, R. 11, Civil P. C. It is true that there is no apportionment of consideration, but this ought not to make any difference because the plaintiffs

(20) A. I. R. 1926 All. 217=48 All. 334 (F.B.).

are challenging the transfer of the alleged ancestral property by the father in favour of the vendees and it is a matter of indifference to them as to what sum, by way of consideration, was paid by each of the four vendees. We can test this proposition by assuming that instead of the sale-deed there had been a deed of gift, without any consideration. The position would not be altered. It would be open to the plaintiffs to bring a suit challenging the transfer by way of gift and the total absence of consideration would not make any difference to their claim Thus the fact that the amount of consideration is indicated by one lump sum ought not to affect the question which we have to consider.

Reverting to the four separate suits already assumed it cannot be urged that the plaintiffs would not be competent to withdraw one of the suits against the sole defendant in one of the suits under O. 23, R. 1, Civil P. C. Again, there would be nothing to prevent the plaintiff from entering into a compromise with the defendants in one of the suits and as a result of the compromise asking the Court to dismiss that suit. Applying the same reasoning to the present appeal in view of O. 22, R. 11, Civil P. C., in my opinion it would be competent to the plaintiffs-appellants either to withdraw unconditionally their appeal *qua* defendant-respondent 1 or to enter into a compromise with him and then ask the Court to dismiss the appeal as against him. This being so, I cannot understand how on general principles the mere fact that one of the defendants or respondents has died it should follow as a matter of course that the whole suit or appeal should abate.

Under the old Code, Act 14 of 1882, S. 368, which was the section corresponding to O. 22, R. 4, of Act 5 of 1908, the words used by the Legislature were :

> Where the plaintiff fails to make such an application within the period prescribed therefor the suit shall abate.

It is significant that even under the old Code and in spite of the phraseology used in S. 368 there were cases that the total abatement of the suit would not follow in case the interests of the several defendants were distinct and capable of separation. The present Code of Civil Procedure has introduced an important change by altering the phraseology of O. 22, R. 4, and we find that the language of sub-R. (3) is a distinct departure from the phraseology of the old S. 368, in that it lays down that

> where within the time limited by law no application is made under sub-R. (1), the suit shall abate *as against the deceased defendant.*

The italicized words introduce an important change and the meaning of the text standing by itself is clear and unmistakable, in that it lays down that from the mere fact that the suit has abated against the deceased defendant it does not necessarily follow that it would abate against the remaining defendants as well. In fact there are some cases, which I shall presently discuss, which have laid down the proposition that by reason of this altered phraseology the suit or appeal, as the case may be, must proceed as a matter of course, even if it has abated as against a particular defendant or respondent. I am not prepared, with due deference, to accept this broad and general statement of law. It would, in my humble judgment, depend upon the nature of the suit and the relief claimed. There are some suits which, from their very nature, cannot proceed if one of the defendants dies and his legal representatives are not duly brought on the record. One very good test is whether the particular suit was one which, when originally instituted, could have proceeded in the absence of a party. I may illustrate the proposition which I am submitting by referring to a suit for partition or for the dissolution of partnership and rendition of accounts. There is a very good illustration of a suit belonging to the latter class. In *Raj Chunder Sen* v. *Ganga Das Seal* (21). which was a suit for accounts and for winding up the affairs of a partnership which had subsisted between the plaintiffs and the several defendants, there were complicated questions between the parties inter se as regards their respective relations. One of the defendants-respondents in the suit died. An application to bring his legal representatives on the record was made and being time barred was eventually dismissed. It was held by their Lordships of the Privy Council that the nature of the suit was such that the cause of action did not survive against the remaining respon-

(21) [1904) 31 Cal. 487=31 I. A. 71=8 C. w. N. 442=8 Sar. 623 (P. C.).

dents and therefore the whole appeal bated.

Some cases of injunctions also present similar features. Thus if several plaintiffs bring a joint suit for a mandatory injunction against a defendant and obtain a decree and the defendant appeals, and during the pendency of the appeal one of the plaintiffs-respondents dies and his legal representatives are not brought on the record, the result would be a deadlock. The decree in favour of the deceased plaintiff-respondent would become final and his legal representatives would be entitled to execute it, while the defendant, in case he succeeds in his appeal against the remaining plaintiffs respondents, would be powerless to stop them from executing the decree in their favour. In this class of cases also it is not possible to allow the appeal to abate against one of the respondents only and to proceed with its trial as against the remaining respondents. The appeal must abate as a whole. A case of this kind is to be found in *Gauhar Khan* v. *Sher Muhammad Khan* (22).

My view, therefore, is that the death of one of the respondents does not necessarily result in the abatement of the appeal in its entirety. The interpretation placed upon the concluding words of O. 22, R. 4 (3), namely, that the appeal must as a matter of course proceed against the remaining respondents in spite of its abatement against the deceased respondent is too wide and is not justified. As already stated it would depend entirely upon the nature of the suit, and if the suit, having regard to its frame and character, could proceed in the absence of the deceased defendant there is no reason why the appeal should not ordinarily proceed against the surviving respondent or respondents.

I may observe that the cases of the members of a joint Hindu family governed by the law of Mitakshara, being parties to a suit or appeal, and the case of parties to a suit for pre-emption, are governed by different principles which are not applicable to the facts of the reference before us.

As regards the case-law on the subject I would naturally begin with a discussion of the cases of our own High Court and of its predecessor, the Chief Court of the Punjab. In *Mir Nawab* v. *Hardeo* (23) one out of the two persons, who represented a numerous body of respondents under O. 1, R. 8, Civil P. C., died during the pendency of the appeal before the Chief Court and the application to bring his legal representatives on the record was rejected as it was made after the expiry of the period of limitation. The learned Chief Judge, referring to the terms of O. 22, R. 4 (3), Civil P. C, observed that they were imperative and that no case has been established which would justify a departure from the rule that the appeal shall be dismissed under the circumstances. It is clear that the learned Chief Judge was thinking of the provisions of S. 368, Civil P. C. (Act 14 of 1882) which provided that if the plaintiff failed to make such an application within the period prescribed therefor, the suit shall abate. O. 22, R. 4 (3) of the Code of 1908 says exactly the contrary, namely, that the suit shall abate as against the deceased defendant. Thus the reference to the terms of O. 22, R. 4 (3), Civil P. C. is inaccurate. Then follows the following cryptic paragraph :

> The decree was joint and we concur in the exposition of the law contained in the judgment of a Division Bench in Civil Appeal No. 649 of 1907, that on the death of one of two representatives of the body of respondents the appeal abates,

I am at a loss to understand the exact meaning of this sentence. It only conveys to my mind the impression of rough and ready injustice.

I find, however, that this judgment was animadverted upon in *Hadu* v. *Lala* (2), where the learned Judges observe as follows:

> We do not rely upon *Mir Nawab* v. *Hardeo* (23) which is a very brief judgment and which is based upon an unpublished ruling, the particulars of which appear to have been wrongly quoted and which we have been unable to find.

Therefore this case cannot be of any help to the respondents.

Nazir Khan v. *Mangli* (11) goes to the other extreme and, while distinguishing *Mir Nawab* v. *Hardeo* (23), it puts a very wide construction upon O. 22, R. 4 (3), Civil P. C., and lays down that the appeal abates only against the deceased respondent implying thereby that it would proceed in the ordinary course against the other respondents. As I have already stated such a general state-

(22) [1913] 107 P. L. R. 1913=18 I. C. 256=84 P. W. R. 1913.

(23) [1911) 60 P. R. 1911=42 P. L. R. 1912= 12 I. C. 871=238 P. W. R. 1911.

ment of law is misleading and in fact goes too far. I find that the learned Judges do not refer to any authorities to any general principles of law in support of their view

The most important case on which counsel for the defendants-respondents relied in support of his contention is *Khuda Bakhsh* v. *Mathra Das* (1). In that case, Ghulam, the father of the plaintiff, sold the land in suit to one Mathra Das, who in his turn sold it to four persons in specified shares. On the death of Ghulam, his son brought a suit claiming to recover possession of the land from the vendees. In this suit Mathra Das was implead as a pro forma defendant while the suit was contested by the transferees from Mathra Das. The trial Court decreed the suit, but the lower appellate Court, on appeal, dismissed the plaintiff's claim. The plaintiff filed a second appeal in the Chief Court and while this appeal was pending one of the purchasers from Mathra Das, namely, Muhammad Din, defendant-respondent, died and no application was made to bring his legal representatives on the record. The appeal consequently abated so far as Muhammad Din's share in the land was concerned. The question arose whether the appeal could be continued against the remaining three transferees from Mathra Das. It may be observed here that although the area which each transferee was to take was specified in bighas, the total area covered by the sale-deed was joint and undivided. The learned Judges following *Hem Kunwar* v. *Amba Prasad* (24), observed that as the land was joint, the liability of the co-sharers was also joint at present even although on partition each of the contesting defendants would be allotted a certain share. They accordingly held that the appeal cannot proceed against any of the respondents and must, therefore, abate in its entirety. The Allahabad decision arose out of a suit for recovery of possession of certain land. It was brought by four plaintiffs, namely Raj Bahadur, Mt. Mohni, Mt. Lachha Kunwar and Hem Kunwar, who claimed to be jointly entitled to the land in suit. The Court of first instance decreed the plaintiff's claim. The defendants went up in appeal to the lower appellate Court and impleaded the four plaintiffs as respondents.

(24) [1900] 22 All. 480=(1900) A. W. N. 136.

While the appeal was pending the appellants made an application alleging that Mt. Mohni and Mt. Lachha Kunwar, two of the plaintiffs-respondents, had died and that Hem Kunwar who was already on the record, was their legal representative. Accordingly necessary alteration was made in the array of defendants. At the hearing of the appeal Hem Kunwar satisfied the Court that Mt. Mohni was alive and that he was not the legal representative of Mt. Lachha Kunwar and that in any event the application to place him on the record as her legal representative was made more than six months after the date of her death. It appeared that notice of the appeal was not served on Mt. Mohni and with regard to Mt. Lachha Kunwar it was held that Hem Kunwar had been wrongly placed on the record as her legal representative. The lower appellate Court decreed the appeal in the following terms:

> It is decreed that the claim of the plaintiffs-respondents Raj Bahadur and Hem Kunwar be dismissed with costs and the appeal of the defendants appellants be dismisssd with costs as against the plaintiffs-respondents, Mt. Mohni and Mt. Lachha Kaur.

Hem Kunwar and Raj Bahadur went up in appeal to the High Court and a learned single Judge decreed the appeal, holding that it was one where the right to appeal did not survive against the surviving respondents only, but against them and the representatives of the respondent who had died and that having regard to the provisions of S. 368 read with S.582, Civil P.C., Act 14 of 1882, the whole appeal before the lower appellate Court should have abated. There is no discussion of any principles of law in the judgment, nor do we know whether the interests of the several plaintiffs-respondents in the lower appellate Court were specified and discriminated. This difficulty was experienced by a Bench of the Calcutta High Court in a case in *Joy Gobind Laha* v. *Monomotha Nath Banerji* (25), while considering the case of *Hem Kunwar* v. *Amba Prasad* (24). In my opinion in the absence of any clear indication that the shares of the plaintiffs-respondents were distinctly specified, the Allahabad case was not an authority which would support the decision of the learned Judges in *Khuda Bakhsh* v. *Mathra Das* (1). In my humble judgment, having regard to the nature of the

(25) [1906] 33 Cal. 580.

suit and the provisions of O. 22, R. 4 (3), Civil P. C., this case was wrongly decided. There was nothing at all to prevent the appeal from proceeding against the surviving defendants-respondents after the appeal had abated against Muhammad Din. The plaintiff, if successful against the three contesting respondents, could obtain joint possession of the property along with the legal representatives of Muhammad Din under the provisions of O. 21, R 55 (2), Civil P. C. There is no principle either of law or of equity which would justify the Court in depriving the plaintiff of such advanatage as he may be entitled to, in case he is successful on the merits, in his appeal.

The case in *Hadu* v. *Lala* (2), purports to follow *Khuda Bakhsh* v. *Mathra Das* (1). This case was in my opinion correctly decided on its own facts, irrespective of the decision in *Khuda Bakhsh* v. *Mathra Das* (1). The case arose out of a suit which the plaintiffs, the proprietors of taraf charhda had brought against the defendants, their co-proprietors, for a declaration that the shamilat land of their taraf was divisible between the proprietary body of the taraf according to their ancestral shares and not according to the entries in the khewat. The trial Court dismissed the suit. The defendants filed a first appeal in the Chief Court and while the appeal was pending one of the defendants-respondents, namely Daim, died. An application to bring his legal representatives on the record was filed too late and the appeal was held to have abated against Daim. It was rightly held that the suit abated as a whole. It would at once appear from this brief statement of the facts of the case that it was a suit in which from its very nature it was necessary that all the members of the proprietary body should be arranged before the Court, either as plaintiffs or defendants, so that their rights may be fully determined and adjusted. The learned Judges applied the correct test that the suit could not have been correctly framed and instituted if Daim had been left out of the array of parties.

The case in *Jamna* v. *Sarjit* (26), belongs to the same class of cases and may be taken to have been correctly decided by the learned single Judge, although unfortunately, the judgment comes to an end somewhat abruptly without any discussion of authorities or legal principles.

The case in *Inayat* v. *Ganga* (3), was a mortgage suit brought by the plaintiff for possession of certain land on the allegation that the mortgage on the land had been discharged. The suit was dismissed by the trial Court and while the plaintiff's appeal was pending in the lower appellate Court, Sukhu, a co-mortgagee, who was impleaded as one of the respondents, died and his legal representative was not brought on the record. The lower appellate Court accordingly dismissed the suit. In second appeal a Bench of the Chief Court rightly held that the plaintiff's suit could not have proceeded at all unless Sukhu in his capacity as a co-mortgagee had been impleaded and on his death as a respondent the appeal could not have proceeded from the very nature of the suit. I have no doubt that the learned Judges while deciding this appeal had in their mind the well-known principles of law that in a mortgage suit every person having an interest in the mortgage security should be joined as a party, that a mortgage is primarily indivisible and that, except in special circumstances, which did not exist in the case before them, the integrity of the mortgage cannot be broken. Therefore, the decision was based upon different principles which have no application to the present case.

We now come to an important judgment in *Mt. Zainab Bibi* v. *Rohila* (6), which fully supports the appellants' contention. In this case the plaintiff brought a suit against nine defendants, for possession of certain lands on the ground that it was self-acquired property of the last owner and that the plaintiff, as his daughter, had a preferential right as against the defendants who were collaterals. The trial Court dismissed the suit. The plaintiff came up in appeal to the Chief Court. One Sadar Din, defendant-respondent, died without his legal representatives being brought on the record. The suit consequently abated as against Sadar Din. It was urged on behalf of the remaining defendants-respondents that the appeal abated as a whole, but this contention was overruled by the learned Judges who held that Sadar Din had no joint right with his co-defendants but each had a separate interest and, there-

(26) [1919] 67 P. R. 1919=52 I. C. 510.

fore, Sadar Din's heirs will retain the shares secured to him by the decree of the trial Court and that there was nothing to prevent the plaintiff-appellant from attacking the remaining defendants-respondents. The learned Judges referred to *Khuda Bakhsh* v. *Mathra Das* (1), but observed that that case presented features which differentiated it from the case before them. With due respect to the learned Judges I fail to see any differentiating features. The position of the defendants in *Khuda Bakhsh* v. *Mathra Das* (1) as well as in *Mt. Zainab Bibi* v. *Rohila* (6) was practically the same. However, the case supports the contention of the appellant and is an authority in his favour. In my judgment the decision proceeds on the right principle.

Mt. Zainab Bibi v. *Rohila* (6) was followed by a Division Bench of two Judges in *Nandoo Singh* v. *Baljit Singh* (8). The facts of the two cases are exactly similar, with this difference only, that the case in *Nandoo Singh, etc.* v. *Baljit Singh* (8) was a suit for a declaration and therefore is an authority which supports even more fully the contention of the appellants in the reference before us. I need not stop to consider the case in *L. Devi Das* v. *Muhammad* (10) which, although decided by two learned Judges, does not contain either any discussion of legal principles or of the reported decisions on the subject.

In the case in *Sardari Mal* v. *Ram Lal* (27) three persons obtained a joint decree on the foot of a mortgage for a sum of Rs. 6,670 with costs realizable by the sale of the mortgaged property. The defendant appealed to the High Court and while the appeal was pending one of the plaintiffs-respondents died and her legal representatives were not brought on the record. The learned Judges observed that

> under O. 22, R. 4, Civil P. C., the appeal abates entirely unless the right to appeal survives so far as the present respondents are concerned.

With due respect I beg to submit that O. 22, R. 4, Civil P. C., says exactly the contrary, in that it provides that the appeal shall abate as against the deceased defendant only and not in its entirety. In any event this case does not apply to the facts of the reference because here the decree was for a single sum of money and was joint in its character, the shares of the decree-holders not being specified.

The case in *Raghbir Saran* v. *Mt. Sohni Devi* (7) presents certain difficulties though the decision is correct. The widow of B. S., while in possession of her husband's estate, made a gift of four items of property in favour of defendants 2 and 3. These donees sold one of the items of property to defendants 4 to 36. The property sold was indicated by 29 shares, 27 of which were transferred to vendees 1 to 27 and the remaining two shares to vendees 28 to 31. A suit was brought by the adopted son of the deceased B. S. for possession of the property transferred by the widow. While the suit was pending, one of the vendees, namely, Hargopal (defendant 30) died and no application to bring his legal representatives on the record was made within time. The suit therefore abated against Hargopal. The trial Court dismissed the whole suit holding that as a result of the death of Hargopal the whole suit had abated. Plaintiff appealed. On behalf of the respondents it was conceded that the appeal could not possibly abate against the defendants (Set II). It was, however, contended that the suit abated as against the co-vendees of Hargopal (Set I). Reliance was placed by the respondents upon the case of *Khuda Bakhsh* v. *Mathra Das* (1) and it was argued that as the interests of the vendees (Set I) were joint in the sense that the property acquired by them under the sale-deed had not been actually divided, therefore the appeal abated against this set of defendants. The learned Judges, while distinguishing the case of *Sardara* v. *Allahyar* (28) observed that Hargopal, the deceased defendant-respondent, had only 1/29th share according to the specification of shares in the sale-deed and that therefore his co-vendees had no concern with this 1/29th share. In my judgment, having adopted this line of reasoning, the learned Judges should have refused to follow the rule of law laid down in *Khuda Bakhsh* v. *Mathra Das* (1). The learned Judges, however, tried to distinguish the facts of the case before them from those of

(27) [1920] 1 Lah. 225=57 I. C. 199=1 L. L. J. 225.

(28) A. I. R. 1923 Lah. 132.

Khuda Bakhsh v. *Mathra Das* (1) by observing that in the latter case the son who had brought the suit to avoid the effect of the sale-deed executed by his father could not achieve his object and obtain possession of any portion of the property without getting rid of the sale-deed and that as the sale-deed was a joint one, the suit could not proceed against the surviving defendants alone. The learned Judges seem to be under the impression that *Khuda Bakhsh* v. *Mathra Das* (1) was a suit for the cancellation of a deed of sale. As a matter of fact it was a suit for possession and on the plaintiff's proving his title the sale-deed would no longer have any legal effect. The learned Judges, however, relied upon the principles of law laid down in *Mt. Zainab Bibi* v. *Rohila* (6) and held that the suit abated only as regards the interest of Hargopal, the deceased defendant, and should have been allowed to proceed against the remaining defendants. The learned Judges having decided to follow the principle of *Mt. Zainab Bibi* v. *Rohila* (6) should have consistently dissented from the case in *Khuda Bakhsh* v. *Mathra Das* (1). The distinction which has been made, as I have tried to show, is not the right distinction. The decision of the learned Judges, however, in *Raghubir Saran* v. *Mt. Sohni Devi* (7) is correct, and I follow it as well as the principle of the decision on which it is founded, namely, *Mt. Zainab Bibi* v. *Rohila* (6).

Raghubir Saran v. *Mt. Sohni Devi* (7) and *Mt. Zainab Bibi* v. *Rohila* (6) have been recently followed by a Bench of this Court in the case of *Jalal* v. *Bahawali* (9) where the facts were very similar and the learned Judges observed that where the interests of the reversioners of the deceased proprietor were ascertainable and originally a suit could have been brought against some of the defendants in respect of the land which fell to their share there was no reason why on the abatement of the appeal against one of the respondents (reversioners) the appeal should not proceed against the remaining respondents the extent of whose respective interests was clearly defined.

Lastly, I may refer to the decision of a learned single Judge in *Karam Khan* v. *Mast Ali Khan* (16) which besides following *Raghubir Saran* v. *Mt Sohni Devi* (7) and *Mt. Zainab Bibi* v. *Rohila* (6), further relies upon the principle of the recent case in *Darshan Das* v. *Bikramajit Rai* (12). The learned Judge observes that the question whether the appeal abates in whole or in part depends on whether the interests of the respondents are or are not separately defined and if they are, the appeal would abate only as against the interests of the deceased respondent. This in my opinion is the correct principle deducible from the cases relied upon by the learned Judge.

Thus the preponderance of the relevant judicial authority in this Court is in favour of the contention put forward by the learned counsel for the plaintiffs-appellants. In my humble judgment the case in *Khuda Bakhsh* v. *Mathra Das* (1), and other cases which have followed its authority were wrongly decided.

In the Bombay High Court the current of decisions has been uniform and this perhaps accounts for the paucity of the case-law on the subject. The first case of any importance is *Chandar Sang* v. *Khimabhai* (14) This was a suit for possession which the trial Court decreed. There was an appeal to the lower appellate Court and during the course of the appeal one of the plaintiffs-respondents and one of the defendants-appellants died and their respective legal representatives were not brought on the record. The lower appellate Court dismissed the appeal on the ground that the land being held in common the appeal was therefore defective for want of parties. The defendants filed a second appeal in the High Court and the learned Judges, so far as the death of the deceased respondent was concerned, held that the lower appellate Court ought to have acted under the provisions of S. 368, Civil P. C. (now O. 22, R. 4 (3) of the new Code), and declared that the appeal had abated as against him only and should have proceeded against the rest of the respondents under S. 544, Civil P. C., (now O. 41, R. 4, Civil P. C.). They accordingly set aside the order of the dismissal of the appeal and remanded the case to the lower appellate Court for disposal. This case was followed in *Bai Full* v. *Adesangh* (29). This was a suit in which the plaintiff claimed a certain

(29) [1902] 26 Bom. 203=3 Bom. L. R. 736

undivided area out of a larger area against a number of defendants. While the suit was pending in the trial Court some of the defendants died and their legal representatives were not brought on the record. The trial Court dismissed the suit holding that it abated in its entirety. It was held in appeal by the High Court that the proper course for the Court below was to follow *Chandar Sang* v. *Khimabhai* (14), and to declare that the appeal had abated against the deceased defendants-respondents and to proceed to hear the appeal on the merits as against the other respondents.

The last and the most important Bombay case is to be found in *Shankerbhai* v. *Motilal* (13), in which the learned Acting Chief Justice delivered a very instructive judgment. This was a suit for possession of a certain house site. The plaintiffs were related to each other as uncle and nephew and claimed the land in suit as tenants-in-common. While the suit was pending the nephew died and his widow was duly brought on the record and the suit was decreed. After the appeal had been filed by the defendant in the lower appellate Court, the widow, who was impleaded as respondent 2, died and her legal representatives were not brought on the record, but an application was made by the defendant-appellant that plaintiff-respondent 1 was her heir and legal representative and that the appeal could proceed against him. Respondent 1 opposed this application and mentioned the name of the proper heir and legal representative of the deceased lady, respondent 2, and urged that as the said legal representative had not been brought on the record, the appeal abated as regards respondent 2. The lower appellate Court held that the appeal abated not only against respondent 2 but in its entirety, the reasoning being that the shares of the plaintiffs-respondents not being ascertained, any decree which might be passed against respondent 1, in case the defendants' appeal was successful, would be infructuous, as the decree in favour of respondent 2 would continue to stand. This reasoning was not accepted in appeal by the High Court and it was held that the order treating the appeal as having abated in respect of respondent 1 as well, was wrong, there being nothing in O. 22, R. 4 (3), Civil P. C., which would justify the abatement of the whole appeal. Shah, Ag. C. J., fully realized that there might be difficulties when the relief which the Court may grant against the remaining respondents in appeal is not likely to be effective. He rightly observed that that difficulty must depend largely upon the nature of the suit and the possible relief that can be granted in appeal, under the circumstances of the particular case. He, however, pointed out that, ordinarily speaking, if the appellant succeeded in proving his case on the merits, there was no reason why he should be deprived of the possible advantage that would accrue to him by obtaining a decree against the surviving respondent or respondents and making as much as he can out of the said decree. Fawcett, J., in the course of the judgment referred to the case *Kali Dayal* v. *Nagendra Nath* (30) which seems to lay down the contrary view but he followed *Chandar Sang* v. *Khimabhai* (14) and held that it was not a necessary consequence in every case that the whole appeal should abate.

He observed that if the appeal ultimately succeeded the result will not be so anomalous or inconvenient that the Court should merely on that account refuse to pass a decree in favour of the defendant-appellant against respondent 1. He pointed out that in such a case the result will be that while the appellant would fail against respondent 2, he shall succeed against respondent 1 and the order of the lower appellate Court could be modified by directing that the defendants do put the legal representatives of plaintiff-respondent 2 in joint possession of the property while the suit of plaintiff 1 as regards his share would stand dismissed. I entirely agree with this reasoning and in my humble judgment there is nothing anomalous or impracticable in framing a decree on these lines in the circumstances of the case which their Lordships of the Bombay High Court had before them. I have in my experience come across many decrees where a suit instituted against a large array of defendants had abated against one or more defendants and decreed against the rest, or the plaintiff has entered into a compromise with one or more of the defendants and asked the

(30) [1920] 24 C. W. N. 44=54 I. C. 822=30 C. L. J. 217.

Court as a result of that compromise to dismiss his claim against them. The decree simply mentions the result of the abatement or the compromise as regards the said defendant or defendants, and in case the plaintiff succeeds on the merits grants him a decree against the remaining defendants. Having regard to the provisions of O. 22, R. 11, Civil P. C., and S. 107, Civil P. C., I fail to understand why a similar decree may not be possible in an appeal which has partially abated as regards some of the respondents and only has succeeded against the remaining respondents. No question of contradictory decrees on the record of one suit arises in the case. There would be only one decree in the suit, but having regard to the course of events the rights of the various parties under the decree would be distinct and capable of being separately dealt with in execution.

Turning to the decisions of the Allahabad High Court, I have already dealt with the case in *Hem Kunwar* v. *Amba Prasad* (24). Neave, J, sitting singly in *Dayaram* v. *Ram Narain* (*A. I. R.* 1925 *All.* 623) followed *Kali Dayal* v. *Nagendra Nath* (30) a case which came up before him under the following circumstances : Three persons who were not members of a joint family, brought a suit and obtained a joint decree for possession of certain property. The defendant appealed to the lower appellate Court and before the appeal was decided one of the plaintiffs-respondents, namely Ram Narain, died and as his legal representatives were not brought on the record, the appeal was held to have abated against him. The appeal was apparently dismissed by the lower appellate Court on the merits. The defendant went in second appeal to the High Court when a preliminary objection was raised that the decree being one for joint possession in favour of three persons, the appeal could not proceed against two of them only. The learned Judge gave effect to this objection and held that where a joint decree had been obtained and the appellant had failed to bring on the record the legal representatives of one of the joint decree-holders who had died, though under O. 22, R. 4, Civil P. C., the appeal abated against the deceased plaintiff-respondent only, the result of such abatement would be that the appeal would become imperfectly constituted so that in the absence of a necessary party the Court would be unable to decide the appeal on the merits. The learned Judge accordingly dismissed the appeal.

Another case *Bikramjit Rai* v. *Darshan Das* (31) came up before the same learned Judge, but I need not discuss it as it went up in appeal under the Letters Patent before a Bench of two learned Judges in *Darshan Das* v. *Bikramjit Rai* (12). The facts of the case are briefly these: A certain Mahant transferred the property in suit to a woman named Mt. Sobhagi. She in her turn transferred her interest under a sale-deed to several persons in the following manner:

B and G	...	½ share
G R and J	...	... ¼ share
K and R	...	... ¼ share

A suit was brought by the successor of the Mahant for possession of the property which had been the subject-matter of these transfers. It was dismissed by the trial Court. The plaintiff appealed and the lower appellate Court decreed the suit. While the appeal was pending in the lower appellate Court, G died but no steps were taken to bring his legal representatives on the record, nor was the matter brought to the notice of the lower appellate Court. The lower appellate Court decreed the plaintiff's suit. In second appeal filed by the defendants the attention of the learned single Judge was drawn to the fact that G had died while the appeal was pending in the lower appellate Court and that his legal representatives had not been brought on the record and it was argued that the appeal abated as a whole. The learned Judge accepted this contention and allowing the appeal dismissed the plaintiff's suit. It appears that the attention of the learned single Judge was not drawn to the fractions already mentioned indicating the shares of the various groups of transferees from Mt. Sobhagi. Accordingly the learned Judges in the Letters Patent appeal modified the decree of the single Judge and held that the appeal abated only against the half-share which represented the joint and undivided interest of B and G. In other words the learned Judges treated the various fractions and the various groups of transferees who jointly held them as

(31) A. I. R. 1925 All. 141.

so many separate watertight compartments which stood independently of each other so that one compartment could not be affected by the partial abatement of the appeal *qua* another compartment as a result of the death of an individual belonging to that compartment. Thus the appeal was decreed against the two groups of transferees, namely, G, R and J (=½) and K. R. (=½) and dismissed against the group B and G (=¼). The learned Judges justified their decision by observing that to hold otherwise would lead to the inconvenience of there being two contradictory decrees in the course of one suit with regard to the same property. This ruling supports the plaintiff-appellant's contention, in so far as it held that the appeal abated only partially against the parties who were holding a particular share and could proceed against the holders of the remaining shares.

I may observe that shortly afterwards. in the case reported in *Narain Das* v, *Sheo Din* (32) Sulaiman, J., who delivered the judgment of the Court in *Darshan Das* v. *Bikramjit Rai* (12) deal-, ing with the question of the abatement of the appeal against one or more of the defendants in a suit for joint possession seems to have modified his view and observed as follows:

> In any case, very often an appellate Court may uphold the decree in favour of some of the plaintiffs and may dismiss the claim of the other plaintiffs. It, therefore, seems to me that in a case for joint possession of property brought by a number of plaintiffs it is possible to dismiss the claim of some and uphold the decree in favour of the others. The decree is certainly a joint decree, but the rights of claimants are distinct and can be considered indvidually and disposed of separately.

This disposes of the contention based upon the alleged inconvenience of there being two contradictory decrees in the same suit. In such cases there would be only one decree dealing with the rights of the various parties and the history of the litigation would at a glance explain the meaning and purpose of such decree. In the same case Mukerji, J., quoted with approval the following passages from *Shankerbhai* v. *Motilal* (13).

> It is enough for our present purpose to point out that if the defendants succeed it would place them in a more advantageous position in so far as they would have then to satisfy plaintiff 2 only with reference to the decree and not plaintiff 1.

(32) A. I. R. 1926 All. 234=48 All.251.

This case, therefore, lends support to my view that there is nothing in law to prevent the same decree containing adjudication as regards the various rights and liabilities of the different parties to it.

After the conclusion of the arguments I received the report of another case which came before three learned Judges of the Allahabad High Court. I am referring to the case in *Fakira* v. *Hardewa* (19). In that case the learned Judges held that where during the pendency of a second appeal arising out of a suit for a declaration of title against two sets of defendants, one defendant belonging to the second set died and no steps were taken within the time allowed by law to bring his heirs on the record, and the other defendants did not represent the deceased, the appeal would abate as against the second set of defendants only, but not against the first set whose interests were separate and distinct from the other defendants. Mukerji, J., expressed his definite opinion that when under the law his suit or appeal abates against one party only, the rest of the appeal or suit must continue and cannot be dismissed for want of parties. He goes on to say that in a suit for declaration if the plaintiff cannot obtain a declaration of title against some of the defendants, it does not follow that he should not obtain it against the other defendants as well.

With this opinion I entirely agree. The learned Judge once again approves of the decision in *Shankarbhai* v. *Motilal* (13), but having regard to the trend of decisions in the Allahabad High Court the learned Judge did not find himself strong enough to differ from it and agreed with the other Judges that on the death of the defendant-respondent, when his legal representatives were not duly brought on the record, the appeal abated against the whole set of defendants with whom he was jointly holding the land in suit. Thus the weight of authority in the Allahabad High Court is on the whole in favour of the appellants before us and the single Judge case in *Gajraj* v. *Bhagirathi* (33) which follows *Kali Dayal* v. *Nagendra Nath* (30), need not be separately considered.

In the Calcutta High Court the course of decisions has not been uniform. As matters stand now, *Kali Dayal* v. *Nagendra Nath* (30), which has been

(33) A. I. R. 1924 All. 95.

followed in a number of cases, may be taken to be the leading authority on the subject. This was a joint suit for a declaration that the land in dispute appertained to the plaintiffs' property in zamindari rights as well as by adverse possession. The trial Court decreed the plaintiffs' claim and gave the declaration sought for. The defendants filed an appeal in the High Court. Some of the plaintiffs-respondents died and their legal representatives were not brought on the record as required by law. The appeal therefore abated against the deceased respondents under the provisions of O. 22, R. 4, read with R. 11, Civil P. C. The question arose whether the appeal in view of the nature of the suit could proceed against the other respondents and the decision of the trial Court in their favour could be reversed. The learned Judges, while dealing with the conflict of decisions, pointed out that Rampini, J., had expressed divergent views on the subject in different cases. They, however, treated the decree in plaintiffs' favour as a joint decree against the defendants who claimed one undivided interest against the plaintiffs.

On these facts they held that the appeal abated in its entirety. Their reasoning was that if the defendants' appeal were allowed to proceed then, having regard to the nature of the claim and the decree of the trial Court, the result would be that the appeal would become imperfectly constituted and the appellants would no longer be in a position to invite the Court to adjudicate upon the matters in controversy. They further pointed out the incovenience of there being two contradictory declarations in the same suit, one by the trial Court in favour of the deceased plaintiffs and the other by the High Court against the plaintiff-respondents in case the defendants' appeal succeeded. Reference is also made to the embarrassing situation which would arise if these contradictory declarations were produced before the Collector with a view to the entries being made in the revenue records in accordance therewith. The facts of this case are essentially different from those of the case before us, and, therefore, strictly speaking, the decision has no direct application. But as the case was strongly relied upon by the respondents' counsel and contains important propositions, it requires careful consideration. I have already expressed my views when discussing the case in *Shankarbhai* v. *Moti Lal* (13) on the question of the so-called inconvenience of having two contradictory decrees in the same suit. I would further point out that a declaratory suit is in the nature of quiatimet relief and the decree in such a suit is incapable of execution except as to costs and is used in many cases either as the basis of a subsequent suit or for the purposes of correcting the revenue records. In the event of the defendants succeeding in their appeal, the declaration would hold good only in favour of the deceased respondents. They undoubtedly secured an advantage of which the heirs cannot be deprived. And there is no reason either in law or in equity why the remaining plaintiffs respondents should benefit simply because one or more of their co-respondents had died and the suit has abated as against them. This case was followed in *Dendoo* v. *Sachoo* (34) where the facts were similar. In *Arjan Mirdha* v. *Kali Kumar* (*A. I. R.* 1923 *Cal.* 294) also *Kali Dayal* v. *Nagendra Nath* (30) was followed, although in that case the plaintiffs had specified their shares but had sued for joint possession.

Neyajaddin v. *Akamat Ali* (35) follows *Kali Dayal* v. *Nagendra Nath* (30). In this case a suit was brought for the recovery of possession of a certain plot of land against a number of joint tort-feasors. The trial Court granted only a declaration as regards two plots and dismissed the suit as to khas possession. The plaintiffs appealed and the lower appellate Court passed a decree for khas possession of those plots. It appears, however, that while the appeal was pending before the lower appellate Court one of the defendants-respondents died and some of his heirs were brought on the record. Five of these heirs were minors. It was noticed by the lower appellate Court that these minors were not duly represented and that in fact no steps had been taken to secure their proper representation before the Court. The lower appellate Court's decree was, therefore, given against the major defendants only. Some of the heirs of the deceased defendants and the other defendants appealed to the High Court and

(34) A. I. R. 1924 Cal. 399.
(35) A. I. R. 1925 Cal. 411.

urged that in the absence of the minor heirs of the deceased defendant who were properly not represented in appeal the whole appeal before the lower appellate Court ought to have abated. The High Court gave effect to this contention on the ground that the suit being for recovery of possession aginst a number of joint tortfeasors and the plaintiffs not having alleged that the defendants individually dispossessed them from different portions of the land, the decree was inseparable and indivisible and the appeal before the lower appellate Court was, therefore, liable to be dismissed in toto. It is significant that the learned Judges based their decision upon the fact of the decree of the trial Court being inseparable and indivisible implying thereby that if the interests of the defendants had been separate the result would have been different. As in the reference before us the shares of the defendants are admittedly divisible and separable and the plaintiff has come into the Court on the distinct allegation that the defendants 1 to 4 purchased the property in certain specified shares, the case is an indirect authority in favour of the appellants.

In *Midnapur Zamindari Co.* v. *Ishar Chandar* (*A. I. R.* 1924 *Cal* 346) following *Kali Dayal* v. *Nagendra Nath* (30) it was held that if the appellate Court were called upon to set aside a decree for possession which enured to the benefit of four persons, one of whom is dead and his legal representatives have not been brought on the record, it will refuse to do so on the ground that even if the appeal were to succeed the legal representatives of the deceased plaintiff would not be bound by the appellate Court's decree and would be at liberty to execute it in its entirety as one of several joint decree-holders and the appeal would become infructuous. This case proceeds on the principle of avoiding two contradictory decrees in the suit. To the same effect is the case in *Midnapur Zamindary Co.* v. *Amulya Nath* (36) which also follows *Kali Dayal* v. *Nagendra Nath* (30).

Gopika Raman Roy v. *Atal Singh* (*A. I. R.* 1926, *Cal.* 193) and *Tara Prasanna Singh* v. *Ranjit Lal Mandal* (*A. I. R.* 1926 *Cal.* 252) have been decided on grounds which very closely approach the principle on which *Darshan Das* v. *Bikramajit Rai* (12) was decided. In this case distinct plots were held by the various defendants. The plaintiff brought a suit for possession, treating the defendants as if they were joint tort-feasors. The suit was dismissed by the trial Court and while the plaintiff's appeal was pending in the lower appellate Court some of the defendants-respondents died and their legal representatives were not brought on the record. It was held that the appeal did not abate in its entirety for should the plaintiff-appellant succeed in his appeal, he would obtain a decree against such of the defendants-respondents who may be in possession of specified plots, provided such plots were not held jointly by them with some of the defendants against whom the appeal had abated. As I have already observed the principle upon which the decision of this case is based supports to a certain extent the contention of the plaintiffs-appellants in the case before us for in the present case also the defendants were holding the land in specific sharers under their purchase and the plaintiff can obtain a decree against such of the shares as represented the respective interests of the surviving defendants-respondents.

In *Siddik* v. *Aziz* (37) the plaintiff brought a suit for a declaration and khas possession of certain land. The trial Court decreed the suit in part and gave him a declaration in respect of most of the lands claimed by him and also awarded him khas possession. In appeal the lower appellate Court upheld the declaration of the plaintiff's title in respect of the land decreed by the lower Court but set aside the order as regards khas possession. The plaintiff filed a second appeal and while this appeal was pending one of the defendants-respondents died and no steps were taken to substitute his heirs. It was held that the whole appeal abated and the reasoning of the learned Judges was that the order which they were asked to give was one of khas possession of the lands in dispute and that as there was nothing on the record to show that the various defendants owned lands in separate allotments or even in separate shares and as there is no definition of shares or of specific lands belonging more to one defendant than to another, the appeal could

(3)6 A. I. R. 1926 Cal. 893=53 Cal. 752.

(37) A. I. R. 1927 Cal. 238.

not be proceeded with as it would be impossible for the Court in case the plaintiff succeeded, to grant an effective decree. This reasoning shows that if, as in the case before us, the various defendants had held lands in separate and defined shares, the result of the second appeal would have been different and the learned Judges would not have ordered the abatement of the whole appeal. This case, therefore, though cited on behalf of of the defendandants-respondents, really supports the principle contended for by the plaintiffs-appellants.

Only one Madras case was cited before us in argument, namely *Srinivasalu Chetty* v. *P. Guraviah* (38). In this case a joint decree to establish the rights of the plaintiffs to a site had been obtained and the defendants appealed. While the appeal was pending one of the plaintiffs-respondents died and the Court following *Kali Dayal* v. *Nagendra Nath* (30) held that whole appeal abated as the legal representatives of the deceased-respondent who had not been brought on the record could execute the decree as a whole.

This case and similar cases decided on the same principle are not authorities against the plaintiffs-appellants in the present case, and I am not called upon to express a definite opinion as to their correctness or otherwise. But I may observe with due deference to the learned Judges who have held this view, that the Code of Civil Procedure in O. 21, R. 15, makes ample provision to meet such a contingency and it is not at all difficult in such cases for the Court to frame its decree in such a way as to make it consistent with its actual decision as regards the abatement of the appeal against some of the respondents and the success of the appeal as against the others. The provisions of O. 21, R. 15, Civil P. C., are as follows:

> Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all. . . . . .

Now, in case the appeal of the defendants succeeds there would be nothing to prevent the Court from imposing such conditions as would meet the situation created by the death of one of the plaintiffs-respondents. And according to sub-R. (2), R. 15, O. 21, Civil P. C., the Court can protect the interests of the ultimately successful defendants-appellants. After all decrees, as a rule, should not be drawn up on the model of a steel-frame and it is always desirable that the Court, under its inherent powers and in order to give full effect to its decision, should frame its decree in such elastic form as would define the respective rights and liabilities of the several parties to the suit and thus to do substantial justice between all those who are concerned with the result of litigation.

I have discussed the authorities cited by the parties before me with a few others which I found out after the arguments were over. I find that there is a substantial volume of authority in the Punjab itself which is against the view expressed in *Khuda Bakhsh* v. *Mathra Das* (1). The Bombay cases are very helpful and support the contention of the plaintiffs-appellants to its full logical extent while the tendency of the Allahabad decisions is also distinctly in favour of the appellants' contention. The observations occurring in some of the cases of the Calcutta High Court also lend support to the appellants' contention while most of the cases of that Court like *Kali Dayal* v. *Nagendra Nath* (30) and the cases following it only inferentially support the contention of the respondents. Though their facts are distinguishable from those of the reference before us I have, however, discussed these cases at some length and have expressed my views on some of the propositions enunciated in them and on which reliance has been placed by the respondent.

My answer, therefore, to the reference is that the appeal can proceed against *B*, *C* and *D*, the surviving vendees-respondents, and that the abatement of the appeal as against *A* would not result in the dismissal of the appeal in its entirety.

D.D. *Reference answered.*

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(38) A. I. R. 1927 Mad. 505.

A. I. R. 1928 Lahore 593

TEK CHAND, J.

Gian Chand — Decree-holder — Petitioner.

v.

Gopi Chand and *another*—Judgment-debtors—Respondents.

Civil Revn. Petn. No. 227 of 1927, Decided on 14th November 1927, from order of 4th Class Sub-Judge, Chakwal, D/- 14th December 1926.

Civil P. C., O. 21, R. 52—C mortgaging his properties to A and then to B—A suing on his mortgage without joining B and properties sold—Surplus proceeds doposited in Court—B attaching the deposit before the judgment in his suit, but no note made in Deposit Register—A obtaining another decree for unsecured debts and deposit paid to him towards the decree—Deposit was held to have been properly attached by B, and his rights as puisne mortgagee not affected.

A, a prior mortgagee, and *B*, a puisne mortgagee, of the same property, got two decrees against *C*, the mortgagor. *A*, in execution of his decree, sold the property, and the surplus of the sale proceeds was deposited in the Court. *B*, during the pendency of his suit, applied for the attachment of this amount before judgment. Attachment was allowed, but no note was made in the Deposit Register about attachment. Meantime *A* brought another suit in another Court against *C* to recover unsecured debts and the amount deposited in the first Court was paid to him in satisfaction of his decree. *B* objected. Later *B* obtained the decree and applied that the amount due to him on this decree be paid out of the amount deposited in Court as the surplus of the sale proceeds. Finding that the money was already paid to *A* the Court, acting under S. 151, Civil P.C., ordered *A* to refund the money and that money so refunded should be paid to *B*.

Held: that the amount had been properly and validly attached before judgment in the suit instituted by *B* and that *A* could not in execution of the decree obtained by him for his unsecured debts take away the whole of the deposit without first paying off *B* the amount due to him on foot of his mortgage. [P 594 C 2]

Held, further, that the sale of a mortgaged property held in the circumstances did not affect the title of the puisne mortgagee who had not been made a party to the suit by the prior mortgagee or who had not intervened at the sale : 41 *Cal.* 654 (*P. C.*) and *A. I. R* 1926 *Mad.* 101, *Rel. on*: 20 *C. W. N.* 412, *Dist.* [P 595 C 1]

Gobind Ram Khanna—for Petitioner.

Manohar Lal—for Respondents.

Judgment.—This petition was admitted by Campbell, J., as the facts were a little complicated and had not been expressed with sufficient clearness in the judgment of the Court below in which the names of the two rival claimants Gopi Chand and Gian Chand had been by a slip of pen mixed up at several places. I have had the case argued at great length by both counsel and I think it necessary to re-state the facts in some detail.

One Waris was the owner of a house which he mortgaged to Gian Chand, petitioner. Subsequently, on the 4th October 1920, Waris created another mortgage on the same house in favour of Gopi Chand, respondent. Waris also owed to Gian Chand money on account of certain other unsecured debts for which he had executed bonds in his favour.

Waris having died childless leaving a widow, Mt. Bano, Gian Chand instituted a suit against her for recovery of the amount due to him on foot of the mortgage dated the 5th August 1916, and obtained from the Court of the Subordinate Judge, Chakwal, a decree for Rs. 330 plus costs recoverable from the house. In execution of this decree the house was sold for Rs. 1,000 on 9th June 1925, and out of the sale proceeds Gian Chand was paid off the decretal amount and the balance, Rs. 610, remained in deposit with the executing Court (Subordinate Judge, Chakwal) to the credit of Mt. Bano.

On the 20th April 1925 Gopi Chand instituted a suit against Mt. Bano for recovery of Rs. 180 due to him on foot of the mortgage in his favour, dated 4th October 1920. On the 9th July 1925 he applied for attachment before judgment of the amount that was in deposit in the Court of the Subordinate Judge, Chakwal, as the surplus of the sale proceeds of the house. On the 14th July 1925 an order was passed directing the attachment of the above sum. It seems, however, that by a mistake of the ministerial officers of the Court no note in the register of deposits was made to the effect that the amount had been attached before judgment in this suit. The suit against Mt. Bano proceeded and a preliminary decree was passed on the 15th August for Rs. 180 principal plus Rs. 31-6-0 costs recoverable from the estate of Waris, deceased This was followed by a final decree passed on the 4th January 1926.

In the meantime Gian Chand had, on the 16th December 1924, instituted a suit against Mt. Bano in the Court of the Senior Subordinate Judge, Jhelum, for recovery of Rs. 1,899 due to him by

Waris on foot of two bonds which had been executed by Waris. It may be noted that the amount due on these bonds had not been charged on the house. On the 13th July 1925, Gian Chand also applied to the Senior Subordinate Judge, Jhelum, for attachment before judgment of the deposit of Rs. 610, which was lying with the Subordinate Judge, Chakwal, as the surplus of the sale proceeds of the house. On the 12th August 1925, the Senior Subordinate Judge passed an order allowing attachment before judgment and the usual precept was issued to the Subordinate Judge, Chakwal. Gian Chand obtained a decree on the 27th October 1925; he took out execution praying that the amount which had been attached before judgment may be made over to him. On the 4th November 1925, a precept was issued by the Senior Subordinate Judge, Jhelum, to the Subordinate Judge, Chakwal, asking him to pay the amount to Gian Chand, and on the 13th February 1926, Rs. 610 was paid.

On the 4th January 1926 Gopi Chand who had, as already stated, obtained a final decree for Rs. 180 (plus Rs. 31-6-0 costs) on foot of his mortgage recoverable from the house, and who had an order of attachment of the surplus of sale proceeds on the 14th July 1925, applied that the amount due to him on account of this decree be paid to him. On this the nazir reported that the amount had already been attached in Gian Chand's decree and there was no note in his register that this amount had been attached before judgment in the suit instituted by Gopi Chand against Mt. Bano. While enquiry on this application was proceeding Gian Chand took away the whole of the amount on the 18th February 1926 as already stated. Gopi Chand contested the right of Gian Chand to take this amount and after enquiry the Subordinate Judge, Chakwal, acting under S. 151, Civil P. C., directed Gian Chand to refund Rs. 212-14-0 out of the Rs. 610 and ordered that amount as refunded to be paid to Gopi Chand.

Against this order of refund the present petition for revision has been presented by Gian Chand and I have heard Mr. Gobind Ram Khanna in support of it. The main point urged by him is that the lower Court was in error in presuming that the amount of Rs. 610 had been actually attached before judgment in the suit instituted by Gopi Chand to enforce the mortgage in his favour. He admits that Gopi Chand's application for attachment was granted by the Court on the 14th July 1925, and that the necessary process-fee was deposited almost immediately by Gopi Chand, but he urges that the provisions of O. 21, R. 52 were not complied with inasmuch as no notice was issued to the Court in which the deposit was lying requesting it that the money might be held subject to further orders of the Court and for this reason there was no valid attachment of the money. In my opinion this contention is void of all force. In this case the order attaching the money had been issued by the Subordinate Judge, Chakwal, and the amount which was to be attached was lying in that Court itself. In my opinion it would have been a meaningless formality for the Court to issue a precept to itself requesting it to hold the money subject to its own orders. I have no doubt that under the circumstances the order of the Court directing attachment was a sufficient compliance with the provisions of O. 21, R. 52. Mr. Gobind Ram relies upon *Surjamull Agarwal* v. *Ram Chandra Mistry* (1), but the facts of that case were wholly different, and, so far as I can see, the remarks of the learned Judges at p. 126 really negative the contention of Mr. Gobind Ram. I therefore hold that the amount had been properly and validly attached before judgment in the suit instituted by Gopi Chand and that Gian Chand could not in execution of the decree obtained by him for his unsecured debts take away the whole of the deposit without first paying off Gopi Chand, mortgagee, the amount due to him on foot of his mortgage.

Mr. Gobind Ram has further argued that Gopi Chand, the second mortgagee, by not intervening at the sale of the house in execution of the decree obtained by Gian Chand, the prior mortgagee, and not having his rights reserved at the sale, had lost his lien for his mortgage money on the sale proceeds of the house and that the only remedy now available to him is to file a suit to have the sale set aside and the property re-sold. In my opinion this contention also has no force whatever. It is well settled that the sale of a mortgaged property held in the

(1) [1915] 20 C. W. N. 412=28 I. C. 123.

circumstances described above, does not affect the title of the puisne mortgagee who had not been made a party to the suit by the prior mortgagee or who had not intervened at the sale. Such a person can either proceed against the mortgaged property in the hands of the purchaser by bringing it to sale or he can proceed against the surplus of the sale proceeds left with the Court after satisfying the claim of the prior mortgagee: see in this connexion *Barhamdeo Prasad* v. *Tara Chand* (2), and the recent judgment of the Madras High Court in *Krishnaswami Bhagavathar* v. *Thirumalai Iyer* (3), where most of the previous authorities have been discussed.

For the foregoing reasons I hold that there is no force in this revision and I dismiss it with costs.

N.K. *Petition dismissed,*

(2) [1914] 41 Cal. 654=21 I. C. 951=41 I. A. 45 (P. C.).
(3) A. I. R. 1926 Mad. 101.

A. I. R. 1928 Lahore 595

JAI LAL, J.

Mangal Sain and *another*—Plaintiffs—Appellants.

v.

Mt. Bharai—Defendant—Respondent.

Second Appeal No. 2373 of 1926, Decided on 19th April 1928, from decree of District Judge, Jhelum, D/- 31st August 1926.

Custom (Punjab)—Succesion — Brahmins of Bhilowal, Tahsil Pind Dadan Khan,

The custom that the reversioners among the Brahmins of Bhilowal, Tahsil Pind Dadan Khan, succeed to the property of their deceased collaterals to the exclusion of daughters was held not proved. [P 595 C 2]

Amar Nath Chopra—for Appellants.

M. L. Puri and *S. L. Puri*—for Respondent.

Judgment.—The appellants in appeals Nos. 2373 and 2374 of 1926, alleging themselves to be the reversioners of one Mathra Das, Brahman of Saroba in the district of Jhelum, instituted two suits, one for the recovery of certain land from Mt. Bharai, the daughter of Mathra Das, and another for possession of a house and a kotha on the allegation that Mathra Das had made a gift thereof to them four days before his death. The District Judge has found that Mathra Das was governed by the Hindu Law and not by custom, and that, therefore, he was entitled to make a gift of his land to his daughter, Mt. Bharai. With regard to the house and the kotha he has held that the gift of the same in favour of the plaintiffs, the appellants before me, has not been established as having been made by the deceased while he was in possession of his full senses. He has found on the evidence that the deceased was suffering from melancholia for about a month before his death and that he was unconscious three or four days before that. He has, therefore, been unable to hold that the alleged gift was made by him. This conclusion is also supported by him from the consideration of suspicious circumstances under which the deed of gift in favour of the appellants was executed. These, in my opinion, are all findings of fact and cannot be attacked in this Court on second appeal.

The appellants, however, have obtained a certificate from the District Judge which is to the effect that

there is a question regarding the existence of a custom involved, i, e., that the reversioners among Brahmans Bhilowal, Tahsil Pind Dadan Khan, succeed to the property of their deceased collateral to the exclusion of daughters.

The matter, however, was not decided by the District Judge on that basis. He held that the parties were governed by the Hindu Law and not by custom. Even if I assumed that the certificate is sufficient to enable me to examine the question whether such a custom, as is mentioned in the certificate, does actually exist governing the family to which Mathra Das belonged, an examination of the record shows that there is practically no reliable evidence in support of the appellant's assertion. The evidence is very meagre. For instance, one of the witnesses says that among the parties daughters do not succeed to the estate of the father and the other merely says that the parties cultivate land. In my opinion such evidence was rightly held by the District Judge as insufficient to establish the existence of a custom such as is mentioned in the certificate, assuming that the District Judge considered the question of the existence of the custom at all.

On all the grounds, therefore, I hold that there is no ground for these appeals. They are accordinly dismissed with costs.

A.L./R.K. *Appeals dismissed.*

* A. I. R. 1928 Lahore 596

ZAFAR ALI AND DALIP SINGH, JJ.

Mul Chand-Ganga Bishen—Defendants—Appellants.

v.

R. M. Downie & Co., Ltd. and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 526 of 1924, Decided on 23rd April 1928, from decree of Senior Sub-Judge, Delhi, D/- 29th November 1923.

* (a) *Civil P. C., O. 22, R. 8—Appellant declared insolvent—Official Receiver not continuing appeal and not furnishing required security—Appeal abates.*

Where the appellant has become insolvent and the Official Receiver declines to continue the appeal and to furnish security, the appeal abates, even without the respondents' application for dismissal : 37 *Cal.* 229 (*P. C.*) *Foll.* : *A. I. R.* 1922 *All.* 361; 16 *Bom.* 404; and *A. I. R.* 1927 *Cal.* 76; *Cons.* [P 597 C 1]

* (b) *Civil P. C., O. 41, R. 22 (4)—Abatement of appeal—Cross-objections cannot be heard.*

When the appeal has abated, the cross-objections cannot be heard : *A. I. R.* 1921 *Mad.* 405, *Foll.* [P 597 C 2]

J. N. Bhandari for *Sardha Ram*—for Appellants.

Ram Kishore, Bishen Narain, Jagan Nath Aggarwal, D. C. Ralli and *Hem Raj*—for Respondents.

Dalip Singh, J.—Plaintiffs in this case sued defendant 1 for the price of certain goods which the plaintiffs alleged the defendant had contracted to buy from them, and they sued defendants 2 and 3 as acceptors of certain drafts for the price of the said goods which defendants 2 and 3 finally refused to honour. The trial Court granted the plaintiffs a preliminary decree holding that defendant 1 had contracted to buy the said goods from the plaintiffs, that the property in the said goods had passed, but as the plaintiffs had sold some portion of the goods on their own account they were entitled to damages from defendant 1 for the difference in price by resale and for the price of the goods still unsold which was to be determined after further enquiry. It refused a decree against defendants 2 and 3 holding that the property in the goods had passed to defendant 1 and the drafts were against shipping documents or against goods which the plaintiffs were not in a position to deliver to defendants 2 and 3.

Defendant 1 alone appealed from the decree making the plaintiffs as respondent 1 and defendants 2 and 3, pro-forma respondents, as respondents 2 and 3. The appeal was lodged in this Court in 1924. Plaintiff-respondent 1 lodged cross-objections against defendants-respondents 2 and 3 on 12th March 1926. On 26th January 1928, when the appeal came on for hearing before a Division Bench, counsel for the appellant stated that his client had been adjudicated insolvent. Under O. 22, R. 8, Civil P. C., the Division Bench ordered notice to the Official Receiver directing him to take steps to continue the appeal if he wished to do so. They also ordered that if he decided to proceed with the appeal he should furnish security for the costs of the appeal within two months from that date, namely, 26th January 1928.

The appeal has now come on for hearing and the Official Receiver has notified that he is unable to give security as the insolvency Court will not allow him to do so. Counsel for defendant-respondent 3 has put in a petition under O. 22, R. 8 (1) and (2), Civil P. C., praying that the appeal be declared to have abated as the Official Receiver is not continuing the same and has not furnished the required security, and further that the appeal be ordered to be dismissed and costs awarded to petitioner, respondent 3, against the estate of the insolvent. Counsel for plaintiff-respondent 1 has contended that the appeal does not abate. He has referred to the history of the section and points out that in the Civil Procedure Code of 1859 the word "abatement" is definitely used. In the Civil Procedure Code of 1882 he contends that there was no abatement but only dismissal of the suit. He contends that under O. 22, R. 8 the only course open in a case, where the appellant has become insolvent and the Official Receiver declines to continue the appeal and to furnish security, is for the defendant to apply for a dismissal of the suit with costs, and if he does not do so the appeal does not abate but remains suspended.

In support of his contention he has cited *Khuni Lal* v. *Rameshar* (1), *Lekhraj* v. *Sham Lal* (2) and *Kissen Gopal* v. *Suklal Karnani* ( ). Counsel for defendant-respondent 3 has cited *Peary Mohan* v. *Narendra Nath* (4).

(1) A. I. R. 1922 All. 361=43 All. 621.
(2) [1892] 16 Bom. 404.
(3) A. I. R. 1927 Cal. 76=53 Cal. 844.
(4) [1910] 37 Cal. 229=5 I. C. 404=37 I. A. 27 (P. C.).

After considering all these rulings we are of opinion that the section itself, namely, O. 22, R. 8 (1) is too clear to admit of any debate on the point. That section states that the appeal shall not abate unless certain contingencies happen, clearly implying thereby that if those contingencies happen the appeal shall abate. Counsel for the plaintiff-respondents has contended that the section is badly drafted and contends that in O. 22, R. 1 similar words occur but are followed by O. 22, R. 3 in which it is definitely stated that the appeal shall abate, whereas in sub-S. (2), O. 22, R. 8 it is stated that the appeal shall be dismissed, and in O. 22, R. 9, a remedy is provided both for abatement and for dismissal. The section certainly does not seem to be very happily drafted, for instance, it is pointed out by counsel on both sides that, whereas in the first portion of the section the words are that

the Official Receiver may neglect or refuse to continue the suit or to furnish security,

whereas in sub-S. (2) the words are

the Official Receiver refuses or neglects to continue the suit and to furnish security.

Whatever may be the exact effect of the use of the word "and" in the second portion of the section it is clear that the two sections cannot be read as if the words "shall not abate" had no meaning whatsoever. Why in sub-S. (2) the word "dismissal" is put for "abate" is certainly not very clear, but be that as it may, we are of opinion that the appeal does abate, even without the defendant's application for dismissal with costs. In this particular case the defendant has applied both for dismissal and for costs, as well as for a declaration that the appeal has abated, and we accept his contention and declare that the appeal has abated and is dismissed as abated with costs against the insolvent's estate. We have ascertained the costs of the defendant-respondent 3 and of plaintiff-respondent 1, and we allow defendant 3 Rs. 23-4-0, for printing and Rs. 100 as counsel's fees. We allow plaintiff-respondent 1 who has also orally applied for costs Rs. 159-2-0 for printing and Rs. 875 as counsel's fees.

Counsel for plaintiff-respondent 1 next contended that his cross-objections against defendants-respondents 2 and 3 could proceed although the appeal has been held to have abated. He cites O. 41, R. 22 on this point and contends that the change in the section, i. e., the omission of the words "upon the hearing" and the change in sub-S. (3) by which for the word "appellant" the words "the party who may be affected by such objection" have been substituted shows that any respondent may now urge cross-objections against any other co-respondent without reference to the fate of the appeal provided an appeal has been duly lodged. That is to say he admits that in the case of an appeal barred by limitation the cross-objections could not be heard. But he contends that sub-S. (4) is merely illustrative and an appeal which has abated was once in existence and therefore is no bar to the hearing of the cross-objections. It might, however, as well be contended that the words "upon the hearing" were omitted from sub-S. (1), O. 41, R. 22 because of the insertion of sub-S. (4) and that sub-S. (4) is exhaustive of the cases in which cross-objections may be heard even though the appeal is not heard. The form of the draft seems to us to suggest that the latter view is the more correct one and that, except for the cases provided in sub-S. (4), cross-objections share the fate of the appeal, and this view is supported by the only authority brought to our notice, namely *Murugappa Chettiar* v. *Ponnusami Pillai* (5). There it was definitely held that in a case of abatement cross-objections could not be heard. It is, therefore, unnecessary for us to go into all the points which were urged by counsel for defendant-respondent 3 as to whether the cross-objections against co-respondents could be urged in the circumstances of this particular case. It is sufficient for us to hold that the appeal has abated in the present case and the cross-objections therefore cannot be heard. We therefore dismiss the cross-objections and allow Rs. 100 costs to counsel for defendant-respondent 3 in the same.

Appeal and cross objections dismissed.

S.J.

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(5) A. I. R. 1921 Mad. 405=44 Mad. 828.

A. I. R. 1928 Lahore 598

ADDISON, J.

Hira Lal and *another* — Defendants—Appellants.

v.

Milkhiram—Plaintiff—Respondent.

Second Appeal No. 2129 of 1927, Decided on 11th January 1928, from decree of Dist. Judge, Hoshiarpur, D/- 29th March 1927.

Party wall—Raised portion of a joint wall must be considered to be a party wall.

In a portion raised on an existing joint wall by one party with the acquiescence of the other neither owner is at liberty to open windows without the consent of the other, while the raised portion must also be considered to be a party wall: *A. I. R.* 1925 *Bom.* 373, *Foll.*: 82 *P. R.* 1888, *Dist.* [P 599 C 1]

Nanak Chand—for Appellants.

Judgment.— The plaintiff sued the defendants for an injunction to be issued to them to close two windows and a ventilator which they had made in the wall of their third storey. It was alleged in the plaint that the wall separating the two houses was joint up to the first storey, by which was meant the ground floor, and that the windows and the ventilator had been forcibly opened on the third storey of their house by the defendants. The defendants' house is one of three storeys but that of the plaintiff has two storeys. Defendants pleaded that plaintiff was a tenant or raiyat and that the openings had existed for over 20 years. Later the plaintiff was allowed to take an additional plea that the openings interfered with his privacy. The trial Court held that the plaintiff owned his house, that the openings had been made within five or six years, that the plaintiff's privacy was interfered with and that by custom this privacy could be protected by the Courts. The defendants appealed. The learned District Judge held that the house belonged to the plaintiff, that the openings had been made within six years and the suit was thus within time but that the plaintiff had not proved that his community observed purda and also had failed to prove that at the time in question there was a custom by which persons were bound not to interfere with the privacy of others. The learned District Judge, however, then went on to state that the real points in the case had not been decided, namely, whether the party wall in the first storey (i. e., the ground floor) was joint and if so, what was the effect of the defendants having built on this joint wall for other two storeys. He, therefore, accepted the appeal and remanded the case for re-decision on these lines, at the same time refunding the stamp on appeal. Both sides seem to have been content with this order.

When the suit went back for re-decision the trial Judge held that the wall of the parties to the height of the first storey (i. e., the ground floor) was not joint. He found that there were four niches in the wall on the plaintiff's side in this first storey while 10 or 11 rafters of the first storey, i. e., the ground floor, of the plaintiff rested upon the wall. In the second storey of the plaintiff's house, however, there were no niches on the plaintiff's side of the wall and no rafters rested on the wall in dispute on the plaintiff's side. He purported to follow *Chiragh Din* v. *Buta* (1) and held that the evidence did not establish that it was a joint wall to the height of the ground floor. He, therefore, dismissed the suit.

On appeal the learned District Judge held that the facts proved established that the wall was a joint wall to the height of the first storey, that is, the ground floor, and he distinguished *Chiragh Din* v. *Buta* (1). Following *Imambhai Kamrudin* v. *Rahimbhai Usmanbhai* (2) he held that the defendants must have built the wall to the height of their third storey on the joint wall, already existing to the height of the ground floor with the consent or acquiescence of the plaintiff, but that the raised portion must also be considered to be a party wall and that neither owner was at liberty to open windows in the portion so raised without the permission of the other. He, therefore, accepted the appeal and granted the plaintiff the injunction sued for. Against this decision the defendants have preferred this second appeal.

There was evidence before the learned District Judge which he has considered when coming to his finding that the wall is a party wall up to the height of the first storey. His finding must, therefore, be accepted.

The plaintiff did not even object in his suit to the raising by the defendants of the wall held to be joint to the height of

(1) [1888] 82 P. R. 1888.
(2) A. I. R. 1925 Bom. 373=49 Bom. 586.

the first storey, that is, the ground floor, so that it must be taken that the plaintiff acquiesced at least in the raising of the wall. The cases, therefore, which state that one party cannot raise a joint wall without the consent of the other do not apply. *Imambhai Kamrudin* v. *Rahimbhai Usmanbhai* (2) is, however, directly in point. It is to the effect that in a portion raised on an existing joint wall by one party with the acquiescence of the, other neither owner is at liberty to open windows without the consent of the other, while the raised portion must also be considered to be a apply party wall. I should have thought that it would have been sufficient to protect the plaintiff's right by a declaration to the effect that he can close the openings whenever he desired to use the raised portion for his building. I think, however, that I should follow the ruling referred to and I, therefore, dismiss this appeal though I leave the parties to bear their own costs in it. It will remain for future decision, if necessary, whether the plaintiff can use the portion of the joint wall which has been raised by the defendants without paying his share of the cost.

N.K. *Appeal allowed.*

A. I. R. 1928 Lahore 599

BROADWAY AND AGHA HAIDAR, JJ.

Punjab National Bank Ltd., Kasur—Plaintiff—Appellant.

v.

Uma Datt-Hans Raj and *another*—Defendants—Respondents.

Second Appeal No. 1916 of 1923, Decided on 27th September 1927, from decree of Addl. Dist. Judge, Lahore, D/- 9th June 1923.

(a) *Civil P. C., O. 41, R. 33—Powers under O. 41, R. 33 must be carefully exercised.*

The powers given to the High Court under O. 41, R. 33, have to be exercised with care and discretion and only when the party appealing to it can fairly be said to be entitled to the relief equitably: *A. I. R. 1927 Mad. 620, Ref.* [P 601 C 1]

(b) *Civil P. C., O. 6, R. 17—Amendment of plaint was not allowed at the stage of second appeal.*

A sued *B*, and *C* and prayed for a decree against one or both. The trial Court decreed the suit against *C*. *C* appealed to the District Judge, but *A* neither appealed nor filed cross-objection. The District Judge finding that the plaint did not disclose any cause of action against *C*, dismissed the suit. Thereupon, *A* preferred a second appeal to the High Court and prayed for an amendment.

Held: that amendment could not be allowed at that stage as it would amount to a retrial and equity did not require such a course being adopted. [P 600 C 2]

Har Gopal—for Appellant.

Fakir Chand and *Jai Gopal Sethi*—for Respondents.

Broadway, J.—The facts giving rise to this second appeal are briefly these:

The Punjab National bank had dealings with a firm known as Gokal Chand Salig Ram, while a firm entitled Uma Datt-Hansraj acted as the bank's agents. Gokal Chand Salig Ram were in the habit of buying produce, making a certain deposit with the bank purchasing the produce through the bank, acting through their agents Uma Datt-Hans Raj and executing a promissory note in favour of the bank for the amount advanced. They undertook to increase the deposit whenever called upon to do so by the bank, the bank intending to cover itself in this way when the rates of the produce varied adversely. In addition to the execution of a promissory note the produce purchased was hypothecated or mortgaged to the bank for the amount of the money payable.

It appears that on 8th September 1915 the firm Gokal Chand Salig Ram purchased a kotha of gram for Rs. 3,834-11-3 and executed a promissory note for that amount in favour of the bank. The purchase was made through the agency of Uma Datt-Hans Raj. A sum of Rs. 565 was deposited to cover any loss. The interest payable under the promissory note was at the rate of seven and a half per cent. Prices went down, and it is said the bank called upon Gokal Chand Salig Ram to increase the deposit. They failed to do so whereupon the bank exercised its rights and sold the kotha of gram through their agents Uma Datt-Hans Raj. It appears that the amount realized at the sale was Rs. 3,266-0-9. This amount should have been paid into the bank to the credit of Gokal Chand Salig Ram. As a matter of fact Uma Datt Hans Raj only paid in the sum of Rs. 2,205-4-0. I would note that the sale took place on 5th February 1917.

On the 25th July 1919, the bank instituted a suit, impleading as defendant 1 Gokal Chand Salig Ram and as defen-

dant 2 Uma Datt-Hans Raj. The suit was based on the promissory note and it was alleged that the amount outstanding including interest to date of suit, came to Rs. 1,734-3-0. It was prayed that a decree for that amount together with further interest and costs should be granted against one or both of the defendants.

Gokal Chand Salig Ram, for some reason best known to themselves, pleaded that they had not executed any promissory note and this matter was put in issue. Uma Datt-Hans Raj raised the plea that the plaint showed no cause of action against them, but this was not put to issue. The case then proceeded, and a commissioner was appointed to go into all manner of accounts between the plaintiff and Gokal Chand Salig Ram as well as between Gokal Chand Salig Ram and Uma Datt-Hans Raj. Why this was allowed to be done it is difficult to understand. Finally, the trial Court came to the decision that nothing was due to the bank from Gokal Chand Salig Ram; but the bank's claim was decreed against Uma Datt-Hans Raj.

Uma Datt-Hans Raj preferred an appeal against this decree which was disposed of by the Additional District Judge, Lahore, on 9th June 1923. The bank apparently was content with its decree and neither appealed against the dismissal of the suit so far as Gokal Chand Salig Ram were concerned nor filed any cross-objections. The learned Additional District Judge came to the conclusion that the plaint disclosed no cause of action against Uma Datt-Hans Raj and that if there was any dispute between the bank and Uma Datt-Hans Raj relating to their agency that was a matter which could not be gone into in this suit but might well form the subject of a suit for rendition of accounts. In conclusion the learned Additional District Judge stated that it was not

necessary to consider whether the suit against defendant 1 should or should not have been dismissed because the bank has not appealed.

On the 6th August 1923 the bank preferred this second appeal against the order of the Additional District Judge dismissing their suit, impleading both the original defendants as respondents.

It was urged that, inasmuch as the bank had a lien on the kotha of gram, Uma Datt-Hans Raj were not entitled to retain any part of the purchase-money to reimburse themselves for moneys due to them by Gokal Chand Salig Ram. It was also urged that the Additional District Judge should have acted under R. 33, O. 41, Civil P. C, and passed a decree against Gokal Chand Salig Ram.

This second appeal was admitted on the question of lien and the learned counsel for the parties in this case have admitted that the bank had a lien on the kotha of gram in accordance with the hypothecation that had been made. The question for determination, however, is whether or not, so far as Uma Datt-Hans Raj are concerned, the plaint discloses any cause of action. Mr. Har Gopal for the bank has read the plaint and has emphasized the points that he considered of importance, notably the contents of paras.3 and 5. On the other hand Mr. Fakir Chand for Uma Dutt-Hans Raj has urged that nothing in the plaint really amounts to an assertion or allegation which can be construed into forming any cause of action. After a careful consideration of the point my learned brother and I have come to the conclusion that the contention of Mr. Fakir Chand is correct and that no cause of action at all was alleged in the plaint. Mr. Har Gopal then urged that he should be allowed even at this stage to amend the plaint, pointing out that Uma Datt Hans Raj had taken this plea but that it had not been put in issue. I am afraid we are unable to agree to this course being adopted. It would practically amount to a retrial, and it appears that at this late stage equity does not require such a course being adopted. The suit against Uma Datt-Hans Raj having been, therefore, rightly dismissed the appeal as against them must be dismissed as well.

Turning to the next point.: Mr. Har Gopal urged that R. 33, O. 41, Civil P.C., was wide enough to enable the Additional District Judge and this Court to modify or alter the decree of the trial Court so as to make it one against Gokal Chand Salig Ram. Mr. Sethi for Gokal Chand Salig Ram has, however, strenuosly protested against the use of this rule and order against his clients. He has indeed urged that the powers of this Court are limited in this direction, and, having regard to a Madras authority reported as *Ramalingam Chettiar* v. *Sub-*

ramania Chettiar (1) there seems some force in this contention. But the authorities of this Court have not gone as far as Mr. Sethi contends the Madras High Court have. At the same time it is obvious that, even if this rule and order gives a Court such wide powers, these powers have to be exercised with care and discretion and only when the party appealing to it can fairly be said to be entitled to the relief equitably. In the present case we have a bank, drafting through its counsel, a most defective plaint and allowing the case to be mishandled from start to finish. We have a finding of the trial Court, arrived at apparently after a careful examination of all the dealings between the bank and this firm, that this firm is not indebted to the bank as a result of all the transactions between them. It is also clear that the firm of Uma Datt-Hans Raj have escaped liability through the errors into which the plaintiff bank fell in drawing up its plaint, and, having regard to all these circumstances, I am forced to the conclusion that this present case would not be a proper one in which to exercise the powers conferred on this Court by R. 33, O. 41, Civil P. C., even assuming that those powers were wide enough to cover the case. To decide whether the firm of Gokal Chand Salig Ram was in any way indebted to the bank it would be necessary to treat this appeal practically as a first appeal from the decision arrived at by the trial Court and, speaking for myself, I do not think that it was the intention of the legislature to give such a right of appeal when R. 33 was enacted. I would, therefore, dismiss the appeal in toto; but in the circumstances of the case direct that the parties bear their own costs in this Court.

Agha Haidar, J.—I concur.

A.L./R.K. *Appeal dismissed.*

(1) A. I. R. 1927 Mad. 620=50 Mad. 614.

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* A. I. R. 1928 Lahore 601

ZAFAR ALI AND JAI LAL, JJ.

Mt. Jaswant Kuar and *others*—Plaintiffs—Appellants.

v.

Gajan Singh and *others*—Defendants—Respondents.

First Appeal No. 2376 of 1923, Decided on 19th March 1928, from decree of Sr. Sub-Judge, Ludhiana, D/- 2nd July 1923.

* (a) *Civil P. C., O. 41, R. 1—Correctness or otherwise of order on preliminary issues not affecting decree materially—Copy of that order need not be filed.*

Where the correctness or otherwise of the decree passed by the lower Court did not in any way depend upon the correctness or otherwise of the order passed on the preliminary issues and that order did not materially effect the decree:

Held: that it was not necessary to file a copy of the order on preliminary points: *A. I. R.* 1927 *Lah.* 103 and 451 and *A. I. R.* 1928 *Lah.* 46, *Doubted* and *Dist.* [P 603 C 1]

(b) *Contract Act, S. 16—Mortgagor an opium eater and a simpleton—Mortgagee, father of a pleader who was helping mortgagor and would have helped in future—Undue influence was held not proved.*

Where the mortgagor who used to eat opium and was a simpleton, mortgaged the land in suit to a pleader's father, as the former (pleader) was helping him and would be of service to him on some future occasion:

Held: that the evidence was entirely insufficient to establish the plea of undue influence. [P 603 C 1]

(c) *Mortgage—Condition to compound interest on failure to pay interest at the end of each year is not unlawful—Contract Act, S. 74.*

Condition in a mortgage-deed for the payment of compound interest on failure of payment of interest at the end of each year is not unlawful and unenforceable. [P 603 C 2]

Hargopal, M.A. Ghani, Jawahar Singh, Shamair Chand, and *Qabul Chand*—for Appellants.

Badri Das, Balwant Rai and *Fakir Chand*—for Respondents.

Jai Lal, J.—This appeal arises out of a suit for the redemption of three mortgages effected by the predecessor-in-interest of the plaintiff in favour of the father of the defendants. The first mortgage-deed dated 7th June 1888 is printed at p. 15 at the printed paper-book. The principal amount mentioned in the deed was Rs. 800, and interest thereon was agreed to be paid yearly at the rate of Rs. 8 per cent. per annum. A further condition was added that the mortgagee would be put in possession of the land mortgaged if interest due were not paid in any year, and in that case the interest and the income of the property mortgaged were to balance each other. In addition to the interest the mortgagor agreed to pay Rs. 29 a year to the mortgagee as what is called badhautri. What this term actually means was not made clear before us, but apparently it means "profit" or "additional payment."

The second mortgage-deed was executed on 24th April 1893, and the principal

amount mentioned therein was Rs. 1,534-14-0. This included Rs. 317-3-0 interest due on the first mortgage, and the rest was money otherwise due from or paid to the mortgagor. The property mortgaged was the same as had previously been mortgaged and possession thereof was given to the mortgagee and it was stipulated that the income therefrom would balance the interest on Rs. 600 out of the mortgage amount and the rest, i. e., Rs. 934-14-0 would carry interest at Re. 1-9-0 per cent. per mensem. It was further stipulated that the mortgage amount shall be payable within two months, otherwise interest on the entire amount due under the deed shall be payable at rate of Rs. 2-8-0 per cent. per mensem till the date of repayment. Under the third deed, which is dated 20th December 1895, the mortgagor effected a further mortgage on the same property for Rs. 982 out of which Rs. 582 was interest on Rs. 934-14-0 mentioned in the second mortgage-deed and the rest was paid in cash to the mortgagor. Interest on this amount was payable at the rate of Re. 1-9-0 per cent. per mensem every year and it was further stipulated that in case of non-payment of the annual interest, compound interest at the same rate would be paid.

The plaintiffs alleged in their plaint that the condition relating to the payment of badhautri in the first mortgage-deed was unlawful and that

> the condition as to the payment of compound interest in the third mortgage-deed was unfair and unlawful,

and they prayed that an account might be taken from the defendants, the mortgagees, on the above basis and a decree for redemption be passed accordingly.

The defendants in their written statement claimed that a sum of Rs. 30,811-9-6 was due to them on the three mortgage-deeds and thus agreed to redeem the land on receiving that amount. In the plaint it was further alleged that the mortgagor was blind and simple-minded and that some of the conditions in the mortgage-deeds were onerous and were, therefore, not binding on him. The trial Court construed this as a plea of undue influence and put in issue the question, whether the mortgage-deeds were executed under undue influence. Other issues which are relevant, so far as this appeal is concerned, were whether the condition as to the payment of badhautri was illegal and whether the condition with regard to the payment of compound interest in the third mortgage-deed was illegal and unenforceable. The Court found against the plaintiffs on all these issues and granted them a decree for redemption on payment of the full amount claimed by the defendants together with future interest and costs of the suit. The plaintiffs appeal.

A preliminary objection was taken on behalf of the defendants-respondents that this appeal has not been properly presented, inasmuch as a copy of the order of the Court on two preliminary issues has not been filed with the memorandum of appeal. It appears that in the Court below they had pleaded that one of the legal representatives of the mortgagor, namely, Sher Singh, had not been impleaded by the plaintiffs and that the occupancy tenants of the land in suit had also not been impleaded. Sher Singh was examined by the trial Court and he stated that he had no interest in the mortgaged property as he had made a gift of whatever rights he had therein to his sons who were already plaintiffs in the case. The Court, however, holding that though he was not a necessary party it was desirable to implead him, added him as a defendant. Sher Singh, however, died during the pendency of the suit and as his sons were his only legal representatives and were already on the record, the suit proceeded to trial. With regard to the tenants the first Court held, and quite rightly, that they were not necessary parties to the suit for redemption. In the final judgment the trial Court did not make any mention of those preliminary issues nor of its decision thereon.

It is contended on behalf of the respondents that it was necessary for the appellants to file a copy of that order and that as they have not done so the appeal cannot be entertained. Reliance is placed in support of this objection on O. 41, R. 1, Civil P. C., which provides that a memorandum of appeal shall be accompanied inter alia by a copy of the judgment on which the decree is founded. The same rule provides also that the appellate Court can dispense with such copy. The question is whether it can be successfully urged by the respondents that the decree in this case is founded on the order of the trial Court

on the two preliminary issues. In my opinion this contention is devoid of force. The correctness or otherwise of the decree passed by the Subordinate Judge in this case does not in any way depend upon the correctness or otherwise of the order passed on the preliminary issues. That order does not materially affect the decree which would have been passed even in the absence of Sher Singh or of his legal representatives and obviously in the absence of the occupancy tenants. It is not even contended by counsel for the respondents that they propose to support the decree or to file cross-objections on any ground based on that order. I am, therefore, unable to see that it was necessary to file a copy of the order concerned The cases cited by the respondents, i. e., *Morton* v. *Woodfall* (1) *A.I.R.* 1927 *Lah.* 451 and *A.I.R.* 1928 *Lah.* 46, even if they lay down correct law—a matter on which, with great respect, I entertain some doubt—are, therefore, distinguishable from the present case. In any case under the circumstances I would be prepared, if necessary, to dispense with the filing of the copy of the order. I would, therefore, overrule the preliminary objection.

With regard to the merits, there is absolutely no evidence on the record in support of the plea of undue influence, In fact there was no such plea definitely raised by the defendants, and consequently there are no details given by them of facts on which such a plea can be founded. Some witnesses were produced by the plaintiffs, i. e., Jagat Singh (P. W. 2), Surjan Singh (P. W. 3), Wadhawa Singh (P. W. 4) and Mit Singh (P. W. 5). None of these support the case of the plaintiffs on this point. I do not think it necessary to discuss the testimony of these witnesses in detail. All that they say is that the mortgagee's son Sardar Gajjan Singh was a pleader who practised in Ludhiana and that the plaintiffs' predecessor-in-interest, who used to eat opium and was a simpleton, mortgaged the land in suit to the pleader's father, as the former was helping him and would be of service to him on some future occasion. This evidence is entirely insufficient to establish the plea of undue influence. Indeed the learned counsel did not seriously attempt to press this evidence to our attention.

(1) A. I. R. 1927 Lah. 103=8 Lah. 257.

His case, however, was that the conditions in the second and the third mortgage-deeds were onerous and, therefore, unconscionable and as the mortgagee by virtue of the first mortgage was in a position to dominate the will of the mortgagor, therefore, a presumption of undue influence should be raised in this case and he relied upon S. 16, Contract Act, in support of this contention. I am, unable, however, to hold that any presumption can arise in this case such as is claimed by the counsel. I am not prepared to hold that the conditions in the second and the third mortgage-deeds are unconscionable so as to entitle the Court to raise the presumption of undue influence even if it be held that the mortgagee was in position to dominate the will of the mortgagor.

The real contention of the appellants' counsel, however, was with regard to the amount of interest claimed by the mortgagee. With regard to the second mortgage-deed his contention was that the condition as to the payment of interest at Rs. 2-8-0 per cent per mensem instead of the original rate of Re. 1-9-0 per cent per mensem in default of payment of the amount within two months was penal as the enhanced rate of interest was payable from the date of the mortgage-deed. He claimed that under S. 74, Contract Act, his clients were entitled to relief with regard to the penal part of the interest. It is to be observed that in the plaint the plaintiffs have nowhere alleged that this rate of interest is penal and there was no issue framed by the trial Court on this point. The plaint is very badly and inartistically drafted as would appear from the fact that with regard to the third mortgage it is alleged that the interest is Rs. 2-8-0 per cent per mensem and is unlawful and illegal. A reference to the mortgage-deed shows that this interest of Rs. 2-8-0 was not payable at all on the third mortgage-deed but on the second mortgage-deed. In view of this fact, and the fact that the question is one of law, we have, as a special case, allowed the appellants to raise the question of interest on the second mortgage-deed. On a reading of the mortgage-deed there is not the least doubt that the condition to pay enhanced rate of interest is penal and, therefore, the Court is competent to give relief to the mortgagor. Having regard to the

security, the number of years during which this mortgage has continued in force and other surrounding circumstances I consider that interest at the rate of 24 per cent per annum would be ample compensation to the mortgagor and I would, therefore, reduce the rate accordingly.

A further objection was taken by the appellants that interest had been calculated on the full amount of Rs. 1,534-14 0 and not on Rs. 934-14-0 as should have been done. A reference to the account filed by the defendants, however shows that this contention is not correct and that interest has been calculated on Rs. 934-14-0. There is, however, one mistake in the calculation and this mistake has been admitted by the counsel for the respondents and that is that interest has been calculated from the date of the mortgage-deed, i. e., 24th April 1893, whereas it should have been calculated from the 20th December 1895, as interest up to the last-mentioned date has been included in the third mortgage-deed.

With regard to the third mortgage-deed: the contention of the appellants is that compound interest is not claimable under the terms of the mortgage-deed. Now, in the first instance, it would be observed that the plea of the plaintiffs was that the condition relating to compound interest "is quite unfair and unlawful" and an issue was framed in those terms. The learned counsel for the appellants has abandoned that position before us and has contended that as a matter of fact the mortgage-deed does not provide for the payment of compound interest and in any case not with yearly rests. Even if such a plea is open to the counsel at this stage, I am of opinion that the mortgage-deed does provide for the payment of compound interest as claimed by the mortgagee. It provides, that interest at Re. 1-9-0 per cent per mensem shall be payable annually to the mortgagee and that on failure of payment of such interest, interest thereon at the same rate and in the form of compound interest shall be payable. The actual words in the deed are :

Ba surat wada khilafi adam adae sud saliyana ke sud ba hisab sud dar sud ba sharah bala shumar kar ke bawaqt fakhurrehn hamrah asal zare-e-rehn sabiqa wa hal ada karunga.

This condition, in my opinion, is distinguishable from the condition in *P. C. Muthu Chettiar* v. *K. V. Meenakshisundaram Ayyar* (2), where on a construction of the condition in the mortgage-deed their Lordships of the Privy Council held that the claim of the mortgagee to be awarded compound interest with monthly rests was not tenable. The condition therein merely was that the principal amount would carry interest at eight annas per cent per mensem which would be paid before the 10th of every month, but in case of default in payment in that manner the rate of interest was to be doubled. The claim of the mortgagee was that the mortgagor must pay interest with monthly rests on the composite sum of the principal and interest at the end of each month at double the original rate. Their Lordships held that the mere condition that the mortgagor shall pay "interest on interest" did not support the claim of the mortgagor. It is to be observed that in the present case the terms of the deed, as stated above, clearly provide for the payment of compound interest on failure of payment of interest at the end of each year. I therefore hold that the conclusion of the trial Court on this matter is correct.

This leaves a short point with regard to the payment of Rs. 29 a year as badhautri on the first mortgage-deed. The learned counsel has not seriously contended that the condition as to the payment of this amount is illegal and I am unable to see how such a condition under the circumstances of this case can be held to be illegal.

The result is that the decree of the trial Court must be upheld, except with regard to the amount payable on the second mortgage-deed, which shall be calculated in the manner indicated above and a decree for redemption prepared accordingly. The parties have undertaken to prepare an account of the amount that would be payable by the mortgagor to the mortgagee. A date six months from to-day shall be fixed as the date for redemption. The plaintiffs shall pay the costs of the defendants in the trial Court and the parties shall bear their own costs in this Court. The appeal is accepted pro tanto.

Zafar Ali, J.—I agree.

R.D. *Appeal accepted.*

(2) A. I. R. 1928 P. C. 35.

A. I. R. 1928 Lahore 605

TEK CHAND AND BHIDE, JJ.

Andley Brothers -- Defendants — Appellants.

v.

Mrs. K. M. McCready — Plaintiffs — Respondents.

First Appeal No. 1778 of 1926, Decided on 25th January 1928, from decree of Sr. Sub-Judge, Delhi, D/- 11th June 1926.

Principal and Agent — Commission agent— Agent must show that the transaction was brought about by the direct result of his intervention in order to entitle him to commission.

Where a person is employed as an agent to bring about a transaction on behalf of his principal, he is entitled to have his remuneration only if the transaction in question is the direct consequence of his agency.

It need not necessarily be the immediate cause of the transaction, but it must be shown that the transaction was brought about as the direct result of his intervention. It is not sufficient for him to show that it would not have been entered into but for his services, if it resulted therefrom only as a casual or remote consequence : *Bray* v. *Chandler*, 107 *R. R.* 479 ; *Gibson* v. *Crick*, (1862) 31 *L. J. Ex.* 304 ; *Burton* v. *Hughes*, (1885) 1 *T. L. R.* 205; *Tribe* v. *Taylor*, (1876) 1 *C.P. D.* 505; and 8 *C. W. N.* 831 ; *Foll.* [P 607 C 2]

Moti Sagar and *Kishen Dyal*—for Appellants.

Bhawani Prasad and *Nanwan Mal*—for Respondents.

Tek Chand, J. — This appeal and Civil Appeal No. 2563 of 1926 arise out of a suit which was instituted in forma pauperis by Mrs. K. McCready against the firm of Messrs. Andley Brothers, Coal Merchants, Delhi, for recovery of Rs. 8,900 as remuneration for work done by her for the defendants as their commission agent in securing for them : (a) a contract for the purchase of 12,000 tons of coal from Kantapahari Colliery of the North West Angrapathra Coal Company, Behar, in December 1921 ; and (b) an order from the Superintending Engineer, 2nd Circle, Raisina, Delhi, for the supply of 10,000 tons of coal on 26th September 1922.

A sum of Rs. 3,000 was claimed as commission at 4 annas per ton for the first of these transactions and Rs. 5,000 at 8 annas per ton for the second. To these items was added Rs. 900 as interest at 7½ per cent making up a total of Rs. 8,900.

The defendants pleaded that the plaintiff was not entitled to any commission on either transaction, but the learned Subordinate Judge upheld the plaintiff's claim for Rs. 341-4-0 on account of (a) and Rs. 5,000 on account of (b) or Rs. 5,341-4-0 in all, and deducting Rs. 125 as having been already paid by the defendants to the plaintiff he passed a decree in her favour for Rs. 5216-4-0. Both parties have filed cross appeals, the plaintiff praying that the decretal amount be enhanced to the full sum claimed in the plaint and the defendants urging that the plaintiff's suit be dismissed in toto. It will be convenient to deal with the two claims separately.

As already stated the first claim for Rs. 3,000 is based on the allegation that in December 1921 the plaintiff, at the request of the defendants, secured for them a contract for the purchase of 12,000 tons of coal from the Kantapahari Colliery and that she was entitled to commission thereon at the stipulated rate of 4 annas per ton. The contract between the defendants and the colliery is evidenced by the bought and sold notes, Ex. D-6 and C-1 printed at p. 9 and 20 of the supplementary paper-book. In the lower Court the defendants admitted having entered into this contract, but denied that it was brought about by the plaintiff. The learned Subordinate Judge, however, held it proved on the record that the contract had been secured for the defendants by the plaintiff who had acted as their commission agent in the transaction. This finding has not been challenged before us by Mr. Moti Sagar, who admits that the plaintiff acted as their agent and is entitled to commission at 4 annas a ton. The dispute as to this claim is now confined to the simple question, whether under the terms of the agency the plaintiff was, as claimed by her, entitled to commission on the total quantity agreed to be sold by the colliery to the defendants or, as held by the learned Subordinate Judge, on the quantity actually supplied to the defendants. Both parties are agreed that the conditions of agency are contained in the letter Ex. P-1 written by defendants to the plaintiff on 8th December 1921, which is printed at p. 11 of the supplementary paper-book and which runs as follows :

Delhi, 8th December 1921.

My dear Mrs. McCready.

I promise to give you 4 annas a ton if I will get a contract of Kantapahari Colliery of North West Angarapthra Coal Company through you. Your duty will be to see some 3 or 4 wagons of this coal at Sabzimandi station and to keep a little sample with you of this coal. Our contract with Kantapahari will be of first class steam and slack coal and if I find the coal inferior or water mark or if there will be slack in steam wagon or steam in slack wagon then I shall show that coal and the wagon to you and you shall have to get the matter settled with the managing agents of the above colliery. Kindly confirm and oblige

Yours sincerely.

(Sd.) C. B. Mathur.

It is conceded by the plaintiff's learned counsel that this letter does not state in clear and explicit terms whether commission at the rate of 4 annas per ton was payable on the 12,000 tons of coal contracted for or whether it was to be paid on the quantity actually dispatched by the colliery to the defendants. He contends, however, that it was understood at the time that the plaintiff's duty would end the moment she succeeded in securing the contract for the defendants from the colliery, and that on a binding agreement of sale and purchase being entered into between them, commission at the rate of four annas per ton on the quantity contracted for would be paid to her, irrespective of the fact whether the colliery supplied the whole or any part of it to the defendants. The defendants, on the other hand, deny that there was any such understanding, and urge that it is one of the incidents of the coal trade, that in the absence of a contract to the contrary, commission is payable on the quantity actually dispatched. In support of their contention they have led evidence to prove that contracts of agency like the one embodied in Ex. P-1 are always understood by coal merchants to mean that commission is payable after the colliery has executed the contract and is paid on the quantity actually dispatched. Counsel for the plaintiff has argued that this evidence was not legally admissible, but after hearing him at length I am of opinion that this contention is devoid of all force. It is conceded, as already stated, that the letter Ex. P. 1 is silent on the point, and this being so proviso 5, S. 92, Evidence Act, applies, under which any usage or custom by which incidents not expressly mentioned in any contract or usually annexed to contracts of that description may be proved provided that the annexing of such incidents would not be repugnant to, or inconsistent with, the express terms of the contract.

I hold, therefore, that the evidence relied on by the lower Court was legally admissible. Both Mr. Mukerji (D. W. 3), who is described as a colliery owner and coal merchant, Delhi, and Mr. Grant Goven (D.W. 4), who has experience of coal business, have deposed that in contracts relating to purchase of coal from collieries the agent gets commission on actual deliveries and not upon the quantity contracted for. It is significant that Mr. Mukerji was not cross-examined at all on this point and Mr. Grant Goven in cross-examination emphasized what he had stated in his examination-in-chief, that in the absence of a special contract to the contrary the commission was payable on the actual supply after the order had been executed. The plaintiff led no evidence beyond her own statement on the point and she admitted that she had not acted as commission agent in any other transaction. Further light on the matter is thrown by the correspondence that passed between the parties and Mr. Carapiet, the proprietor of the Kantapahari Colliery, all of whom seem to have understood the contract to mean that commission was payable on the quantity dispatched by the colliery. This is fully borne out by Ex. P-3, P-5, P-15 and C-2 which the lower Court has discussed at length in its judgment at p. 35 and 36 of the paper-book and which I need not reproduce here. There is also the significant fact that if the plaintiff's contention were correct Rs. 3,000 had become payable to her on the completion of the contract between the colliery and the defendants in December 1921, but she never made any demand for this amount until the suit was instituted. All that she has been found to have received is Rs. 125 in two instalments on 25th and 26th January 1922 and on each occasion she executed a receipt describing the item as having been received "in advance of

coal." Her counsel is unable to explain why the words "in advance" were used if the Rs. 3,000 were actually due at the time. Again we find the plaintiff writing to Mr. Carapiet several months later asking him to recover from the defendants the amount of her commission as he was "the best person to know the number of wagons supplied." Further, it is admitted that in those days, there was a shortage of wagons and it is not likely that the defendants would have agreed to pay commission on the quantity contracted for, when it was possible that a very small portion of it would be actually dispatched for delivery to them. In my judgment the lower Court has come to a correct conclusion in holding that the commission of 4 annas per ton was payable to the plaintiff on the quantity actually dispatched and I would accordingly affirm its finding on issue 1.

The next question to be decided is how much coal was in fact dispatched by the colliery to the defendants. The plaintiff has led no evidence whatsoever on this point. Mr. Carapiet, the colliery proprietor, was examined by interrogatories, but no effort was made to ascertain from him as to how many wagons he had dispatched. The defendants had clearly pleaded in their written statement that 1,365 tons only had been supplied to them. This allegation was not specifically denied in the replication as it should have been under O. 8, R. 5, Civil P. C. At the trial Chand Bahadur, a member of the defendants' firm, stated on oath that 1,365 tons only had been received by them in execution of the contract in question, and this was not contradicted by anything on the record. I agree, therefore, with the lower Court on this point also and hold that the amount due to the plaintiff in this account was Rs. 341-4-0. The defendants had pleaded that as against this item the plaintiff had been actually paid Rs. 412-8-0. But the lower Court has found payment to the extent of Rs. 125 only as proved. This finding has been challenged by Mr. Moti Sagar, but, after hearing him, I am of opinion that the additional sum was received on account of the travelling expenses of the plaintiff's husband who had gone to the colliery at the defendants' request. The result is that as regard claim (a) both the appeal and the cross-appeal should be dismissed and the decision of the lower Court allowing the plaintiff Rs. 216 only affirmed. (After discussing evidence as to claim (B) the judgment proceeded.) The learned Subordinate Judge has held that the plaintiff, acting as the defendant's agent, approached Mr. Rouse to buy coal from them, but he, instead of buying it himself, told the contractors who were working under him that they might, if they liked, buy from the defendants and this was a "dignified hint from a superior officer to patronize 'the defendants' firm." He thought that on these facts the plaintiff is entitled to be paid commission at 8 annas per ton. I am, however, of opinion that in coming to this conclusion, the learned Judge has ignored the well-established principle of law that where a person has been employed as an agent to bring about a transaction on behalf of his principal he is entitled to have his remuneration only if the transaction in question is the direct consequence of his agency : see *Bray* v. *Chandler* (1) and *Gibson* v. *Crick* (2). It need not necessarily be the immediate cause of the transaction, but it must be shown that it was brought about as the direct result of his intervention *Burton* v. *Hughes* (3). It is not sufficient for the agent to show that it would not have been entered into but for his services, if it resulted therefrom only as a casual or remote consequence : *Tribe* v. *Taylor* (4) and *Jordon* v. *Ram Chandra Gupta* (5). To such cases the maxim *causa causans et non remota spectatur* (the direct and not the remote cause of an event is to be regarded) is applicable.

For the foregoing reasons I feel bound to disagree with the lower Court on this point and hold that the plaintiff is not entitled to any commission on claim (b). In view of this finding it is not necessary for me to discuss at length the additional argument put forward by Mr. Moti Sagar, that even if the order in question was secured to the defendants by the plaintiff, she is not entitled to the full amount of commission claimed, as after a small quantity of coal

(1) 107 R. R. 479.
(2) [1862] 31 L. J. Ex. 304=1 H. & C. 142=10 W. R. 525=6 L. T. 392.
(3) [1885] 1 T. L. R. 205.
(4) [1876] 1 C. P. D. 505.
(5) [1903] 8 C. W. N. 831.

had been supplied to Sobha Singh, etc., the contract between them and the defendants was cancelled and on the principle of *quantum meruit* the plaintiff should have been paid on the quantity supplied. It is sufficient to say that in my opinion this contention is devoid of all force, and had I found in favour of the plaintiff on merits I would have had no hesitation in rejecting this last argument of the defendants' learned counsel. In the agreement between the plaintiff and defendants as embodied in Ex. P.-5 it is specifically stated that she would get commission at the rate of 8 annas per ton on the "receival of each and every order." In face of this express term in this agreement, there is no question of paying the agent a *quantum meruit* on her services and she could not be deprived of her commission merely because the transaction by her fell through subsequently or that the principal derived no benefit from it. Reference may in this connexion be made to the recent case of *Howard Houlder and Partners Ltd.* v. *Manx Isles Steamship Co. Ltd.* (1923) *I.K.B.* 110, and the authorities cited therein. The claim relating to (b) has, however, failed on the merits and I need not discuss this point further.

The result is that the plaintiff is entitled to a decree for the sum of Rs. 216 only. Accordingly I would accept appeal No. 1778 of 1926 and dismiss appeal No. 2563 of 1926, and in lieu of the decree passed by the lower Court, pass a decree in favour of the plaintiff for Rs. 216. Having regard to all the circumstances of the case I would leave the parties to bear their own costs in both the Courts.

Bhide, J.—I concur.

A.L./R.K. *Decree varied.*

A. I. R. 1928 Lahore 608

BROADWAY AND AGHA HAIDAR, JJ.

Mt. Bakhtan—Defendant—Appellant.

v.

Ghulam Hassan and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 2593 of 1923, Decided on 29th September 1927, from decree of Dist. Judge, Mianwali, D/- 15th October 1923.

Civil P. C., O. 47, R. 7—Appeal.

It is competent for a party aggrieved to appeal against an order allowing review under the provisions of O. 43, R. 1 (w). However, the powers of the appellate Court are limited by R. 7, O. 47. [P 604 C 1]

Niaz Muhammad—for Appellant.

S. R. Laul—for Respondents.

Broadway, J.—It appears that one Mt. Bakhtan executed a deed of sale in favour of her brother Ghulam Hassan on 15th February 1914. The property conveyed consisted of a house. On 27th March 1923 Ghulam Hassan sued his sister and her second husband and his son for possession of the house, alleging that subsequent to the sale he had obtained possession of the property bought, but had permitted his sister to continue to live in it. Mt. Bakhtan pleaded that the house had belonged to her first husband from whom she had obtained it, that she had been induced by her brother, the plaintiff, to execute this deed of sale in his favour in order to deprive her first husband's collaterals of the property and that the deed of conveyance had never been acted upon and was purely fictitious. The trial Court dismissed the plaintiff's suit, holding that the transaction was a fictitious one. Ghulam Hassan appealed to the District Judge, and the learned District Judge took a contrary view, holding that Mt. Bakhtan had failed to prove that the transaction had been fictitious. He accordingly decreed the plaintiff's suit for the property claimed excluding from the decree, however, one small kothi.

Mt. Bakhtan then preferred a second appeal to this Court which came up for hearing as a motion before a Division Bench on 10th December 1923. On this date Mr. Niaz Muhammad for the appellant stated that the lower appellate Court had reviewed its judgment and asked for time to file an amended memorandum of appeal. Time was allowed, and in due course an amended memorandum of appeal was filed, containing certain additional grounds.

Before us to-day Mr. Niaz Muhammad has urged that the decision of the lower appellate Court was open to attack in second appeal on the ground that the onus had been wrongly placed on the appellant to prove that the transaction was a fictitious one. He placed reliance on *Ram Chand* v. *Harnam Singh* (1)

(1) [1900] 68 P. R. 1900.

and *Bhagwan Das* v. *Mt. Ram Bai* (2), Those cases proceeded on their own particular facts. There can be no doubt that, having regard to the facts that Mt. Bakhtan executed the deed of sale, the onus lay on her to prove that the transaction was a fictitious one. The finding of the learned District Judge that it was not a fictitious transaction is one of fact which we are precluded from examining in second appeal.

This would dispose of the case before us but for the fact that the matter has been complicated by the learned District Judge's action in granting application for review referred to above. This application related to the exclusion of the kothi from the decree. It was entertained by the learned District Judge and granted. Mr. Niaz Muhammad has attacked this action of the learned District Judge and has urged that the review had been wrongly granted. As a matter of fact the appeal before us is one against the final decree as prepared after the review had been allowed. Therefore, the finding as to the fictitious nature of this transaction covers this kothi. No doubt it is competent for a party aggrieved to appeal against an order allowing review under the provisions of O. 43, R. 1 (w), Civil P. C. It seems to me, however, that the powers of an appellate Court are limited by R. 7, O. 47, Civil P. C. Mr. Niaz Muhammad had been asked to state whether the order on review contravened the provisions of R. 2 or R. 4, O. 47, and was constrained to admit that neither of these two rules had been contravened. In these circumstances it appears to me that we are not empowered to interfere with the order passed on review in this appeal.

It was then contended that, inasmuch as the order was passed without jurisdiction having regard to the decision of their Lordships of the Judicial Committee in *Chhajju Ram* v. *Neki* (3), this appeal might be treated as a revision. Speaking for myself, it seems to me that the learned District Judge's action in dealing with this application for review was unsatisfactory, but at the same time I am not prepared to treat this part of this appeal as a revision in this particular case because it appears that this kothi was definitely claimed in the plaint and not specifically referred to in the written statement filed by the appellant. The appellant's defence was that the entire transaction was fictitious. She did not elect to differentiate between any portions of the properties claimed by the plaintiff. I would, therefore, dismiss this appeal, but, in the circumstances, leave the parties to bear their own costs.

Agha Haidar, J.—I agree.

N.K. *Appeal dismissed.*

(2) [1914] 58 P. R. 1914=236 P. L. R. 1914=25 I. C. 538=152 P. W. R. 1914.

(3) A. I. R. 1922 P. C. 112=3 Lah. 127=49 I. A. 144 (P. C.).

** A. I. R. 1928 Lahore 609
Full Bench

SHADI LAL, C. J., AND BROADWAY, HARRISON, TEK CHAND AND DALIP SINGH, JJ.

Khan Gul and *another*—Defendants—Appellants.

v.

Lakha Singh and *another*—Plaintiffs—Respondents.

First Appeal No. 2569 of 1922, Decided on 2nd April 1928, from decree of Sr. Sub-Judge, Layallpur, D/- 31st July 1922.

**(a) *Evidence Act, S.* 115—*Minor representing to be major and thus entering into contract—He can plead minority in avoidance of the contract—Contract Act, S.* 11 : I. L. R. 1 Lah. 389 & 60 I. C. 267, Overruled.

Where an infant has induced a person to contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract. Though S. 115, Evidence Act, is general in its terms, it must be read subject to the provisions of the Contract Act declaring a transaction entered into by a minor to be void : 59 *I. C.* 393=1 *Lah.* 389 & 60 *I. C.* 267, *Overruled.* [P 615 C 1]

**(b) *Specific Relief Act, S.* 41—*Minor avoiding contract on ground of minority—Contract entered by false representation as to age—Minor must, in equity, return benefit.*

(*Per Full Bench, contra Harrison, J.*)—A party, who, when a minor, has entered into a contract by means of a false representation as to his age, cannot, whether he be defendant or plaintiff, in a subsequent litigation while refusing to perform the contract, claim to retain the benefit he may have derived therefrom: *Leslie* v. *Sheill*, (1914) 3 *K. B.* 607, *not Appr* : 76 *P. R.* 1910 and *A. I. R.* 1928 *Lah.* 510, *Ref.* [P 612 C 2]

*(c) *Interpretation of statutes—Language admitting two constructions—One leading to absurdity should not be accepted.*

It is a cardinal rule governing the interpretation of statutes that when the language of

the legislature admits of two constructions, the Court should not adopt a construction which would lead to an absurdity or obvious injustice. [P 613 C 2]

✲✲(*d*) *Evidence Act, S.* 115—"*Person*" *includes minor.*

The language of S. 115 is comprehensive enough to include a minor : 26 *Cal.* 381, *Diss. from.* [P 613 C 2]

✲(*e*) *Interpretation of Statutes—General and particular intention—Latter prevails whether contained in same or different statutes.*

It is a well-established principle that, where a general intention is expressed by the legislature, and also a particular intention, which is incompatible with the general one, the particular intention is considered an exception to the general one. This rule applies whether the general and special provisions are contained in the same statute or different statutes : *Churchill* v. *Crease*, 5 *Bing.* 180, *Rel. on.* [P 613 C 2; P 614 C 1]

(*f*) *Interpretation of Statutes— Harmonious construction should be accepted.*

The Court should struggle against repugnancy and should construe an enactment as far as possible in accordance with the terms of the other statute which it does not expressly modify or repeal. [P 614 C 1]

(*g*) *Interpretation of Statutes — Same word should be given the same meaning.*

The same words are to be prima facie construed in the same sense in different parts of the same statute ; *Spencer* v. *Metropolitan Board of Works*, 22 *Ch. D.* 142, *Rel. on.* [P 625 C 1]

(*h*) *Interpretation of Statutes—Statute cannot be circumvented by estoppel—Evidence Act, S.* 115.

Where a particular act is declared to be void and unlawful by statute a party cannot by representation, any more than by other means, raise against him an estoppel so as to create a state of things, which he is under a legal disability from creating. [P 625 C 2]

(*i*) *Evidence Act, S.* 115—*English law is not different.*

Tek Chand, J.—The law enacted in S. 115 relating to estoppel does not differ from the English law on the subject.1 [P 626 C 1]

Abdul Qadir and *D. C. Ralli*—for Appellants.

Nand Lal—for Respondents.

Order of Reference

Dalip Singh, J.—Plaintiffs brought a suit for possession of half a square which had been sold to them by defendant 1 for Rs. 17,500 out of which Rs. 8,000 had been paid in cash before the Sub-Registrar and Rs. 9,500 was secured by a promissory note payable on demand from the plaintiffs. The plaintiffs alleged that defendant 1 had been duly paid Rs. 17,500 because the promissory note for Rs. 9,500 in his favour had been discharged by another promissory note executed by the plaintiff in favour of the defendant's brother-in-law Muhammad Hussain at the request and with the consent of the defendant, that the plaintiffs had paid Rs. 5,500 out of the Rs. 9,500 to Muhammad Hussain and were prepared to pay the balance. Defendant 1 had refused to deliver possession of the property and the plaintiffs prayed that possession of the property sold might be delivered to them, or, in the alternative, that a decree for Rs. 17,500 the consideration money, together with interest or damages arising from breach of contract at the rate of one per cent. per mensem, amounting to Rs. 1,050, i. e., for Rs. 19,000, in all, might be passed against the other property of defendant 1.

Defendant 1 pleaded minority. Defendant 2, wife of defendant 1, pleaded minority of defendant 1, and also pleaded a prior gift by defendant 1. The trial Court decreed the suit for possession holding that defendant 1 had made a false representation that he was of full age to the plaintiffs and was therefore estopped from raising the plea of minority, following the authority of *Wasinda Ram* v. *Sita Ram* (1). It also held that the consideration had been duly discharged by payment of Rs. 8,000 in cash and by substitution of the promissory note in favour of the defendant by one in favour of Muhammad Hussain and that Muhammad Hussain had realized Rs. 5,500 out of this sum from the plaintiffs. It also held that the gift to the wife was of no effect and was void ab initio. Defendants have appealed.

Their counsel has urged that the facts do not show that the plaintiffs were in any way deceived by any representation made by defendant 1. He relies on the evidence of Fakir Muhammad (P. W. 3) who states that Lakha Singh, one of the plaintiffs, had told the defendant that he (defendant) should state his age to be 19 at time of registration. There can be no doubt that the defendant stated his age to be 19 at the time of registration. Except the evidence of Fakir Muhammad there is no evidence to show us that the plaintiffs knew or were in a position to know what the age of the defendant was. The defendant had previously executed other mortgages and deeds of gift in which he had

(1) [1920] 1 Lah. 389=59 I. C. 393.

represented himself to be 19. In one case he had obtained a medical certificate showing that he was over 19 years of age. He admits that he stated before the Sub-Registrar that he was 19 years of age because his cousin Muhammad Hussain had asked him to give his age as 19 years. We have no reason to suppose that the plaintiffs knew that this representation was false and we do not accept the evidence of Fakir Muhammad.

The question that arises then is whether a minor is estopped from pleading minority when he has made a false representation as to his age. *Wasinda Ram* v. *Sita Ram* (1) is undoubtedly an authority for the proposition that he is so estopped. This ruling followed a Bombay ruling reported in *Ganesh Lala* v. *Bapu* (2) and the Bombay High Court has since followed that ruling in *Dadasaheb Dasrathrao* v. *Bai Nahani* (3) and in *Jasraj Bastimal* v. *Sadashiv Mahadev* (4). On the other hand, the Calcutta High Court in *Dhurmo Dass Ghose* v. *Brahmo Dutt* (5) and *Brahmo Dutt* v. *Dharma Das* (6), which is the same case in appeal, held that S. 115, Evidence Act, did not apply to minors. The case went before the Privy Council and is reported as *Mohori Bibee* v. *Dharmodass Ghose* (7) but the Privy Council expressly did not decide this point. In *Levene* v. *Brougham* (8) the Court of appeal in England held that there could be no estoppel in such a case. It has been contended before us that S. 115, Evidence Act, governs the matter and the word "person" in it is wide enough to include minors. I find it difficult to follow this argument because it seems to me that in every honest dealing with a minor there is presumably a representation, expressed or implied, on the part of the minor that he is competent to contract. Therefore, if the doctrine of estoppel could be applied to the case of minors there would hardly be a case in which the doctrine would not apply and the protection given by the law to minors would practically be done away with. Further, I am unable to see how the force of a statute can be avoided by what after all is a law of procedure, namely, estoppel. For these reasons I am quite clear that there can be no estoppel in such a case, but owing to the existence of the Division Bench ruling of this Court and the importance of the matter, I would prefer to refer the question to a Full Bench. Counsel for the appellants has cited *Leslie Ltd.* v. *Sheill* (9) and *Mahomed Syedol Ariffin* v. *Yeohooi Gark* (10). The latter ruling is a Privy Council ruling in an appeal from the Strait Settlements in which their Lordships approved of the doctrine laid down in *Leslie Ltd.* v. *Sheill* (9). At first I was of opinion that this question was covered by the Privy Council ruling and that, therefore, there was no need to refer the matter to a Full Bench, but on carefully examining *Leslie Ltd.* v. *Sheill* (9) I find that the question of estoppel was not decided in that case. That question was decided in the Court of appeal in *Levene* v. *Brougham* (8) and was only referred to in *Leslie Ltd.* v. *Sheill* (9). The question there was whether a suit would lie for money received by a minor where the contract for loan failed on the ground of being void by statute. The ruling of the Privy Council in *Mohammed Syedol Ariffin* v. *Yeoh Ooi Gark* (10) further is obiter on the point and therefore, though entitled to great respect, is not absolutely binding on us. I therefore consider that the question whether a minor who has made a false representation as to his age is estopped from pleading his minority should be referred to a Full Bench for decision.

The next point arising in this case is also a difficult one. As explained above the plaintiffs had pleaded in the alternative that they should get a decree for Rs. 17,500 with interest or damages. Counsel for the appellants has contended on the authority of *Leslie Ltd.* v. *Sheill* (9) that in such a case there could be no restitution by the minor. On considering *Leslie Ltd.* v. *Sheill* (9) I am definitely of opinion that in spite of the doubt expressed as to the correctness of *Bristow* v. *Eastman* (11) in that case

(2) [1897] 21 Bom. 198.
(3) [1917] 41 Bom. 480=41 I. C. 180=19 Bom. L. R. 561.
(4) A. I. R. 1928 Bom 169=46 Bom. 137.
(5) [1898] 25 Cal 616=2 C. W. N. 330.
(6) [1899] 26 Cal. 331=3 C. W. N. 468.
(7) [1903] 30 Cal. 539=30 I. A. 114=8 Sar. 374 (P. C.).
(8) [1909] 25 T. L. R. 265=53 S. J. 243.
(9) [1914] 3 K. B. 607=83 L.J.K.B. 1145=30 T. L. R. 460=58 S. J. 453=111 L. T. 106.
(10) A. I. R. 1916 P. C. 242=43 I. A. 256=(1916) A. C. 575 (P. C.).
(11) [1794] 1 Esp. 174=5 R. R. 728.

the case itself did not decide that *Cowern* v. *Nield* (12) was wrongly decided. That case is directly in point, whereas *Leslie Ltd.* v. *Sheill* (9) is not directly in point, because, as pointed out in *Leslie Ltd.* v. *Sheill* (9) the jurisdiction in equity to force the minor to make restitution was never clearly defined and all that *Leslie Ltd.* v. *Sheill* (9) held was that the jurisdiction did not extend to repayment as distinguished from restitution. On general principles of justice it would seem to me monstrous that the minor should be able both to retain the property and the benefit which he derived by making false representations to parties as to his capacity to deal with the property. I would, therefore, be inclined to hold that there is jurisdiction in the Court to compel the minor to make restitution. It has been contended before us that the position alters when the minor is plaintiff or defendant. I am quite unable to accede to this argument which is moreover not borne out by any authority cited to us. It seems to me that where a minor is plaintiff or defendant all that the Court in effect orders is, that it refuses to allow a certain plea to prevail except upon terms. If such a jurisdiction exists it seems to me wholly immaterial whether the minor is plaintiff or defendant and it would certainly be extremely anomalous that such a question should rest on the relative position of the parties as plaintiff and defendant. The question, however, is by no means free from difficulty and undoubtedly there are expressions in *Leslie Ltd.* v. *Sheill* (9) which would tend to show that their Lordships in that case disapproved of certain previous cases taking the more equitable view, if I may so call it, and, I, therefore, think, in view of the importance of the question that this matter also should be referred to the Full Bench. The question would be whether a party who, when a minor, has entered into a contract by means of false representation as to his age, can whether he be defendant or plaintiff in a subsequent litigation refuse to perform the contract and at the same time retain the benefit he may have derived therefrom.

If the Full Bench hold that the minor is bound to make restitution it will be for the Division Bench to decide on the evidence how much is due.

Harrison, J.—I am also of opinion that the two questions should be referred to a Full Bench. At present I am inclined to think that it is impossible to escape from the logical result of holding that the contract is void, however deplorable that result may be. The suit is based on a contract and by no process of mental gymnastics can it, in my opinion, be converted into anything else. As I understand *Cowern* v. *Nield* (12) the reasoning is somewhat as follows: The contract being void has no existence and no reality. No action can, therefore, result from or be based upon it, but the tort which gave rise to and brought about the contract may possibly be treated as the true foundation of the action. If the contract, however, be void the only reality in the tort is the fact that it is the origin or cause of that void contract, for it is only because of its subsequent history or development that an action can be based upon it. True as it is that had there been no tort there would have been no contract. It is equally true that had there been no contract there would have been no tort, in the sense that there would have been no actionable wrong but merely an infructuous attempt to deceive. It appears to me to be impossible to separate the two chapters in the incident and to give reality to the embryo while denying it to the child into which the embryo develops.

Opinion.

Shadi Lal, C. J.—The questions, which have been formulated for decision by the Full Bench, are in these terms :

(1) Whether a minor, who, by falsely representing himself to be a major, has induced a person to enter into a contract, is estopped from pleading his minority to avoid the contract.

(2) Whether a party, who, when a minor, has entered into a contract by means of a false representation as to his age, whether he be defendant or plaintiff, in a subsequent litigation, refuse to perform the contract and at the same time retain the benefit he may have derived therefrom.

As regards the minor's capacity to enter into a contract, there was some uncertainty prior to 1903 as to whether a minor's contract was void or voidable. But all doubt on the subject has been

(12) [1912] 2 K.B. 419=81 L. J. K. B. 865=28 T. L. R. 423=56 S. J. 552=106 L. T. 934.

dispelled by the judgment of their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (7), which declares that a person who, by reason of infancy is, as laid down by S. 11, Contract Act, incompetent to contract, cannot make a contract within the meaning of the Act. The transaction entered cannot be recognized by law.

The question arises whether an infant is precluded by the rule of estoppel from showing the invalidity of a transaction of this description. Now, the doctrine of estoppel is embodied in S. 115, Evidence Act, which runs as follows :

> When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

There is a conflict of judicial opinion as to whether an infant comes within the ambit of the section ; the Bombay High Court holding that an infant is not excepted by the language of the section, vide *Ganesh Lal* v. *Bapu* (2) ; *Dadasaheb Dasrathrao* v. *Bai Nahani* (3) and *Jasraj Bastimal* v. *Sadasiv Mahadev Walekar* (4) ; while the Calcutta High Court has adopted the opposite view : vide *Dhurmo Dass Ghose* v. *Brahmo Datt* (5) which view was endorsed on appeal by a Division Bench of the same Court in *Brahmo Dutt* v. *Dhurmo Dass Ghose* (6). In the latter Calcutta case Maclean, C. J., sought to get over the comprehensive language of S. 115 by holding that the term " person " in that section applies to " one who is of full age and competent to enter into a contract." It will be observed that the expression " person " is used twice in that section, and it is clear that if in the first portion of the section it means a person sui juris, it must have the same meaning when used again in the same section. The interpretation placed upon the word " person " by the Calcutta High Court would, no doubt, help the minor in so far as he would be able to repel the plea of estoppel when it is urged against him ; but he must, at the same time, forego the benefit accruing from the doctrine of estoppel and cannot invoke the plea for his own advantage. If the word " person " means only a person competent to enter into a contract, then the section cannot be used to the advantage of the minor any more than to his detriment ; in other words the doctrine of estoppel, as enacted by S. 115, must be treated as non-existent in so far a person under disability is concerned.

That a minor cannot set up the plea of estoppel as against an adult is obviously an absurd result. Now, it is a cardinal rule governing the interpretation of statutes that when the language of the legislature admits of two constructions, the Court should not adopt a construction which would lead to an absurdity or obvious injustice. But I do not think that there is any ambiguity in the term " person." In construing statutes, and indeed all written instruments, it is the duty of the Court to adhere to the grammatical and ordinary sense of the words ; and the expression " person," when used in its ordinary sense, includes every person whether sui juris or under a contractual disability. As pointed out above, the same word is used again in S. 115, and there can be no doubt that it cannot, in that connexion, bear any restricted meaning. Indeed the term " person " is to be found also in S. 116, which deals with the estoppel of a tenant as against his landlord, and in numerous other sections of the Evidence Act, e. g., Ss. 5, 8, 10, 112, 118, 122 and 139 ; and a perusal of those sections leaves no doubt that it is intended to include minors as well as other persons under disability.

I must, therefore, hold that the language of S. 115 is comprehensive enough to include a minor ; and if the matter rested there, I would say that an infant, who has induced another person to deal with him by falsely representing himself as of full age, should not be allowed to deny the truth of his representation. But the rule of estoppel is a rule of evidence and must be read along with and subject to the provisions of other laws. The law of estoppel is a general law applicable to all persons, while the law of contract relating to capacity to enter into a contract is directed towards a special object ; and it is a well established principle that, where a general intention is expressed by the legislature, and also a particular intention, which is incompatible with the general one, particular intention is considered an exception to the general one : per Best, C. J. in *Churchill*

v. *Crease* (13 & 14). This rule applies whether the general and special provisions are contained in the same statute or different statutes. Now, when the law of contract lays down that a minor shall not be liable upon a contract entered into by him, he should not be made liable upon the same contract by virtue of the general rule of estoppel. I do not go so far as to say that the language of S. 115, would, if given its full scope, render absolutely nugatory the law declaring the incapacity of a minor to make a contract; for there may be instances in which a contract though entered into with a minor has not been induced by any misrepresentation made by him and no question of estoppel can arise in such cases. There can, however, be be no doubt that the rule of estoppel would take away in many cases the protection which the legislature has deliberately created for the benefit of the minors, and would make them liable on a transaction which has no existence in the eye of the law. The Court should struggle against repugnancy and should construe an enactment as far as possible in accordance with the terms of the other statute which it does not expressly modify or repeal.

Now, both the statutes can stand together, if we apply the general rule of estoppel, as enacted by S. 115, Evidence Act, subject to the special law imposing disability upon the contractual capacity of an infant. This construction which recognizes an exception to the general rule, avoids all repugnancy and does not lead to any absurdity or injustice.

It is to be observed that, so far as the English law is concerned, there is no authority for the proposition that a contract, which is void under the statute on the ground of infancy, can be enforced simply because it has been entered into on the faith of a false representation as to age which the minor is precluded from denying. In the case of *Levene* v. *Brougham* (8), the plea of estoppel was raised against the minor but was rejected by the Court of appeal. It must be remembered that, as observed by their Lordships of the Privy Council in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (15), S. 115, Evidence Act, has not enacted as law in India anything different from the law of England on the subject of estoppel and the English decisions are therefore, relevant to the discussion of the subject before us.

In India the rule against the application of the doctrine of estoppel to a contract void on the ground of infancy has been adopted, not only by the Calcutta High Court, but also by the High Courts at Madras, Allahabad and Patna: Vide *Vaikuntarama Pillai* v. *Authimoolam Chettiar* (16), *Jagar Nath Singh* v. *Lalta Pershad* (17) and *Ganganand Singh* v. *Rameshwar Singh* (18). A Division Bench of the Lahore High Court has, however, favoured the view taken by the Bombay High Court in *Wasinda Ram* v *Sita Ram* (1). I am not aware of any judgment of the Privy Council which gives expression to the considered view of their Lordships on the subject. In the case of *Mohoree Bibee* v. *Dharmodas Ghose* (7), which was an appeal from the judgment of the Calcutta High Court in *Brahmo Datt* v. *Dhurmoo Dass Ghose* (6) their Lordships refrained from expressing their opinion and disposed of the question by making the following observations:

> The Courts below seem to have decided that this section (S. 115) does not apply to infants but their Lordships do not think it necessary to deal with that question now. They consider it clear that the section does not apply to a case like the present, where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement.

Nor is there anything in the judgment in *Mahomed Syedol Ariffin* v. *Yeoh Oon Gark* (10), which can be treated even as an obiter dictum on the subject of estoppel. That case was heard by the Privy Council on an appeal from the Supreme Court of the Straits Settlements and dealt with the Strait Settlements Ordinance (3 of 1893), which is in similar terms to the Indian Evidence Act. It was sought to establish the liability of the infant for damages on the ground of a fraudulent statement, but their Lordships held that no fraud had been established. It is clear that no case of estoppel was either set up or decided in that case.

(13 & 14) 5 Bing 177 (180)=2 M. & P. 415=7 L. J. (O. S.) C. P. 63.

(15) [1893] 20 Cal. 296=19 I. A. 203=6 Sar. 224 (P. C.).

(16) [1915] 38 Mad. 1071=23 I. C. 799=26 M. L. J. 612.

(17) [1909] 31 All. 21=5 A. L. J. 674=1 I. C. 562=(1908) A. W. N. 267.

(18) A. I. R. 1927 Pat. 271=6 Pat. 388.

It will be seen from the foregoing discussion that not only the English law, but also the balance of the judicial authority in India, is decidedly in favour of the rule that where an infant has induced a person to contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract and, though S. 115, Evidence Act is general in its terms, I consider for the reasons, which I have already given, that it must be read subject to the provisions of the Contract Act, declaring a transaction entered into by a minor to be void. My answer to the first question referred to us is, therefore, in the negative.

Coming now to the second question: I am clear that when a contract has been induced by a false representation made by an infant as to his age, he is liable neither on the contract nor in tort, if the tort is directly connected with the contract and is the means of effecting it and parcel of the same transaction: *The Liverpool Adelphi Loan Association* v. *Fairthurst* (19 & 20). It is true that infancy does not constitute a valid defence to an action on tort, but the tort, which can sustain an action for damages must be independent of the contract and must not be another name for the breach of the contract. No person can evade the law conferring immunity upon an infant from performing a contractual obligation by converting the contract into a tort for the purpose of charging the infant. As observed by Byles, J., in *Burnard* v. *Haggie* (21), one cannot make an infant liable for the breach of a contract by changing the form of action to one ex delicto.

The Court has to look at the substance, and not at the form, of the action; and if it finds that the action is in reality an action ex contractu but disguised as an action ex delicto, it would decline to enforce the claim. Indeed, it has been repeatedly held in England that when an infant has induced a person to contract with him by making a false statement that he was of full age, the infant is not answerable either for the breach of the contract or for damages arising from the tort committed by him.

But a false representation by an infant that he was of full age gives rise to an equitable liability. The Court, while relieving him from the consequences of the contract may in the exercise of its equitable jurisdiction restore the parties to the position which they occupied before the date of the contract. If the infant is in possession of any property which he has obtained by fraud, he can be compelled to restore it to his former owner. The matter is, however, debatable: if the benefit acquired by him consists of money which is not earmarked, has the Court of equity authority to make him liable for the payment, to the defrauded person, of a sum equal to the amount of which the latter has been deprived by the former? The equitable jurisdiction is founded upon the desire of the Court to do justice to both the parties by restoring them to the status quo ante, and there is no real difference between restoring the property and refunding the money except that the property can be identified but cash cannot be traced.

The doctrine of restitution finds expression in S. 41, Specific Relief Act. Suppose, *A*, an infant, executes an instrument of mortgage in favour of *B* for Rs. 1,000 borrowed by *B* by making a false representation as to his age. This instrument is void, and S. 39, which expressly applies, not only to a voidable but also to a void, instrument, allows *A* to move the Court to adjudge it to be void and order it to be delivered up and cancelled. Then comes S. 41, by which it is provided that on adjudging the cancellation of the instrument the Court may require *A*, to whom such relief is granted, to make any compensation to *B* which justice may require. It is beyond question that under this section the Court has the discretion to impose terms upon *A* and to compel him to pay Rs. 1,000 as compensation to *B*. The statute nowhere says that pecuniary compensation should not be allowed, when the award thereof would be tantamount to a repayment of the money borrowed on the strength of a void transaction. Indeed, the Courts in India have ordered the minor to refund the money received by him before allowing him to recover the property sold or mortgaged to the other party.

In *Jagar Nath Singh* v. *Lalta Pershad* (17) the minor, who, by making fraudulent representation as to his age, had induced the defendant to purchase property

(19 & 20) [1854] 9 Ex 422=96 R. R. 778.
(21) [1868] 32 L. J. C. P. 189=14 C. B. (N. S.) 45=8 L. T. 320 = 11 W. R. 644=9 Jur. (N. S.) 1325.

from him, was held liable in equity to restore to the purchaser the benefit he had obtained before he could recover possession of the property sold. The same rule was followed in *Balak Ram* v. *Dadu* (22), where the plaintiff was directed to refund the purchase money as a condition precedent to his obtaining possession of the property. In *Saral Chand Mitter* v. *Mohan Bibi* (22a), the minor was required to refund the money borrowed by him on the foot of a mortgage.

It is true that in the case of *Mohori Bibee* v. *Dharmodas Ghose* (7) restitution was not allowed, but the party, who had lent the money to the minor, was aware of the minority; and their Lordships of the Privy Council, while recognizing that S. 41 does give a discretion to the Court, did not see any reason for interfering with the discretion of the lower Courts which, on the facts of the case, had declined to direct the return of the money.

There are some English cases in which an infant repudiating a transaction was held liable in equity to return the benefit he had obtained by reason of his fraud. *In re King Ex Parte, The Unity Joint Stock Mutual Banking Association* (23), a person, who had lent money to an infant on the faith of a fraudulent representation as to age, was held entitled to prove in his bankruptcy. Lord Justice Knight Bruce, while deciding that in equity the liability of the borrower had been established, made the following pertinent observations :

> The question is whether in the view of a Court of equity, according to the sense of decisions not now to be disputed, he has made himself liable to pay the debt whatever, be his liability or nonliability at law. In my opinion we are compelled to say that he has.

Cowern v. *Nield* (12) was a case in which it was decided that an infant trader, who had entered into a contract for the sale of goods and failed to deliver them after receiving their price, was not liable on the contract, but that

> if the plaintiff can prove that the defendant obtained his money by fraud, the action can be maintained.

The Court of appeal accordingly ordered a new trial

> in order that the plaintiff may have an opportunity of proving if he can, that his money was obtained from him by the defendant by fraud.

In *Stocke* v. *Wilson* (24) an infant, who had obtained furniture from the plaintiff by falsely stating himself to be of age, and had sold part of it for £.30 was directed to pay this amount as part of the relief granted to the plaintiff.

A different view was, however, taken by the Court of appeal in *R. Leslie Ltd.* v. *Sheill* (9). In that case an action for the recovery of advances made to an infant on the faith of his fraudulent representation as to his age was dismissed, because the cause of action was held in substance ex contractu. The learned Judges of the Court of appeal distinguished the judgment in *The Unity Joint Stock Mutual Banking Association* (23) on the ground that it expressed the law in bankruptcy and did not lay down a doctrine of general application. With all respect, I am unable to follow the distinction. Either the liability to return the benefit obtained by fraud exists or it does not exist. If it does not, then the mere fact that the quondam infant has been subsequently adjudged a bankrupt cannot bring it into existence. If, on the other hand, the infant is in equity liable to return his ill-gotten gains his liability holds good, even if he is not subsequently adjudged to be an insolvent. It must be remembered that the relief springs, not from the circumstance that the borrower is adjudicated a bankrupt, which may be a pure accident, but from the rule of equity that a person should not be allowed to take advantage of his own fraud. It would be sheer injustice if an infant should retain, not only the property which he has agreed to sell or mortgage, but also the money which he has obtained by perpetrating fraud. As stated by Lord Kenyon in *Jennings* v. *Rundall* (25) the protection given by law to the infant "was to be used as a shield and not as a sword." It must be remembered that, while in India all contracts made by an infant are void, there is no such general rule in England. For instance, a contract for necessaries is not affected by the Infants Relief Act, 1874, and can be validly entered into by an infant. There should, therefore, be greater scope in India than in England for the application of the equitable doctrine of restitution.

(22) [1910] 76 P. R. 1910 =7 I. C. 1000=98 P. W. R. 1910.
(22a) [1898] 25 Cal. 371=2 C. W. N. 201.
(23) [1858] 3 De. G. & J. 63=4 Jur. (N.S.) 1257 =6 W. R. 640=27 L. J. B. K. 33.
(24) [1913] K. B. 235=82 L. J. K. B. 598=29 T.L.R. 352=108 L.T. 34=20 Manson 129.
(25) [1799] 8 T. R. 335=4 R. R. 680.

It is, however, argued that this jurisdiction can be exercised only when the minor invokes the aid of the Court as a plaintiff. If he asks the Court to cancel a transaction brought about by his own fraud, he cannot complain if the Court does justice to both the parties ; and, while granting him the relief the Court compels him, at the same time, to return the advantage which he has acquired in pursuance of the void transaction. But if the minor happens to occupy the position of a defendant in an action involving the cancellation of the transaction of the above description, he should not, it is urged, be required to make restitution.

It is difficult to understand why the granting of an equitable remedy should depend upon a mere accident, namely, whether it is the minor or his adversary who has taken the initiative in bringing the transaction before the Court. The material circumstances in both the cases are exactly the same. A contract has been entered into with an infant and, as it is an invalid transaction, it must be cancelled. The Court, however, finds that the infant has, by practising fraud upon the opposite party, received property or money ; and that justice requires that he should not retain the benefit derived by him from a transaction which has been declared to be ineffectual against him. The transaction has been wiped out. It is only fair that both the parties should revert to their original position. These considerations are, in no way, affected by the circumstance that one party and not the other, has moved the Court in the first instance. There is neither principle nor justice which would warrant a discrimination.

The equitable jurisdiction of the Court to order restitution rests purely upon the principle of justice, and that principle is no more applicable to a case in which he is a defendant. But when we come to the case law, we find it in an unsatisfactory state. The decisions of the High Courts in India show that when the minor succeeds in an action brought by him, he is ordinarily required to restore the benefit obtained by him by committing fraud. The same unanimity is not, however, found in cases in which he occupies the role of a defendant. In some cases of this character restitution has been allowed, e. g., *Saral Chand Mitter* v. *Mohun Bibi* (22a), but there are several cases in which relief has not been granted against frauds committed by minors when they were defendants. The language of Ss. 39 and 41, Specific Relief Act, no doubt shows that the jurisdiction conferred thereby is to be exercised when the minor himself invokes the aid of the Court. The doctrine of restitution is not, however, confined to the cases covered by that section. That doctrine rests upon the salutary principle that an infant cannot be allowed by a Court of equity to take advantage of his own fraud. It is possible that, though the Court ordinarily imposes terms upon an infant guilty of fraud if he seeks its aid as a plaintiff, it may decline to exercise its equitable jurisdiction if he happens to be a defendant. All that can reasonably be said is that the Court, in deciding whether relief against fraud practised by an infant should or should not be granted, will consider, along with other circumstances of the case, the fact that the infant is a defendant and not a plaintiff in the case. But there is no warrant either in principle or in equity for the general rule that the relief shall never be granted in a case where the infant happens to be a defendant.

No such distinction seems to have been drawn in the English cases. Indeed, *Stocks* v. *Wilson* (24) was a case in which the infant was the defendant, and yet he was held liable to refund to the plaintiff the price of the furniture received from the latter. Similarly in *Cowern* v. *Nield* (12) the action was brought against the infant but it was never suggested that the circumstance of his being a defendant should make any difference in his liability.

The exact form which the relief should take must depend upon the peculiar circumstances of each case, but the contract or any stipulation therein should never be enforced. The remedy by way of restitution may sometimes involve the payment of a sum of money equal to that borrowed under the void contract. The grant of such relief is not, however, an enforcement of the contract, but a restoration of the state of affairs as they existed before the formation of the contract. The Court, while giving this relief, has not to look at the contract or to give effect to any of the stipulations contained therein. Indeed, the relief is granted, not because there is a

contract which should be enforced, but because the transaction being void does not exist and the parties should revert to the condition in which they were before the transaction. This is not a performance of the contract but a negation of it. For example, the contract may provide for the payment of interest at a certain rate, but the Court does not give effect to such stipulation or to any other term of the contract. The defrauded party gets, not the remedy on the contract, but the relief in equity against fraud. The mere fact that the result of granting the relief is similar to that flowing from the performance of one or more of the terms of the contract cannot constitute an adequate ground for refusing the relief, if the Court considers that justice requires that it should be granted. As stated by Knight Bruce, V. C., in *Stikeman* v. *Dawson* (26) in what cases in particular a Court of "equity will thus exert itself is not easy to determine". If the infant has obtained property by fraud the Court will require him to restore it to its owner. In other cases, his estate or he, after attaining majority, may be held liable for the return of the pecuniary advantage acquired by him by fraud.

For the aforesaid reasons my answer to the second question is that an infant though not liable under the contract, may in equity, be required to return the benefit he has received by making a false representation as to his age.

Broadway, J.—I concur with the learned Chief Justice.

Dalip Singh, J.—I concur with the learned Chief Justice.

Harrison, J.—On the first question of whether a minor who has made a false representation as to his age is estopped from pleading his minority, I agree with the learned Chief Justice in holding that he is not estopped from doing so.

On the second question it appears to me that deplorable as the result may be the minor cannot be compelled to make restitution where the result of his misrepresentation has been the passing of money as opposed to goods. In the first place the contract is void and has no legal existence. Doubtless an action in tort can succeed, if it be shown that the tort is independent of the contract. Great reliance has been placed on *Cowern* v. *Nield* (12), but all that this authority lays down is: that if it can be established that there has been an independent tort the action will succeed. That case was sent back for a new trial in order that the plaintiff might have an opportunity of proving, if he could, that his money was obtained from him by fraud, but the judgment has been relied on by counsel for the proposition that where a contract has arisen as the direct consequence of a fraudulent statement, an action may still succeed on the basis of that fraud. It appears to me that what is laid down is precisely the contrary proposition, and that unless and until the fraud can be dissociated from the contract, the plaintiff's suit must fail. In this case there can, I think, be no doubt that the substance of the cause of action is contractual. Had the fraud or misstatement of the defendant not led to a contract, we would have heard no more about it. The only reality in the tort was the fact that it was the origin or the cause of the void contract. In consequence of the misrepresentation a contract was made and it is, therefore, equally true to say that had there been no tort, there would have been no contract and that had there been no contract, there would have been no tort, for there would merely have been an infructuous attempt to deceive as opposed to a successful fraud. It follows that the suit is not based upon a tort and *Cowern* v. *Nield* (12) does not help us. The question remains of whether the defendant can be denied the right of pleading that the contract is void except upon definite terms, which would obviously be that he should restore the benefit he has received in consequence of his dishonesty. To quote from the judgment of Lord Sumner in *Leslie Ltd.* v. *Sheill* (9) at p. 612:

> It is perhaps a pity that no exception was made where, as here, the infant's wickedness was at least equal to that of the person who innocently contracted with him, but so it is. It was thought necessary to safeguard the weakness of infants at large, even though here and there a juvenile knave slipped through.

In the following paragraph it is explained that to a claim for return of the principal money paid to the infant under the contract that failed there are at least two answers: the first the infancy itself being at common law the answer before 1874. I take it that in India this is the answer still. S. 41, Specific Relief Act, is

(26) [1881] 1 De. G. & Sm. 90=11 Jur. 214= 16 L. J. Ch 205.

invoked and relied upon as affording an analogy for ordering restoration. This runs as follows :

On adjudging the cancellation of an instrument the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

In the first place there is no question of the cancellation of an instrument but the assertion of the fact that the contract was void from the start and had no legal existence. In the second place, S. 41, Specific Relief Act, appears to me merely to enunciate and give effect to the well-known principle that he who seeks equity must do equity. In this case the infant asks for no equitable relief, but on the contrary he pleads the substantive law and states the self-evident fact that the contract on which the suit is based had no existence. Whatever may be the consequences where an infant seeks an equitable relief, I do not think the analogy has been established and I do not think that S. 41, Specific Relief Act, throws any light upon or affords any assistance to the decision of the present question. I realize how deplorable it is that a dishonest infant should be able to keep what he has obtained by his dishonesty, but the matter appears to be one for the legislature, and I am of opinion that until and unless the legislature sees fit to move, no suit of this nature, being in its essence contractual, can lead to an order for restitution by the infant on the ground of his having dishonestly induced the plaintiff to contract with him and to pay him money.

Tek Chand, J.—This reference to the Full Bench gives rise to the following three points, which it will be convenient to deal with separately :

(i) Is a party, who, when a minor, has induced another to enter into a contract with him by falsely representing himself to be of age, estopped from pleading his minority in avoidance of the contract ?

(ii) In the event of the answer to the first question being in the negative, can he avoid the contract and at the same time retain the benefit derived by him therefrom ?

(iii) Will the answer to (i) be affected by the circumstance that he is a plaintiff or a defendant in the action in which this question arises ?

I shall take up (i) first. It was contended by the learned counsel for the appellant that this question is concluded in his favour in consequence of the decisions of their Lordships of the Privy Council in *Mohori Bibi* v. *Dharmodass* (7) and *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (10). An examination of these cases, however, shows that this contention is baseless. It is no doubt true that in *Mohori Bibee's* case (7) the question was raised before Jenkins, J., who dealt with the case as the Court of first instance on the original side of the Calcutta High Court in *Dharmo Dass Ghose* v. *Brahmo Dutt* (5) and on appeal three Judges of that Court discussed it at great length : *Brahmo Dutt* v. *Dharmo Dass* (6). But on the matter going up before the Judicial Committee this question did not arise, as their Lordships found on the facts that the party dealing with the minor had not been misled by the alleged misrepresentation made by the minor. It was found on the evidence that at the time when the contract was entered into the representee in that case had full knowledge of the fact that the representor was in reality a minor and it was accordingly held that there could be no estoppel where the truth of the matter was known to both parties. The real question decided in that case was that having regard to the provisions of S. 11, Contract Act, a contract entered into by a minor was void and not merely voidable as had been hitherto erroneously held in a number of cases in India.

The question appears to have been argued before their Lordships in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (10), which was an appeal from the Straits Settlements, where the statute in force is identical in terms with S. 115, Evidence Act. But the actual decision in that case also proceeded on a different point, their Lordships finding on the facts that the representation which was alleged to have been made by the minor could not be justly characterized as fraudulent. There is, however, a remark in the judgment of Lord Shaw to the effect that the plaintiff's case, based on the minor representing himself to be of age would have failed on the principle recently given effect to in the case of *Leslie Ltd.* v. *Shiell* (9).

The remark is clearly in the nature of an obiter dictum and though entitled to great respect cannot be said to be decisive of the matter.

The question is, therefore, not directly covered by any authoritative pronouncement of their Lordships of the Privy Council and it is open to us to come to our own conclusion on it. It is admitted that the matter has to be decided in reference to S. 11, Contract Act, and S. 115, Evidence Act. As already pointed out the former section has been authoritatively interpreted in *Mohori Bibee's* case (7) as meaning that a contract entered into by a minor is void. There can, therefore, be no room for controversy on that point. The difficulty, however, arises when, in an action brought in respect of such a transaction, the opposite party urges that the plea that the contract was void ought not to be heard as the transaction had been brought about by the minor representing himself to be of age and on that misrepresentation the opposite party has parted with his money or property. In other words the question is what is the effect on such a case of S. 115, Evidence Act, which runs as follows :

> When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his respresentative, to deny the truth of that thing.

The question has arisen in several cases in India, but as pointed out by the learned Judges of the Division Bench there is a serious conflict of judicial opinion on it. It is, therefore, necessary to review the leading Indian cases on the subject so as to properly appreciate the reasons in support of the two rival views.

Beginning with our own Court, we find that the rulings, though few in number, are not uniform. In *Wasinda Ram* v. *Sita Ram* (1) the plaintiff sued to recover the amount due on a bond which the defendant had, during minority, executed falsely representing himself to be of age. Chevis, Offg. C. J., who delivered the principal judgment, held that S. 115, Evidence Act, applied to the case and that the defendant could not be heard to plead his minority to escape from the consequences of the transaction which he had himself brought about by false representations. He definitely dissented from the view of the Calcutta High Court (which I shall presently discuss) that the word " person " in the first line of S. 115 must be interpreted as meaning a person sui juris and does not include a minor. LeRossignol, J., in agreeing with his learned colleague, thus expressed himself :

> It is true that a contract made with an infant is no contract, but is void ab initio, but that is not a matter of which Courts must take cognizance suo motu, and if S. 115, Evidence Act, prohibits the tender of the plea (and I see no reason to suppose that it does not) then the plea may not be tendered.

The question next arose in *Harji Mal* v. *Abdul Halim* (27 & 28) before LeRossignol, J., sitting singly. The learned Judge reiterated his former opinion and upholding the plea of estoppel decreed the suit on a promissory note on which the defendant had, during minority, obtained a loan falsely representing himself to be of age. A contrary view was, however, taken two years later by Moti Sagar, J., (also sitting in Single Bench) in *Kapura* v. *Arjun Singh*: *A.I.R.* 1923 *Lah.* 511, where a minor had sued to set aside a sale executed by him during minority which it was found he had persuaded the vendee to enter into on a fraudulent misrepresentation that he was sui juris. The learned Judge refused to follow *Wasinda Ram* v. *Sita Ram* (1), being of the opinion that the authority of that ruling had been considerably shaken if not altogether annihilated by the remarks of their Lordships of the Privy Council in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (10) where *Leslie* v. *Sheill* (9) had been approved. He accordingly held that the plaintiff was not estopped from pleading the invalidity of the contract by reason of his minority, even though he had himself induced the contract by false representation.

The view taken in *Wasinda Ram* v. *Sita Ram* (1), is in accord with that which had been uniformly accepted as correct by the Bombay High Court. The first case of that Court which needs notice is *Ganesh Lala* v. *Bapu* (2), where Jardine and Ranade, JJ. held that S. 115, Evidence Act, made no exception in the case of infants and that an infant who had represented himself to be of full age and had sold property to the defendant by falsely representing himself to be of full age was estopped from subsequently pleading that the contract was void

(27 & 28) [1920] 60 I. C. 267.

by reason of his minority and that he could not maintain his suit to set aside the sale on that ground. This ruling was followed in *Dadasaheb Dasrath Rao* v. *Nahani* (3), where Beaman and Heaton, JJ. definitely dissented from the Calcutta view that a minor was not a "person" within the contemplation of S. 115, Evidence Act. At p. 483 it was remarked that the rulings to the contrary

> reveal a constant confusion of thought between what is true estoppel and what may be that effect of fraudulent misrepresentation by a minor. . . . . We are not, however, concerned with any considerations proper to the latter point. Estoppel is a law of allegation and proof and if we are right in our interpretation of S. 115 then defendant 2, being a "person" within the contemplation of that section and having by direct declaration intentionally caused the plaintiff to believe that he was a major, is precluded absolutely from denying the truth of that assertion, that is to say, he might not plead-much less prove-that at the time the conveyance was executed he was in fact a minor. The point is not, as seems too often to be assumed, what would be the effect upon such a transaction of minority as a fact, but it is this that if the law of estoppel be correctly and strictly enforced the Court is not to know that defendant 2 was in fact a minor at all. The whole trial must proceed upon the footing of that being true which he represented and caused the plaintiff to believe to be true, viz., that he was a major. Fraudulent misrepresentation is upon a totally different footing. In the large majority of cases of fraudulent misrepresentation it is the party who has suffered by it who desires the truth to be known and to obtain relief on that basis. That of course is a doctrine wholly outside the law, of estoppel proper and should never be confused with it.

In *Jasraj Bastimal* v. *Sadashiv Mahadev* (4), the plaintiff sued on a promissory note on which he had advanced money to the defendant who was under age at the time, but who had fraudulently represented himself to be a major. The plea of minority was not allowed to be urged and the defendant was held to be estopped, it being laid down that the fact that the present suit was for recovery of money and did not relate to immovable property, as *Dadasaheb Dasrath Rao* v. *Bai Nahani* (3), did not make any difference, the rules of evidence being exactly the same with regard to suits relating to promissory notes. The principle of these rulings has also been accepted by the Bombay Court in *Fazul Bhoy Jaffar* v. *Credit Bank of India Ltd.* (29), and *Gurushiddswami* v. *P. D. Narendra* (30), though the actual decision in each of those cases proceeded on other points. It will thus be seen that the Bombay High Court has given full effect to the plea of estoppel, and has refused to put a narrow interpretation on the word "person" in S. 115 so as to exclude from its connotation all persons described under the Contract Act to be incompetent to contract.

This view has not, however, found favour in Calcutta. The first case of that Court which requires notice is *Dhanmull* v. *Ram Chunder Ghose* (31), where Petheram, C. J., and Prinsep and Pigot, JJ., held that a suit to recover money advanced as a loan to an infant upon his false representation that he was of age could not be maintained against him there being no obligation binding upon him, which could be enforced upon the contract either at law or in equity. It was remarked that

> no doubt an infant will not be allowed to take advantage of his own fraud and may be compelled to make specific restitution, when that is possible, of anything he has obtained by deceit. But this does not come within either principle. If we, as a Court of equity as well as of law, were to allow the plaintiff to recover in this suit, it would amount to restraining a defendant from setting up the plea of infancy in an action on a contract by reason of his having made a fraudulent misrepresentation *dans locum contractui*; and in no case has this ever been done.

It may be noted that though the loan in question had been secured on a mortgage, it was admitted at the Bar on behalf of both parties that the plaintiff was not entitled to a mortgage decree, and the dispute was confined to the right of the promisee to obtain a personal decree only. It is also noteworthy that the case was decided in 1890, but its publication was prohibited by order of one of the Judges constituting the Bench and it did not find its way in the Reports till 1897.

Next we come to the case of *Saral Chand Mitter* v. *Mohun Bibi* (5) which was first heard by Jenkins, J., on the original side, whose judgment is printed at pp. 372 to 386 of the report. That was a suit to obtain a decree on a mortgage, which had been effected on the false representation made by the defendant that he was of age. It was pleaded

(29) [1915] 39 Bom. 331=27 I.C. 335=16 Bom. L. R. 730.

(30) [1920] 44 Bom. 175=55 I. C. 271=22 Bom. L. R. 49.

(31) [1897] 24 Cal. 265=1 C. W. N. 270.

by the defendant that notwithstanding his fraud, infancy was a complete answer to the claim. Jenkins, J. in an exhaustive judgment held that the disability of the defendant could not be successfully used in defence of fraud. He accordingly passed a decree for the sum due recoverable only from the mortgage property. The learned Judge distinguished the case of *Dhanmull* v. *Ram Chand Ghose* (31) on the ground that the only question before the Court in that case was the right of the mortgagee to obtain a personal decree and that his right to enforce the mortgage by foreclosure or sale had not been considered. It may also be mentioned that the learned Judge started with the assumption (which was in accord with the view then prevailing in Calcutta) that a contract entered into by a minor was not void but merely voidable. It is doubtful if the decision would have been the same, if the contract had been treated as void, which must now be the case in view of the Privy Council decision in *Mohori Bibee* v. *Dharmodas* (7). The judgment of Jenkins, J., was appealed against and affirmed by Maclean, C. J., and Macpherson and Trevelyan, JJ., who doubted the correctness of *Dhanmull* v. *Ram Chand Ghose* (31) and held

that in cases of fraud by an infant the protection which the law throws around him is taken away; in other words, that the defence of infants cannot be successfully pleaded in defence of a fraud perpetrated by the infant.

The question arose again before the same learned Judge (Jenkins, J.) presiding over the original side of the Court in *Dharmo Dass Ghose* v. *Brahmo Dutt* (5), to which reference has already been made. There the plaintiff sued to have a mortgage-deed executed by him cancelled on the ground that at the time of its execution he was a minor. In reply the defendant mortgagee pleaded that the loan was induced by a fraudulent misrepresentation as to his age, made by him to the defendant's attorney. It was, however, found as a fact that the said attorney had been made aware of the plaintiff's minority before the transaction was completed. No question of estoppel, therefore, really arose in the case. The learned Judge, however, proceeded to consider the point which had been raised before him that fraud and deceit were not necessary to the success of the defendant's plea of infancy and which was supported by certain remarks in *Ganesh Lala* v. *Bapu* (2). Dissenting from this view he held that the general law of estoppel as enacted by S. 115, Evidence Act, would not apply to an infant unless he had practised fraud operating to deceive, in which case the Court administering equitable principles will deprive a fraudulent minor of the benefit of a plea of infancy. As no fraud had been established in the case, the suit was decreed. The mortgagee's appeal was heard by Maclean, Prinsep and Ameer Ali, JJ., *Brahmo Dut* v. *Dhurmo Dass* (6), who upheld the finding of fact of the trial judge that the defendant-appellant's attorney was not misled by the alleged representation by the plaintiff-respondent as to his age. The learned Judges, however, proceeded to consider the plea of estoppel and laid down the proposition that S. 115, Evidence Act, had no application to contracts by infants. At p. 88 the learned Chief Justice remarked :

The term "person" in S. 115 is amply satisfied by holding it to apply to one who is of full age and competent to enter into a contract, and I cannot bring myself to think that it could have been the intention of the legislature by such a general expression, to institute such a grave change in the law of estoppel in relation to minors.

The point was further developed by Ameer Ali, J., at p. 394, in the following words :

To hold that an infant may be estopped in regard to contracts by conduct or misrepresentation would be practically to sweep away all the limitations the law has imposed on the capacity to contract ; and a person labouring under disability could be enabled to enlarge by his own act his legal capacity to contract. In the *Liverpool Adelphi Loan Association* v. *Fairhurst* (20), it was held that a person under a disability to contract was not liable upon the contract, nor for a wrong arising out of or directly connected with the contract, and which is the means of effecting it and parcel of the same transaction. The same principle was followed in *Bartlett* v. *Welles* (32 & 33). It follows, therefore, that when the present law declares that an infant shall not be liable upon a contract, or in respect of a fraud in connexion with a contract, he cannot be made liable upon the same contract by means of an estoppel under S. 115.

As pointed out already this case went on appeal before the Privy Council in *Mohori Bibi* v. *Dharma Das Ghose* (7) and was decided against the plaintiff on the ground that he knew the truth of the matter and consequently no question of estoppel really arose. At p. 545 Sir Ford North specifically stated that in

(32 & 33) [1862] B. & S. 386.

view of this finding their Lordships did not think it necessary to deal with the question as to whether S. 115 applied to infants or not.

In *Surendra Nath Roy* v. *Krishna Sakhi Dasi* (34) the vendor, while over 18 but below 21 years of age and being himself aware that his minority had been extended by reason of an order under S. 7, Guardians and Wards Act, had sold the property to the plaintiffs, who were not aware of that fact. Caspers and N. R. Chatterjee, JJ., remanded the case for enquiry, whether the vendee was in fact deceived and whether there was misrepresentation and legal fraud on the vendor's part. They expressed the view that if such misrepresentation and fraud was in fact established, the quondam minor would be estopped from taking advantage of his minority to show that the conveyance by him was inoperative. But in the absence of such fraud he cannot be held liable. In *Ram Charan Das* v. *Joy Ram Mejhi* (35) the point was again raised but not definitely decided, though Mukerji, J., expressed the opinion that the proposition that there can never be an estoppel against an infant, is too broadly stated and requires qualifications in the cases of fraud. The last Calcutta case is *Golam Abdur* v. *Hem Chandra* (36), in which on the finding that the representation by the minor was not fraudulent, N. R. Chatterjee and Newbould, JJ., repelled the plea of estoppel and held that

> the law of estoppel must be read subject to other laws such as the Indian Contract Act

and that a minor

> cannot be made liable upon a contract by means of an estoppel under S. 115, Evidence Act.

In view of their finding that the representation in that case was not fraudulent they did not think it necessary to decide whether a man can be estopped when the minor intended to deceive the opposite party and the latter was in fact deceived.

It will thus be seen that the rulings of the Calcutta Court on this point are not uniform. The balance of authority, however, appears to be in favour of the view that while generally speaking the plea of estoppel cannot prevail against a minor he may be estopped in cases where the representation made by him was fraudulent and has in fact resulted in defrauding the representee. It must, however, be borne in mind, as has been pointed out already, that the only considered decisions of that Court, in which this conclusion was arrived at, were given at a time when it was erroneously believed that a minor's contract was voidable and not void.

At Allahabad the question appears to have been first considered in *Jagar Nath Singh* v. *Lalta Prasad* (17), where Banerji, J., held that :

> the law of estoppel can only be applied subject to other provisions of law, and therefore, when, as held by the Privy Council, a contract by a minor is void under the provisions of the Contract Act, the law of estoppel cannot be invoked in aid to validate that which is void under the law.

He, however, held that on equitable grounds the quondam minor must restore the benefit he has derived as a result of his fraudulent representation. But the learned Judge took care to point out that the liability to restitution attached to the minor, not on the ground of estoppel, but because "an infant shall not take advantage of his own fraud." The other member of the Bench, Richards, J., however, took a different view of the facts and held that the representation in question was not fraudulent. Another Bench of this Court (Richards and Tudball, JJ.) in *Kanhaiya Lal* v. *Babu Ram* (37) held that in a suit brought for recovery of money on a promissory note, the defendant was competent to plead his infancy although he had misrepresented his age to the plaintiff at the time of the execution of the promissory note. The same view was taken by Karamat Husain and Chamier, JJ, in *Kanhaya* v. *Girdhari Lal* (38) and by Richards, C. J, and Banerji, J., in *Dhara Singh* v. *Gyan Chand* (39), though in this latter case the High Court refused to set aside the decree against the minor on the ground that the case had come up before it on the revision side.

The first Madras case which needs notice is *Vaikunta Rama Pillai* v. *Authimoolam Chettiar* (16), where, after citing with approval an obiter dictum to the same effect in *Arumugam Chetti* v. *Durasinga Tevar* (40), it was held that the plain statutory provision that a

(34) [1911] 15 C. W. N. 239=9 I. C. 110=13 C. L. J. 228.
(35) [1913] 17 C. W. N. 10=16 I. C. 825=16 C. L. J. 185.
(36) [1916] 20 C. W. N. 418=32 I. C. 393.
(37) [1911] 8 A. L. J. 1058=8 I. C. 888
(38) [1912] 9 A. L. J. 103=13 I. C. 956.
(39) [1918] 16 A. L. J. 441=45 I. C. 761.
(40) [1914] 37 Mad. 38=21 M. L. J. 1077=12 I. C. 568=(1911) 2 M. W. N. 461.

minor is incompetent to incur a contractual debt cannot be overruled by an estoppel. Again in *Raghavayya* v. *Subbayya* (41) Courts-Trotter and Seshagiri Ayyar, JJ., held that a sale-deed executed by a minor is liable to be cancelled by him after attaining majority, but that the Court before granting him possession can put him on terms. Reference was made to *Leslie* v. *Shiell* (9) and *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (10); and the decision in *Dadasahev Dasrathrao* v. *Bai Nahani* (3) was dissented from. The same view was taken in *Guruswamy Pantulu* v. *Budhkaran Lal* (42) though the point is not discussed in any detail. The latest Madras case is *Venkataramayya* v. *Punnayya* (43), where Reilly, J. followed, though not without hesitation, the previous rulings of the Court and repelled the plea of estoppel, but directed the quondam minor to refund the consideration retained by him.

The same view has also found favour with the Rangoon and Patna High Courts. See *Maung Tin* v. *Ma Lun* (44) and *Ganganand Singh* v. *Ramashwar Singh* (18). In the latter case, Das J., held (Adami, J. concurring) that a minor is not bound in law by a contract into which he had entered, even if he induced the other party to enter into it by a fraudulent misrepresentation that he was of age; but where the infant had obtained an advantage by falsely stating himself to be of full age, equity would restore his ill-gotten gains and release the party deceived from obligations or acts induced by the fraud. In order to create this liability, however, the representation must be express and fraudulent and will not be constituted so by mere inference suggested by or drawn from the infant's conduct.

The Sindh Judicial Commissioner's Court at Karachi for a time followed the decisions of the Bombay High Court and upheld the plea of estoppel in several cases : see *Sobhanmal Pohumal* v. *Bachal* (45) and *Lunidomal Khiloomal* v. *Ghanumal Jamna Das* (46). But a Full Bench of that Court has recently taken the contrary view in *Mt. Hari* v. *Roshan* A. I. R. 1923 *Sindh* 5, and has held that S. 115 is inapplicable to such a case.

The above review of the authorities shows that the consensus of judicial opinion in India is decidedly against giving effect to the plea of estoppel in such cases. This has been definitely ruled in Allahabad, Madras, Patna, Rangoon and Karachi; and the Calcutta High Court, while taking the same view on the general question, has in some decisions qualified the proposition by holding that the minor may be estopped where the representation was fraudulent and the representee had in fact been deceived. In our own Court the rulings are not uniform, but the latest decision is in accord with the view taken by the majority of the other Courts. In the Bombay High Court, however, the contrary opinion still holds good, according to which the quondam minor is debarred from setting up the minority in avoidance of the contract. Now I may say at once that I have no hesitation in accepting the reason given by Beaman, J., in *Dadasaheb Dasrathrao* v. *Bai Nahani* (3), for dissenting from the view taken by Maclean, C. J., and the other Judges of the Calcutta High Court in *Brahmo Dutt* v. *Dharmo Das Ghose* (6) that the word "person" in S. 115 must be taken to have been used as meaning only a person sui juris. In my opinion neither the context nor the general scheme of the Evidence Act nor the established canon of interpretation of statutes warrants such a restricted meaning being put on the word. In the absence of there being anything in the definition clauses or other parts of the Act to indicate that a technical meaning has been imposed on the word, it must be taken to cannote what it does in ordinary plain English. Secondly in S.. 115 itself the word "person" is found twice—at one place in reference to the representor (or the person of incidence as he is called by American lawyers) and at the other in reference to the representee (or the person of inherence). Now it is not suggested that the legislature intended to use the same word in two different senses in the same section. If, therefore, it has the same meaning in both places, and is to be taken to mean only a person sui juris, the startling result will follow that even in those cases in which

(41) [1918] 7 M. L. W. 124=43 I. C. 908.
(42) [1919] 10 M. L. W. 225=53 I. C 14=26 M. L. T. 245.
(43) A. I. R. 1926 Mad. 607.
(44) A. I. R. 1927 Rang. 108.
(45) [1916] 9 S. L. R. 214=34 I. C. 890.
(46) [1920] 14 S. L. R. 104.

the minor is the person of inherence (representee) and has acted to his detriment on the belief of the representations made to him by an adult, he shall not be allowed to take advantage of the doctrine of changed situations and shall be debarred from putting forward the plea of estoppel against the opposite party. So far as I am aware such a contention has never been put forward and cannot possibly be accepted as correct. Then again we find the word "person" in several other sections of the Act, e. g., Ss. 8, 10, 112, 116, 118, 122 etc, and it is conceded that in none of them it can be given a restricted meaning so as to exclude minors. This being so, the well-settled rule of construction must be applied that the same words are to be prima facie construed in the same sense in different parts of the same statute: per Chitty, J., in *Spencer* v. *Metropolitan Board of Works* (47). I am, therefore, of opinion that S. 115 cannot be held to be inapplicable on this ground.

Nor am I prepared to accept the argument which seems to have appealed to the learned Judicial Commissioners of Sind in the Full Bench case, above cited, to the effect that as under S. 115 the representor must intentionally cause or permit another person to believe a certain thing to be true and to act upon such belief, and as it is only a person of mature judgment who can be supposed to have such an intention the section cannot apply to a minor. It will be sufficient to say that this construction is opposed to the decision of their Lordships of the Privy Council in *Sarat Chander Dev* v. *Gopal Chander Laha* (15), where it was held that the term "intentionally" has been advisedly used in the Indian Act for the purpose of declaring the law in India to be precisely the same as the law of England, according to which it is not the real intention of the representor which matters, but what has to be seen is whether he has so conducted himself that a reasonable man would take the representation to be true end believe that it was meant that he should act upon it.

This brings us to the remaining but really substantial point, viz, whether the specific provision of the substantive law (S. 11, Contract Act), which declares a minor's contract to be void, can be rendered nugatory by a general provision embodying the rule of estoppel found in a procedural Code like the Evidence Act. In order to find a satisfactory answer to this question two fundamental principles must be borne in mind. The first is embodied in the great maxim *generalia specialibus non derogant*, which has frequently been applied to resolve the apparent conflict between provisions of the same statute or of different statutes. In such cases, wherever there is a particular enactment and a general enactment and the latter, taken at its most comprehensive sense, would overrule the former, the particular statute must be operative : *Pretty* v. *Solly* (48) and its provisions must be read as excepted out of the general : *Dryden* v. *Overseers of Putney* (49) and *Taylor* v. *Corporation of Oldham* (50). The second is that where a a particular act is declared to be void and unlawful by statute a party cannot by representation, any more than by other means, raise against him an estoppel so as to create a state of things, which he is under a legal disability from creating. As pointed out by vice-Chancellor Bacon in *Barrow's case* (51) :

> The doctrine of estoppel cannot be applied to an Act of parliament. Estoppel only applies to a contract inter parties, and it is not competent to the parties to a contract to estop themselves or anybody else in the face of an Act of Parliament . . . I am of opinion that as between the parties to this contract there was no estoppel, they contracted to do a thing which in the result it was unlawful to do.

On the same principle it has been held that a corporate body cannot be estopped from denying that they have entered into a contract, which it was ultra vires for them to make : see *Canterbury Corporation* v. *Cooper* (52).

In this connexion I think it is legitimate to seek guidance from the English law, for though in India the law on the subject of estoppel has been codified, it has been held by their Lordships of the Privy Council in *Sarat Chunder Dev* v.

(47) [1883] 22 Ch. D. 142=52 L. J. Ch. 249=31 W. R. 347=47 L. T. 459.

(48) [1857] 26 Beav. 606.

(49) [1876] 1 Ex. D. 223=34 L. T. 69.

(50) [1877] 4 Ch. D. 395=46 L. J. Ch. 105=25 W. R. 178=35 L. T. 696.

(51) [1880] 14 Ch. D. 432=49 L. J. Ch. 498=42 L. T. 391 affirmed on appeal in 14 Ch. D. 443.

(52) [1909] 100 L. T. 597=73 J. P. 225=53 S. J. 301=7 L. G. R. 908.

Gopal Chandar Lala (15) that the law enacted in S. 115 relating to estoppel doer not differ from the English law on the subject. In *Levene* v. *Brougham* (8) it has been held by the Court of appeal that such a contract being void under the Infants Relief Act, the defendant was not estopped from relying on the statute by the fact that he had made a misrepresentation as to his age. Then there is the much cited case of *Leslie* v. *Shiell* (9) where, however, the question of estoppel was not raised or discussed, it being assumed that a suit to enforce the contract as such would not lie and the real points raised and decided were that in such a case an action delicto for damages on the basis of deceit will not lie, nor can the creditor recover from the defendant the amount as money "had and received" by him for the plaintiff's benefit. The Court of appeal, re-affirming the rule laid down in numerous cases that an infant is not answerable ex delicto, as the tort is directly connected with the contract, which the infant is entitled to avoid. Therefore, this case also supports, though indirectly, the conclusion arrived at in *Levene* v. *Brougham* (8) and is of particular value as having been approved by the Privy Council in the obiter dictum in *Mahomed Syedol Arrifin* v. *Yeoh Ooi Gark* (10) already referred to.

I am, therefore, of opinion that both on principle and authority, the first question referred to the Full Bench must be answered in the negative and it must be held that the minor is not estopped rom pleading his minority in avoidance of the contract. I wish, however, to remark that while this is my well considered opinion on the point I have arrived at it after a great deal of hesitation, for I find that there exist weighty considerations for the opposite view which has in support of it the high authority of eminent Judges in England, India and America and of several learned authors who have made a special study of the subject. In view of this serious divergence of opinion on the subject, I venture to think that it is high time for the legislature to intervene and set the controversy at rest as has been done in several States in America : see American Cyclopedia of Law in Procedure, vol. 32, p. 611 and Curpus Juris vol. 31, p. 1005, et seq. The question is frequently arising and in the absence of an authoritative pronouncement by their Lordships of the Privy Council there does not appear to be much chance of unanimity of judicial opinion on it.

The next question to be decided resolves itself into two parts :

(a) Whether the quondam minor can avoid the contract and at the same time retain the benefit derived by him therefrom ; and,

(b) whether the matter is in any way affected by the circumstances that he is a plaintiff or a defendant in the action in which the question arises.

On both these points again there is considerable conflict of judicial opinion though, speaking for myself, I do not feel the same difficulty here as I do on the first question. It has been argued for the appellant that the contract being void and the Court being incompetent to enforce it or to grant relief in an action ex delicto arising from the deceit practised by the minor, it follows as a matter of course that it has no jurisdiction to order restitution or repayment of the consideration for this would be doing the same thing in another garb. In my opinion this argument is fallacious and ought to be rejected. In ordering restitution the Court is not enforcing a void contract but is restoring the parties to the status quo ante. The necessary consequence of the declaration that the contract is void is to wipe it off entirely out of consideration, to treat it as if it never had any existence, and the Court, while granting the minor this relief is not powerless to adjust the equities between the parties and can make the fraudulent minor restore what he has obtained by the very contract which he is now seeking successfully to avoid. This is in accord with equity, justice and good conscience and appears to have been recognized for a long time by the Courts in England. It is no doubt true that there are dicta in several English decisions that this jurisdiction to make restitution in integrum is limited to those cases only in which it is possible to compel the minor to restore the property in specie which he had obtained by fraud and that the Courts, while holding a contract to be void, cannot order him to refund the money which he has received under it. It is not, however, necessary to discuss the decisions which bear on

the point and which it is not always easy to reconcile as in India jurisdiction of Courts to require a party at whose instance an instrument has been adjudged to be void to make any compensation to the other party, which justice may require, has been expressly recognized by the legislature in Ss. 39 and 41, Specific Relief Act. It will be noticed that this power to grant compensation is not confined to those cases only in which the instruments related to transfer of property, nor is the mode in which compensation is to be given defined. The discretion of the Courts in the matter seems to be absolutely unfettered. They might, therefore, in appropriate cases, while adjudging a deed executed by a minor to be void, order refunds of the monetary consideration received by him under the contract and in addition make him restore any other benefit which he has derived therefrom.

It is no doubt true that Ss. 39 and 41 relate to those cases only in which the minor is the plaintiff; but that does not affect the question of jurisdiction of the Courts to grant equitable relief, either by way of restitution of the property in specie or by refund of the money with or without interest. Of course, whether compensation is to be granted at all and if so to what extent and in what form are matters to be determined by the Courts in each particular case according to its peculiar facts and circumstances. But it does not seem to me to be open to doubt that the Courts in this country possess the powers to compel the fraudulent minor to restore the benefit derived by him from a void contract. This was recognized by Chief Court in *Balak Ram* v. *Dadu* (22) and, so far as I am aware, has been accepted all along as correct law: see also *Kupura* v. *Hardit Singh*, *A. I. R.* 1923 *Lah.* 510. The same view has been taken at Allahabad: see *Jagan Nath Singh* v. *Lalta Parsad* (17), and *Lila Dhar* v. *Piarey Lal* (53), at Madras in *Vikuntarama Pillai* v. *Authimoolam Chettiar* (16), and *Raghavyya* v. *Subhayya* (41), at Patna in *Ganganand Singh* v. *Rameshwar Singh* (18); and by the High Court of Calcutta in *Saral Chand Mitter* v. *Mohun Bibi* (5).

It remains now to notice the subsidiary question whether the power of the Court to order restitution is limited to those cases only in which it has been moved by the minor himself; whether before or after attaining majority, or whether the Court can grant relief also when he is the defendant. On this question again the authorities are not uniform, but after giving the matter my fullest consideration I am of opinion that there is no justification for making such a distinction. It is no doubt true that S. 41, Specific Relief Act, relates to those cases only where the minor is the plaintiff, but its terms are not exhaustive and I fail to see why the equitable jurisdiction of the Court should be affected by the fact that the minor comes before it as a defendant. The Court exercises this power to do complete justice between the parties by restoring them to the position which they occupied before the void contract was entered into and the mere circumstance, that the minor is arrayed before it on one side or the other, ought not to make any difference.

For the foregoing reasons my answer to the reference is:

(1) That in the circumstances stated in the question the quondam minor is not estopped from pleading his minority in avoidance of the contract.

(2) that he cannot in subsequent litigation refuse to perform the contract and at the same time retain the benefit which he had derived therefrom.

(3) It makes no difference whether in such litigation he is the plaintiff or the defendant.

D.D. *Reference answered.*

(53) A. I. R. 1921 All. 326.

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* A. I. R. 1928 Lahore 627

Full Bench

BROADWAY, ADDISON AND TEK CHAND, JJ.

(*Bhai*) *Kirpa Singh*—Defendant—Appellant.

v.

Rasalldar Ajaipal Singh and *others*—Plaintiffs—Respondents.

First Appeal No. 2630 of 1922, Decided on 23rd June 1928, from decree of Senior Sub-Judge, Amritsar, D/- 5th October 1922.

* (*a*) *Sikh Gurudwaras Act* (*Punjab Act* 8 *of* 1925), *S.* 39—*Act coming into force during pendency of appeal from suit regarding manage-*

ment of Gurudwara—High Court can hear appeal—Procedure indicated.

The enactment of the Sikh Gurudwaras Act and the issue of a notification made under the provisions of the said Act declaring the Gurudwaras to be a Sikh Gurudwara do not bar the jurisdiction of the High Court to deal with an appeal against the decree of the subordinate Courts passed in a suit under S. 92, Civil P. C., in respect of Gurudwara, which appeal was pending when the Act came into force or the notification was issued. The High Court must hear and decide the appeal, though in view of the imperative provisions of S. 3 it may not be possible for it to grant all the reliefs claimed. Under that section it is not open to the Court to go into the question whether or not the Gurudwara is a Sikh Gurudwara, nor can it settle a scheme of management in respect of such a Gurudwara. The procedure laid down in S. 32 is applicable to "suits" or "proceedings" ejusdem generis pending in a Court of first instance and does not govern a pending appeal even if all or some of the matters mentioned in that section arise for decision in the appeal. [P 634 C 2]

✲ (*b*) *Appeal—Right to, is vested right—Statute abolishing right of appeal must do it expressly or by necessary implication—Interpretation of statutes.*

It is now authoritatively settled that the right of appeal is not a mere matter of procedure, but is a vested right which inheres in a party from the commencement of the action in the Court of first instance. If according to the law in force at the time when the action was started in the Court of first instance the ultimate decision of such Court was appealable, the right to prefer or prosecute an appeal therefrom is not affected by subsequent change of the law abolishing the appeal or modifying its forum unless it is so provided expressly in the amending statute or follows by necessary implication from its terms. *Colonial Sugar Refining Co., Ltd.* v. *Irving*, (1905) *A. C.* 369, *Rel. on.* [P 630 C 2; P 631 C 1]

✲ (*c*) *Interpretation of Statutes—Vested rights must be respected.*

Statutes should be interpreted, if possible, so as to respect vested rights and in the absence of anything in an enactment to show that it is to have retrospective operation it cannot be so construed as to have the effect of altering the law applicable to a claim in the litigation at the time when the Act is passed. [P 631 C 1]

✲ (*d*) *Interpretation of Statutes—Some sections only retrospective—Particular section must be examined.*

When a statute is retrospective with regard to certain sections only and silent as to others the rule to be followed in construing such a statute is that the Court should examine the subject-matter of the enactment of the particular section and decide whether it is to be supposed that retrospective construction was intended by the legislature to be given to it. [P 631 C 1 & 2]

(*e*) *Interpretation of Statutes—Retrospective effect.*

A statute is not to be construed so as to have a greater retrospective effect than its language renders necessary. [P 631 C 2]

✲ (*f*) *Words—"Suit or proceeding."—Meaning depends on context in a particular case.*

The words "suit," "proceeding," and words of similar connotation have different meanings in different statutes and it is not possible to lay down a general rule of interpretation which would be applicable to all cases. In each particular case the question has to be examined in reference to the context and that meaning is to be preferred which will best fit in with it. [P 632 C 2]

(*g*) *Sikh Gurudwaras Act* (1925), *Ss.* 29 *and* 32—*Suit does not include appeal.*

The words "suit" or "proceeding," in Ss. 29 and 32 must be construed in a narrow sense as signifying an action in the trial Court or proceedings ejusdem generis and cannot be held to include appeals. [P 632 C 2]

Hazara Singh, *Jagan Nath Agarwal* and *M. L. Batra*—for Appellant.

G. C. Narang, *Man Singh* and *Bhagat Singh*—for Respondents.

Tek Chand, J.—The reference has arisen out of a suit instituted on 26th July 1921 in the Court of the Senior Subordinate Judge, Amritsar, with the previous sanction of the Collector obtained under S. 92, Civil P. C., by certain worshippers of the Gurdwara of Guru Sar Sutlani praying that the defendant be removed from the office of the Mahant of the Gurdwara, that he be directed to render accounts of the trust properties, and that a scheme of management under a "committee of administration" be settled. It was alleged that the defendant had set up a title adverse to the trust with respect to the Gurdwara and the properties attached thereto, that he had been guilty of waste and misappropriation of large sums of money and of neglect of his religious duties, and that he was a man of immoral character and otherwise unfit to hold charge of his office as Mahant. The defendant denied these allegations, but the Subordinate Judge decreed the suit holding that the Gurdwara was a Sikh Gurdwara, that the properties in suit were attached to the institution and that the defendant was not a fit person to continue as Mahant. He accordingly ordered his removal from the office and settled a scheme for the appointment of his successor, who was to be assisted by a committee of management. He also ordered the defendant to submit accounts for a specified period for the scrutiny of the committee, and further directed that an allowance of Rs. 75 per mensem be paid out of the Gurdwara income to him as maintenance for his

lifetime and that he be given a house at Amritsar for residence. The costs of the suit were ordered to be paid by the defendant personally and not from the Gurdwara income.

From this decree two appeals were lodged to this Court: C. A. 2630 of 1922, presented on 23rd October 1922 by the defendant praying for the dismissal of the suit, and C. A. 182 of 1923, preferred on 8th January 1923, by the plaintiffs objecting to the grant of maintenance allowance and the house for residence to the defendant. When these appeals came up for hearing before a Division Bench on 26th March 1928, a preliminary objection was raised on behalf of the plaintiffs that the Sikh Gurdwaras Act 8 of 1925 having in the meantime come into force on 1st November 1925, and the Gurdwara in question having been declared to be a "Notified Sikh Gurdwara" under the provisions of that Act, the High Court had no jurisdiction to hear and dispose of the appeals, even though they had been instituted before the Act was passed. As the points raised were of considerable importance the learned Judges of the Division Bench referred the following three questions for the opinion of the Full Bench :

(1) What is the effect of the provisions of the Sikh Gurdwaras Act upon the jurisdiction of the High Court in entertaining an appeal from a decree passed in a suit under S. 92, Civil P. C., with respect to a Gurdwara when such a suit had been decided and an appeal had been preferred to the High Court against the decree of the trial Court *before* the Sikh Gurdwaras Act came into force ?

(2) What difference if any would it make if the Gurdwara, the subject-matter of the suit under S. 92, has been notified as a Sikh Gurdwara under the Sikh Gurdwaras Act after the decision of the trial Court but before the institution of the appeal ?

(3) In case the High Court is not competent to decide these appeals on account of the provisions of the Sikh Gurdwaras Act what further procedure should be adopted by the High Court with a view to forward the records to the tribunal constituted under the provisions of the Sikh Gurdwaras Act ?

It will be noticed that question (1) is expressed in somewhat general terms and asks us to determine the effect of the Sikh Gurdwaras Act on the jurisdiction of the High Court to deal with an appeal which was pending on 1st November 1925, against a decree passed by a subordinate Court in a suit under S. 92, Civil P. C., "with respect to a Gurdwara." Now for the purposes of the Act, Gurdwaras may, broadly speaking, be divided into three main classes :

(A) Gurdwaras included in Sch. 1 of the Act and declared to be "Notified Sikh Gurdwaras" under S. 3 (2).

(B) Gurdwaras, not included in the schedule but in respect of which proceedings have been taken under S. 7 *et seq* of the Act to have them declared Sikh Gurdwaras.

(C) Those which do not fall under class (A) or class (B).

The question as framed is not confined to cases falling in class (A) alone, but includes within its scope Gurdwaras of all the three classes. As the Gurdwaras with which we are concerned in this and the connected references were included in Sch. 1 and no proceedings had admittedly been taken within the prescribed period to have them excluded from it, it was decided at the hearing, with the concurrence of all parties, to limit the arguments to Gurdwaras of class (A) only. I shall accordingly discuss the matter in so far as it relates to such Gurdwaras alone and not concern myself with those which fall under class (B) or class (C).

Dr. Narang, who appeared for the plaintiffs-respondents began his arguments by boldly asserting that as a result of the enactment of the (Punjab) Act 8 of 1925 and of the Sikh Gurdwaras Supplementary Act 24 of 1925 (passed by the Central Legislature) all cases relating to Notified Sikh Gurdwaras, which were pending on 1st November 1925, in all civil Courts (including the High Court on its appellate side) became "automatically dead" and that from that date these Courts lost all power to proceed further with them and to give decisions thereon. He was, however, unable to refer us to any provision in these Acts in support of this contention, and was eventually constrained to admit that the bar applied (if at all) to the determination of certain specified matters only, which had been either conclusively settled by the legislature or the cognizance of which was transferred exclusively to the Sikh Gurdwaras Tribunal, and that subject to these limitations the Courts were competent to continue the cases pending before them. Of the sections of the Act on which reliance was placed and which will be discussed in detail presently, S. 3 (4) lays down certain presumptions, Ss. 29 and 31 prohibit the Courts from entertaining or

continuing "suits" or "proceedings" in so far as they involve certain specified claims or ask for certain reliefs, and S. 32 provides the mode of enquiry into and decision on certain issues. Even if all or any of these sections were intended to govern pending appeals, they merely deprive the Courts of the power to decide the particular matters mentioned therein and cannot be taken as creating an absolute bar against the Courts proceeding with the appeals, simply because the Gurdwaras concerned had been declared to be notified Sikh Gurdwaras. Therefore, even if we were to accept the respondent's interpretation of these sections, it does not follow that the appeals have automatically come to an end, but it will be for the Court in each case to see which (if any) of the questions arising in it have been taken out of its cognizance and what reliefs, if any, it is no longer competent to grant and then to proceed to decide the remaining points in the ordinary way.

Let us now consider whether all or any of the sections relied on by the respondents apply to appeals which were pending in the High Court on 1st November 1925 when the Act came into force. Sub-S. (4), S. 3, lays down *inter alia*, (a) that the publication of a declaration and of a consolidated list under the provisions of sub-S. (2) shall be conclusive proof that the Gurdwara is a Sikh Gurdwara, and (b) that from the date of the publication of the notification declaring it to be a Sikh Gurdwara the provisions of Part 3 of the Act shall apply to it. In S. 41, which appears in Part 3, it is stated that the management of every Notified Sikh Gurdwara shall be administered by the committee constituted therefor, the Board, and the commission, in accordance with the provisions of this Act, and other sections in that part prescribe the machinery by which such administration is to be carried on. Now the terms of sub-S. (4), S. 3 are clear, explicit and imperative, and admit of no exception whatever. They determine conclusively the nature of certain Gurdwaras and lay down the law as to their future control and management. Pending litigation is not excluded from their purview and (provided the conditions laid down in the sub-section are fulfilled) it is not open to any Court including this Court, to determine whether or not a Notified Gurdwara is a Sikh Gurdwara or to settle a scheme for its future control and management. These two matters are, therefore, settled by the legislature and this Court cannot, go into them.

I shall next consider sub-S. (1), S. 31, on which reliance was placed on behalf of the respondents. This sub-section reads as follows :

> No Court shall continue any proceedings in so far as such proceedings involve any claim relating to a gurdwara specified in Sch. 1 or in regard to which a notification has been published under the provisions of sub-S. (2), S. 3, *if such claim could have been made in a petition forwarded to the Local Government* under the provisions of S. 5 or S. 6 or presented to a tribunal under the provisions of Ss. 19, 20, 21 or 27 and *was not so made*, unless and until such Gurdwara is deemed to be excluded from specification in Sch. 1 under the provision of S. 4.

The language used is no doubt obscure on certain points and was the subject of much discussion at the Bar, but it is clear from the portions underlined (here italicized) that this section governs only those cases in which petition could have been made to the Local Government under S. 5 or S. 6 or to the tribunal under S. 17 *et seq*, and were *not* so made. It does not apply whether either petitions could not have been made, or if they could have been made were not actually made within the period prescribed therefor. Now it was stated at the Bar by the counsel for both parties in this and the connected reference (*C. A.* 545 *of* 1925) that the parties concerned had actually presented to the Local Government petitions under S. 5 and that such petitions had been forwarded to the Tribunal for disposal. This being so S. 31(1) does not obviously apply and cannot affect the power of the High Court to proceed with these appeals.

It now remains to examine Ss. 29 and 32 of the Act and see what effect, if any, they have on the appeal before us. Before examining these sections, however, I think it necessary to point out that it is now authoritatively settled that the right of appeal is not a mere matter of procedure but is a vested right which inheres in a party from the commencement of the action in the Court of first instance. If according to the law in force at the time when the action was started in the Court of first instance the ultimate decision of such Court was ap-

pealable the right to prefer or prosecute an appeal therefrom is not affected by a subsequent change of the law abolishing the appeal or modifying its forum, unless it is so provided expressly in the amending statute or follows by necessary implication from its terms. In *Colonial Sugar Refining Co. Ltd.* v. *Irving* (1) Lord Macnaghten, delivering the judgment of the Judicial Committee in a case from New South Wales, which according to the law in force at the time when the action was brought was appealable to the Privy Council, but in which under the Australian Commonwealth Judiciary Act (which had been enacted in the meantime) the appeal lay to the newly constituted Supreme Court, observed :

> The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is : Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure ? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively, unless a clear intention to that effect is manifested.

It is an established canon of interpretation that "statutes should be interpreted if possible, so as to respect vested rights" *Hough* v. *Windus* (2), and in the absence of anything in an enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act is passed : *Leeds and County Bank* v. *Walker* (3) and *Moon* v. *Durden* (4).

Again cases may arise (and the present seems to me to be such a case) when a statute is retrospective with regard to certain sections only and silent as to others. The rule to be followed in construing such a statute was thus explained in the House of Lords by Lord Cairns L. C., in *Gardner* v. *Lucas* (5) :

> No doubt there is, with regard to some of its sections a very clear statement that they shall apply only to instruments written after the passing of the Act ; and with regard to other sections there is an equally clear statement that those sections shall apply to things done both before and after the passing of the Act, and there is a third class of cases, of which the 38th and 39th sections are examples, in which the Act contains no clear and explicit statement of whether it is to be retrospective or merely to be prospective. But in a case of that kind your Lordships have to examine the subject-matter of the enactment of the *particular section which you have to construe*, to bear in mind the effect of a construction which would make it retrospective, and to ask yourselves whether it is to be supposed that that construction was intended by the legislature to be given to it. Your Lordships have further to guide and direct you, the observations which were made in this House in the case last referred to at the Bar, the case of *Urquhart* v. *Urquhart* (6), that in a matter of this nature any Court will be slow to construe an enactment as retrospective and thereby as disturbing existing rights, unless Parliament has clearly said that the enactment is to be construed retrospectively.

Based on the principle underlying the rules enunciated above, another and a subordinate rule has been laid down, that a statute is not to be construed so as to have a greater retrospective effect than its language renders necessary and that in construing "a section which is to a certain extent retrospective, the maxim ought to be borne in mind as applicable whenever the line is reached, at which the words of the section cease to be plain" (Maxwell's Interpretation of Statutes, 6th edn., 382). These being the established rules of interpretation to be followed in interpreting statutes which purport to affect vested rights, let us now proceed to apply them to Ss. 29 and 32, Sikh Gurdwaras Act. It is admitted that in neither of these sections is there an express prohibition against an appellate Court proceeding to determine in a pending appeal the particular matters specified therein. The Bar applies in terms to "suits" or "proceedings" and not to "appeals." It has, however, been contended on behalf of the respondents that an appeal is in reality a continuation of the suit, in which the decree under appeal was passed by the Court of the first instance, and, therefore, the sections must be held to include in their ambit, if not expressly at least by necessary implication, the entire litigation beginning with the filing of the plaint or the making of the initial application in

(1) [1905] A. C. 369=74 L. J. P. C. 77 = 21 T. L. R. 513=92 L. T. 738.
(2) [1884] 12 Q. B. D. 237.
(3) [1883] 11 Q. B. D. 84.
(4) 76 R. R. 479 (495).
(5) [1878] 3 A. C. 582 (589).
(6) 1 Macq. 736.

the trial Court, and ending with the decision of the Court of ultimate appeal or revision. In support of this contention reliance was placed on *Gobind Chundar Roy* v. *Guru Churan* (7), *Dinonath Ghose* v. *Shama Bibi* (8), *Settappa Goundan* v. *Muthia Goundan* (9), *Kristama Chariar* v. *Mangam Mal* (10), *Atchayya* v. *Seetharamachandra* (11) and *Rustomji* v. *Official Liquidator, People's and Amritsar Banks, Ltd.* (12). In the the first three of these cases the question involved was whether, in reference to S. 52, T. P. Act, the rule of *lis pendens* applied to the period between the passing of the decree of the trial Court and the institution of the appeal therefrom. The fourth case interpreted Art. 179, Limitation Act, 1877 and the fifth dealt with S. 115, Civil P. C. In the last case it was laid down that orders passed by the trial Court can be appealed against only by a person who was a party to the litigation before it. The provisions of the law, which the Courts had to interpret in these cases are in no way similar to those of the Sikh Gurdwaras Act and the remarks made therein were not intended to be of universal application but had reference to the particular matter dealt with in each case.

Per contra it is possible to cite an equally large number of cases in which a narrower meaning has been attached to the word "suit" as denoting the stage of the litigation before the Court of the first instance, beginning with the filing of the plaint and ending with the decree or final order passed by such Court: see for example *Mrs. B. Baness* v. *Turton* (13), *Dhonessur Kooer* v. *Roy Gooder Sahay* (14), *Watkins* v. *Fox* (15) and the observations in *Mt. Lachhmi* v. *Mt. Bhulli* (16).

Similarly the word "proceeding" has been held in some enactments to include appeals: *Ratan Chand Shri Chand* v. *Hanmantaray Shivbakas* (17), but in others it has been given a narrower meaning. An instructive case of the latter class is *Hood Barrs* v. *Cathcart* (18) where the expression "action or proceeding instituted" in S. 2, Married Women's Property Act (56 and 57 Vict C. 63, S. 2) was interpreted as an action or proceedings *ejusdem generis* in a Court of first instance, "in which the married woman was the actor," and it was definitely ruled that it did not include an appeal preferred by her from an order passed against her by the trial Court in a *lis* in which she was the defendant. This decision was approved by the House of Lords in *Hood Barrs* v. *Heriot* (19). Reference may also be made in this connexion to the judgment of Jessel, M. R, in *Holme* v. *Guy* (20), where a similar interpretation was put on the expression 'suit, petition or other proceedings' in S. 2, (English) Charitable Trust Act, 1853.

An examination of these and other cases leads to the conclusion that "suit" "proceeding" and words of similar connotation have different meanings in different statutes and that it is not possible to lay down a general rule of interpretation which would be applicable to all cases. In each particular case the question has to be examined in reference to the context and that meaning is to be preferred which will best fit in with it.

I have given my most careful consideration to the phraseology used in Ss. 29 and 32 and have examined it in reference to other parts of the Act, and have reached the conclusion that the word "suit or proceeding" must be construed in a narrow sense as signifying an action in the trial Court or proceedings *ejusdem generis* and cannot be held to include appeals. Taking S. 32 first we find it laid down that where in any suit or proceeding pending at the commencement of the Act, in a civil or revenue Court it has become or becomes necessary to decide any claim in connexion with a Notified Sikh Gurdwara which the Court finds might be made under the provisions of Ss. 3, 5, 6, 7, 10, 11, 19, 20, 21 or 27 within the time prescribed therein the Court shall frame an issue in respect of such claim and shall forward the record

(7) [1888] 15 Cal. 94.
(8) [1901] 28 Cal. 23=4 C. W. N. 740.
(9) [1908] 31 Mad. 268=4 M. L. T. 77.
(10) [1903] 26 Mad. 91.
(11) [1916] 39 Mad. 195=18 I. C. 555=24 M. L. J. 112 (F. B.).
(12) [1919] 79 P. R. 1919=49 I. C. 381=12 P. W. R. 1919.
(13) [1883] 23 P. R. 1883.
(14) [1876] 2 Cal. 336 (F. B.)
(15) [1895] 22 Cal. 943.
(16) A. I. R. 1927 Lah. 289=8 Lah. 384 (F.B.).
(17) 6 Bom. H. C. R. 166 (F. B.).

(18) [1894] 3 Ch. 376.
(19) [1897] A. C. 177=66 L. J. Q. B. 356=76 L. T. 299=45 W. R. 507.
(20) [1877] 5 Ch. D 901=46 L. J. Ch. 648=25 W. R. 547=36 L. T. 600.

of the suit or proceeding to a tribunal and thereupon the tribunal shall proceed to hear and determine the issue and record its decision in the form of an order and shall return the record with a copy of its decision to the Court and the Court shall proceed to determine the suit or proceeding in accordance with such decision subject to the provisions of S. 34. In my opinion the procedure laid down in this section was not and could not have been intended to govern appeals, which were pending in the High Court or other appellate Courts on the day the Act came into force. The Tribunals constituted under the Act are admittedly Courts of original jurisdiction and have no appellate powers, and if the intention was to invest them with jurisdiction to deal with matter arising in pending appeals such intention should have been expressed more clearly and explicitly than has been done in S. 32.

Again, the principal function of an appellate Court is to review (subject to O. 41, R. 27, etc.) the evidence recorded by the trial Court and to give its own findings thereon. But if the contention of the respondents were accepted the appellate Court dealing with matters mentioned in S. 32 must ignore the evidence given at the trial of the suit which is under appeal before it, and irrespective of the wishes of the parties, it must frame an issue and submit it to the Tribunal for determination, and after the Tribunal has given its finding thereon and returned the record to the appellate Court, it must (subject to the provisions of S. 34) decide the matter accordingly, without itself considering the evidence and seeing if the conclusions arrived at by the Tribunal are correct or not. In other words, the appellate Court, which is seized of the case, has not to apply its own mind to the matter but (so far as these issues are concerned) it must merely act as a ministerial functionary of the Tribunal, and decide in accordance with the findings recorded by the latter. And the position will be exactly the same whether the appellate Court is the High Court, to which the Tribunal is admittedly subordinate, or an inferior appellate Court like that of the District Judge or the Senior Sub-Judge, and whether the appeal is before the High Court as a first or second appeal or has been filed under the Letters Patent against a decree passed by a single Judge of the Court itself.

In cases in which the order of the Tribunal has been appealed against under S. 34, there will be simultaneously pending in the High Court two appeals, arising out of the same suit one against the decree of the Sub-Judge and the other against the order of the Tribunal. In one of them the Court has to adjudicate on the findings of the Tribunal on the issues referred to it, and in the other it has virtually no judicial functions to perform so far as the matters covered by the issues are concerned. It is conceded that such a position is highly anomalous and incovenient and may at times lead to serious complications. In these circumstances, I am not, in the absence of clear words to the contrary, prepared to hold that S. 32 applies to appeals.

The phraseology used in S. 29 is similar to that in S. 32 and on similar considerations " suit or proceedings " in that section must be given the same meaning. Indeed it seems to me that the respondent's contention, if accepted with regard to this section, will lead to even greater anomalies. Take for instance a case like the one before us, in which the defendant was removed from his office as Mahant of the Gurdwara at Gur Sar Sutlani in due course of law, in execution of a decree which had been passed by a competent Court long before the Act came into force. Against this decree an appeal having been preferred, the whole case had once more become *res sub judice* and a duty was cast on the appellate Court to see if the trial Court had come to correct conclusions on the questions involved, including the question whether the appellant had been rightly removed from office. Let us assume, for the sake of argument, that the decision of the trial Court on this point was palpably erroneous, and on the evidence and under the law in force at the time, the appellant ought not to have been removed. Now if this Court cannot on appeal look into the matter and point out the error of the lower Court, its finding must stand unreversed, and as a result thereof the appellant will be deprived of the benefit of S. 134 and other provisions of the Sikh Gurdwaras Act to which he would have, but for the trial Court's (admittedly erroneous) decree, been entitled as a " present hereditary

office holder " of a Notified Sikh Gurdwara. Indeed it seems to me, that he would have occupied a far better position if the plaintiffs-respondents instead of having him removed through Court in a suit under S. 92 had taken the law into their own hands and forcibly ejected him. For in that case he or his " presumptive successor " would have been entitled to claim compensation under S. 6, but to which they are not even entitled in view of the decision of the lower Court. That this is not a mere fanciful argument is clear from the fact, admitted by both parties at the hearing, that the appellant (ex-Mahant Kirpa Ram) had actually applied for compensation under S. 6 to the Tribunal, but his application was rejected in *limine* on the ground that the section was inapplicable, as he had not been " unlawfully " dispossessed. In this view of the case the appellate Court is debarred from undoing the mischief done by the erroneous order under appeal. With all these startling consequences staring us in the face I am not prepared to hold that the legislature intended, as if it were by a side wind and without expressing itself more clearly than it has done, to effect so material a change in the jurisdiction and powers of the appellate Courts, including the High Court, to deal with matters properly pending before them. As pointed out by Jassell, M. R., in *Jacobs* v. *Brett* (21):

> Nothing is better settled than that an act of Parliament which takes away the jurisdiction of a superior Court of law must be expressed in clear terms. I do not mean to say that it may not be done by necessary implication as well as by express words, but at all events it must be done clearly. It is not to be assumed that the legislature intends to destroy the jurisdiction of a superior Court. You must find the intention not merely implied, but necessarily implied.

In my opinion, S. 29 is no bar to this Court deciding the question whether the appellant had been properly removed by the trial Court, though it may be that in view of S. it may not be possible for it to grant to the appellant all the reliefs claimed by him. I would, therefore, hold that neither S. 29 nor S. 32 applies to pending appeals.

The foregoing discussion deals with questions (1) and (3). Question (2) as framed, does not really arise in this or the connected references, as it contemplates a case in which a Gurdwara has been notified as a Sikh Gurdwara after the decree of the trial Court but before the institution of the appeal. Both, the Gurdwara at Gur Sar Sutlani and the Dharamsala Bhai Abnasha Singh at Wazirabad, were admittedly notified *after* the institution of the appeals. It is, therefore, not necessary to examine this question in any detail, but having regard to the views expressed above, the position in such a case will for all practical purposes be the same as in cases in which a notification had issued during the pendency of the appeal.

To sum up: my answer to the questions referred is as follows :

(1) The enactment of the Sikh Gurdwaras Act and the issue of a notification under the provisions of the said Act declaring a Gurdwara to be a Sikh Gurdwara do not bar the jurisdiction of the High Court to deal with an appeal against the decree of a subordinate Court passed in a suit under S. 92, Civil P. C., in respect of the Gurdwara, which appeal was pending when the Act came into force or the notification was issued. The High Court must hear and decide the appeal though in view of the imperative provisions of S. 3 it may not be possible for it to grant all the reliefs claimed. Under that section it is not open to the Court to go into the question whether or not the Gurdwara is a Sikh Gurdwara nor can it settle a scheme of management in respect of such a Gurdwara. (2) This question does not arise in this reference. (3) The procedure laid down in S. 32 is applicable to " suits " or " proceedings " *ejusdem generis* pending in a Court of first instance and does not govern a pending appeal, even if all or some of the matters mentioned in that section arise for decision in the appeal.

Broadway, J.—I concur.

Addison, J.—I concur and have nothing to add.

D.D. *Reference answered*

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(21) [1875] 20 Eq. 1=44 L. J. Ch. 377=23 W. R. 556=32 L. T. 522.

A. I. R. 1928 Lahore 635

JAI LAL, J.

Shiv Dial—Plaintiff—Petitioner.

v.

Shiv Ram Das, and *others* — Defendants—Respondents.

Civil Revn. Petn. No. 305 of 1928 (formerly Civil Appeal No. 2902) Decided on 10th April 1928, from order of Dist. Judge, Jhang, D/- 27th August 1926.

Court-fees Act, S. 7 (10) (a)—Specific performance.

In a suit for specific performance of contract for sale of land the proper valuation is the price agreed to be paid for the same: *A. I. R. 1924 Lah.* 439; and *A. I. R. 1924 Mad.* 360; *Foll.*: 60 *I. C.* 512 and 128 *P. W. R.* 1918, *Diss. from.* [P 635 C 2]

J. L. Kapur—for Petitioner.

Kahn Chand—for Respondents.

Judgment.—It was alleged in the plaint that the respondent agreed to sell his land assessed at four annas per annum as land revenue to the plaintiff for Rs. 22,300. The defendant having declined to carry out the contract to sell, the suit out of which these proceedings have arisen for specific performance and possession of the land, was filed by the plaintiff. The suit was valued for the purposes of Court-fee at Rs. 3-8-0 and for purposes of jurisdiction at Rs. 10. On an objection being taken by the defendant as to the valuation of the suit the trial Court held that the valuation by the plaintiff was correct. It finally dismissed the suit on its merits.

The plaintiff appealed to the District Judge who held that the proper value for the purposes of Court fee and jurisdiction should have been Rs. 22,300, that is, the price agreed to be paid for the land, and that he had no jurisdiction to hear the appeal according to such valuation and therefore he returned the memorandum of appeal for presentation to the proper Court. The plaintiff thereupon filed an appeal in this Court.

The first ground of appeal is directed against the order of the District Judge returning the memorandum of appeal on the ground that he had no jurisdiction to entertain the appeal. The remaining grounds of appeal are directed against the decree of the trial Court, dismissing the suit on its merits. Various objections to this appeal were taken before me by the respondent's counsel. The first objection was that no appeal lay to this Court from the order of the District Judge, returning the memorandum of appeal. Mr. Jiwan Lal Kapur, who appeared for the appellant, thereupon asked me to treat these proceedings as a petition for revision from the order of the District Judge. This course necessarily eliminated from consideration by me of the grounds of appeal Nos. 2 to 7. I permitted the appellant to treat this as a petition for revision and proceeded to decide the question whether the view of the District Judge that he had no jurisdiction to hear the appeal was correct.

This view is directly supported by a judgment of a Division Bench of this Court reported in *Fakir Chand* v. *Ram Datt* (1) and is further supported by *Sundararamanujam Naidu* v. *Sivalingam Pillai* (2). Both these authorities are to the effect that in a suit for specific performance of contract for sale of land the proper valuation is the price agreed to be paid for the same. Following these authorities I hold that the appeal did not lie to the District Judge and consequently his view is correct. The counsel for the petitioner sought to distinguish *Fakir Chand* v. *Ram Datt* (1) on the ground that no prayer for possession had been made in the reported case, whereas there was a prayer for possession in this case and he cited *Gopal Das* v. *Paramanand* (3) and *Nathe Khan* v. *Mahomed Khan* (4) both of which are Single Bench judgments of this Court. They have been fully discussed in *Sundararamanuja Naidu* v. *Sivalingam Pillai* (2); moreover I must follow the judgment in *Fakir Chand* v. *Ram Datt* (1).

Mr Kapur, however, contended that the District Judge had no jurisdiction to decide the question of valuation for the purposes of jurisdiction and that he could only decide the question of valuation for purposes of Court-fee. Under S. 8, Suits Valuation Act, the valuation for purposes of Court-fee and jurisdiction in a case like the present must be the same. The District Judge was bound to decide first whether he had

(1) A. I. R. 1924 Lah. 439=5 Lah. 75.
(2) A. I. R. 1924 Mad. 360=47 Mad. 150.
(3) [1919] 60 I. C. 512.
(4) [1918] 128 P. W. R. 1918=46 I. C. 534.

jurisdiction to hear the appeal and in doing so he had necessarily to decide the valuation both for purposes of Court-fee as well. This is what he has done in this case. I am unable to see any force in the contention of the learned counsel that the District Judge was not entitled to decide the question of jurisdiction. I hold that the view of the District Judge is correct and that he had no jurisdiction to entertain the appeal. The consequence is that this petition must be dismissed with costs.

D.D. *Petition dismissed.*

A. I. R. 1928 Lahore 636

TEK CHAND, J.

Relu Mal and *others*—Plaintiffs—Petitioners.

v.

Maru Mal and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 308 of 1927, Decided on 28th November 1927, from order of Dist. Judge, Karnal, D/- 7th February 1927.

Civil P. C., S. 152—Errors arising from accidental slips.

Where in a decree passed in favour of a mortgagee the Court omitted to mention that the amount was recoverable only by sale of the mortgaged property and where subsequently an application was made by the mortgagor to add the words " by sale of the house mortgaged " to the judgment and the decree.

Held: that the words " by sale of the house mortgaged " could be added to the judgment and decree as they were omitted by an accidental slip. [P 637 C 1]

Shamair Chand—for Petitioners.

Nawal Kishore—for Respondents.

Judgment.—This is a petition for revision of the order of the District Judge. Karnal, ordering under S. 152, Civil P. C., amendment of a decree passed by his predecessor two years before.

The relevant facts are that Khuda Bakhsh and Tulli mortgaged a house to one Ulfat Ram. Ulfat Ram died childless and was succeeded by his reversioners Relu Mal, etc. (petitioners). In the meantime the mortgagors had sold the equity of redemption to Maru Mal, respondent, and had authorized him to redeem the mortgage from Ulfat Ram's heirs. Nothing having been paid to the mortgagees, Relu Mal, etc., instituted a suit for recovery of the amount due to them on foot of the mortgage praying that the amount found due to them be realized by sale of the mortgaged property. No prayer for a personal decree against the purchasers of the equity of redemption was made. The trial Court passed a decree for Rs. 308 with proportionate costs in favour of Relu Mal, etc., against the then defendants, Maru Mal etc.,

with the reservation that the decretal amount should be realized by the sale of the house mortgaged.

Maru Mal, etc., preferred an appeal to the District Judge (Mr. Skemp) praying for reduction of the amount found payable by the trial Court. The District Judge went though the accounts and reduced the amount to Rs. 274-8-0, but in the judgment he omitted to mention that the amount was recoverable only by sale of the mortgaged property. The concluding portion of his judgment runs as follows:

The decree of this Court is to state that the mortgagees, Relu Mal, Shugan Chand, Ratan Lal, plaintiffs, and Jai Lal, defendant, are entitled to realize the sum of Rs. 274-8-0 from Maru Mal defendant.

A decree was prepared in accordance with this judgment. No second appeal was preferred by either party. Two years later Maru Mal, etc., applied to the District Judge (Mr. Sri Ram) to amend the judgment and the decree by adding the words at the end " by sale of the house mortgaged," so that it might be made clear that the amount is not recoverable from the judgment-debtors personally but should only be realized by sale of the property mortgaged. This application was granted by the District Judge and he directed that the words mentioned above be added to the decree.

Mr. Shamair Chand, who appears on behalf of the decree-holder Relu Mal contends that the learned District Judge has added these words to the decree but not in the judgment, and therefore the decree is not in accordance with the judgment. This is correct, but there is no doubt that it was due to a mere oversight on the part of the District Judge (Mr. Sri Ram). I accordingly direct that the words " by sale of the house mortgaged" be added to the judgment also.

Mr. Shamai Chand's, main argument, however, is that the learned District Judge was not justified in adding these words either in the judgment or in the decree under S. 152 and that such an amendment could only be made either on

second appeal to this Court or on a properly constituted application for review filed before the District Judge. There is, however, no force in this contention. S. 152 authorizes a Court to correct not only clerical or arithmetical mistakes in judgments, decrees, or orders, but also errors arising therein from accidental slips or omissions. After going through the judgment of Mr. Skemp I have no doubt whatsoever that these words were omitted by an accidental slip and the judgment and decree passed by him could be amended under S. 152, Civil P. C.

I therefore see no force in this revision and dismiss it with the modification that the words "by sale of the house mortgaged" be added to the judgment of Mr. Skemp dated 8th January 1924. Having regard to all the circumstances of the case I leave the parties to bear their own costs in both Courts.

S.J. *Revision dismissed.*

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* A. I. R. 1928 Lahore 637

ADDISON, J.

Hayat—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 185 of 1928, Decided on 23rd April 1928, from order of Sess. Judge, Multan, D/- 20th August 1926.

* *Penal Code, S. 411—Accused in possession of property identified as belonging to different owners—He should not be convicted of more than one offence under S. 411 unless there is evidence to prove that they were received by him at different times.*

A person who is found in possession of properties identified as belonging to different owners should not be convicted of several offences of receiving in respect of the property identified by each owner unless the prosecution proves that they were received by him at different times. It is not for the accused to prove that the act of receiving was only one: 15 *All.* 317; *A. I. R.* 1923 *All.* 547; 15 *Cal.* 511; *A.I.R.* 1923 *Cal.* 557; *Foll.*; 26 *P.R.* 1889 (*F.B.*) and 27 *Cr. L. J.* 872, *Diss from.* [P 637 C 2]

Raj Krishna—for the Crown.

Judgment.—The petitioner was convicted of three different offences under S. 411, I. P. C., by the 1st Class Magistrate on 8th April 1926, and was sentenced to six years' rigorous imprisonment in addition to a fine of Rs. 200 to be followed by six years' police surveillance under S. 565, Criminal P. C. On appeal the learned Sessions Judge maintained the three convictions under S. 411, I. P. C., but reduced the sentences to one year, two years and one years' rigorous imprisonment, total four years, to be followed by six years' police surveillance under S 565, Criminal P. C., that is, two years for each offence. I admitted this revision as it seemed to me that a person who was found in possession of cattle identified as belonging to different owners should not be convicted of several offences of receiving in respect of the property identified by each owner unless there was evidence to prove that they were received by him at different times. The petitioner was found with the stolen cattle of three different persons shortly after the thefts of the cattle had occurred. There was no other evidence against him and nothing to show that there were three distinct acts of receiving the stolen cattle.

I find that there is a Full Bench decision of the Punjab Chief Court, *Pars Ram* v. *Manja Khan* (1), which took the view that it was for the accused to establish that there was only one act of receiving when he was found with property forming the subject-matter of different thefts. This Full Bench decision dissented from a previous Division Bench decision, *Kanhya* v. *Ganesha* (2). The Sind Court has taken the same view as that expressed in the Full Bench decision of the Punjab Chief Court: see *Ghulamo* v. *Emperor* (3). The Allahabad and Calcutta High Courts have taken the other view. The Allahabad decisions are *Queen-Empress* v. *Makhan* (4) and *Emperor* v. *Sheo Charan* (5) and the Calcutta decisions are, *Ishan Muchi* v. *Queen-Empress* (6) and *Ganesh Sahu* v. *Emperor* (7). It seems to me that the correct view is that the prosecution must establish its case and that it was, therefore, for the prosecution to establish that there were three different acts of receiving. No case, following, the Full Bench decision of the Punjab Chief Court, can be traced and I know that the practice of this Court of late years has been to follow the Allahabad and Cal-

(1) [1889] 26 P. R. 1889 (F B.).
(2) [1874] 5 P. R. 1874 (F. B.).
(3) [1923] 27 Cr. L. J. 872.
(4) [1893] 15 All. 317.
(5) A. I. R. 1923 All. 547=45 All. 485
(6) [1888] 15 Cal. 511.
(7) A. I. R. 1923 Cal. 557=50 Cal. 594.

cutta High Courts' view. With very great respect I wish to say that my view is the same as that taken by the learned Judges of the Allahabad and Calcutta High Courts.

In any case it was laid down in the Punjab Chief Court's Full Bench decision that Magistrates would be wise not to inflict aggregate sentences amounting to more than the maximum for the offence, that is three years. This view may have been expressed because the learned Judges had some doubt as to the proper view to be taken of the law. I, therefore, accept these three petitions and in modification of the order of the learned Sessions Judge convict the petitioner of one offence only under S. 411, I. P. C. The petitioner has already been for more than two years in jail. I, therefore, reduce the sentence of imprisonment to that already undergone. I also reduce the period of police surveillance under S. 565, Criminal P.C., to two years in all.

N.K. *Sentence reduced.*

A. I. R. 1928 Lahore 638

TEK CHAND, J.

Sarab Dial—Complainant—Petitioner.

v.

Bir Singh and *others*—Accused—Respondents.

Criminal Revn. Petn. No. 1672 of 1927, Decided on 3rd February 1928, from order of Sess. J. Ambala, D/- 12th August 1927.

Criminal P. C., S. 250 (3) — Complainant ordered to pay compensation to alleged accused persons—Total amount of compensation exeeeeding Rs. 50—Order is appealable.

Where the Magistrate passed an order directing the complainant to pay a sum of Rs. 50 to each of the seven accused as compensation;

Held: the order was appealable, as the aggregate amount of compensation payable to all the accused collectively was more than Rs. 50 : *A. I. R.* 1925 *Bom.* 129 and *A. I. R.* 1926 *All.* 247, *Foll.* [P 538 O 2]

Fakir Chand—for Petitioner.

Anant Ram—for Respondents.

Judgment. — The petitioner Sarab Dial brought a complaint under Ss. 426, 379, 147 and 448, I. P. C., against Bir Singh and six other persons. The learned trial Magistrate recorded the statement of the complainant and held it to be false. He accordingly discharged the accused persons and, while passing the order of discharge, he called upon the petitioner to show cause why he should not pay compensation to the accused. After he had shown cause the learned Magistrate passed an order directing him to pay a sum of Rs. 50 to each of the accused as compensation, or in default, to undergo simple imprisonment for one month. The petitioner preferred (a) a petition for revision to the learned Sessions Judge against the order of discharge and (b) an appeal under S. 250 (3) against the order directing him to pay compensation to the accused. The learned Sessions Judge dismissed the petition for revision and held that no appeal lay to his Court as the amount of compensation ordered to be paid to each accused individually did not exceed Rs. 50.

The complainant has come up to this Court on the revision side and has prayed for the setting aside of the order of discharge as well as has urged that the learned Sessions Judge was in error in holding that no appeal lay against the order directing him to pay compensation to the accused. The second of these prayers is well founded and must, in my opinion, succeed. Having regard to the fact that the aggregate amount of compensation payable to the accused was Rs. 350, an appeal clearly lay to the Sessions Court. Reference may in this connexion be made to *A. M. Pereira* v. *D. P. Demello* (1) and *Sumaria* v. *Emperor* (2). I hold, therefore, that the order in question was appealable to the Sessions Court. As the complaint had been jointly brought against all the seven accused persons it was not necessary for them to file separate appeals. I therefore accept the petition for revision and, setting aside the order of the learned Sessions Judge, send back the case to him for disposal in accordance with law.

As the question whether the complaint was false, frivolous and vexatious may have to be considered again by the learned Sessions Judge, I do not think it proper to decide whether the order of discharge was proper or not. The learned Sessions Judge may, if he thinks fit, go into the matter again and decide whether the order discharging the accused should be affirmed or set aside and further enquiry ordered.

S.J. *Petition accepted.*

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(1) A. I. R. 1925 Bom. 129=49 Bom. 440.
(2) A. I. R. 1926 All. 247.

A. I. R. 1928 Lahore 639

DALIP SINGH, J.

Hakim Singh—Plaintiff—Appellant.

v.

Wasan Singh and *others*—Defendants—Respondents.

Second Appeal No. 1042 of 1927, Decided on 2nd February 1928, from decree of Addl. Dist. Judge, Lahore, D/- 24th March 1927.

Civil P. C., O. 39, R. 1—Alienation in violation of a prohibitory order is not void though the alienator may be liable in contempt of Court—Contempt.

It is clear law that an alienation effected in violation of a prohibitory order is not void though the person who alienates it may be liable for action in contempt of Court or damages. [P 639 C 2]

Gobind Kam Khanna—for Appellant.

Judgment.—In this suit the plaintiff sued for possession of certain land, Khasra No. 1604, measuring 22 kanals 5 marlas, which he alleged, belonged to one Sundar Singh and had been exchanged by Sundar Singh for the plaintiff's field, Khasra No. 186, measuring 17 kanals, by a registered deed of exchange dated 19th January 1924. The plaintiff alleged that he had given possession of Khasra No. 186 to Sundar Singh but Sundar Singh did not give him possession of Khasra No. 1604, that Sundar Singh had sold 22 kanals out of the said khasra to Makhan Singh, Wasan Singh and others on 28th January 1924, that the land having been already exchanged with the plaintiff Sundar Singh had no right to sell the land to Makhan Singh, etc., and hence the plaintiff's suit for possession.

Only three defendants Wasan Singh, Boga Singh and Narain Singh defended the suit. They alleged that the plaintiff was not the owner of Khasra No. 186 and, therefore, could not exchange it. They secondly contended that the land of Sundar Singh was under attachment in a suit brought by themselves against Sundar Singh and, therefore, the exchange, if any, was void as against them.

The trial Court held that the plaintiff was the owner of the land, Khasra No. 186, because his brothers, who had been entered as co-owners with him in the jamabandi admitted that by private partition this khasra had fallen to plaintiff's share. It further held that there was no attachment as pleaded by the defendants, but a prohibitory order had been served on Sundar Singh forbidding him to alienate the land. There is nothing to show that the present plaintiff had any notice of this prohibitory order. Accordingly the trial Court held that the exchange effected by Sundar Singh was not void and as it was prior to the sale by Sundar Singh to the defendants, which took place in execution of a decree obtained by the defendants against Sundar Singh, therefore, the plaintiff was entitled to possession, and decreed the suit.

On appeal the learned District Judge held that the private partition between Hakim Singh, plaintiff, and his brothers was not proved because the entry in the jamabandi was against any private partition. It is not clear what the learned District Judge deduced this fact from. The only co-owners of Hakim Singh, plaintiff, assuming that they were co-owners, had denied their title to the land. At the very best, even assuming that they wrongly denied their title, they must be held to be ratifying the exchange by Hakim Singh and I, therefore, fail to see why the learned District Judge in the first place disbelieved their allegations of a private partition, and secondly what deduction against the plaintiff could be drawn from it. The learned District Judge then proceeded to hold that the execution file showed that the judgment-debtor believed that his property was attached and that the temporary injunction amounted to an order of attachment of his property. After reading the execution record I fail entirely to see on what ground this assumption is based. But even assuming that it was correct I fail to see how the belief of the judgment-debtor affected the rights of the present plaintiff. Nowhere does the learned District Judge find that the present plaintiff had notice of the prohibitory order.

It is clear law that an alienation effected in violation of a prohibitory order is not void though the person who alienates it may be liable for action in contempt of Court or damages. The learned District Judge further admitted in appeal a mutation order whose bearing is not at all clear to me. In it the Tahsildar had held, when the mutation arising from the sale by Sundar Singh to Wasan Singh, etc., came up, that there had been an exchange by Sundar Singh prior to this sale. I do not find that the Tahsil-

dar anywhere held that this prior exchange was a bogus one, nor do I see how the order of the Tahsildar was relevant in this case, nor do I see any reason why it should have been admitted in appeal.

I therefore accept the appeal and decree the plaintiff's suit. In the circumstances I leave the parties to bear their own costs throughout.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 640

ZAFAR ALI, J.

Mahtab Din—Defendant—Appellant.

v.

Kasar Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 1352 of 1927, Decided on 5th December 1927, from decree of Dist. Judge, Gujranwala, D/- 19th February 1927.

Evidence Act, S. 35—Register not prepared by public servant, though kept in Deputy Commissioner's record room is inadmissible.

House registers not prepared by any Government Officer, or by any public servant whose duty it was to prepare them, though kept in the record room of the Deputy Commissioner, are inadmissible in evidence. The mere fact that they are kept in a public office does not lead to the inference that they are public documents: 7 *Cal.* 76, *Rel. on.* [P 640 C 2]

Niaz Mahammad—for Appellant.

G. C. Narang—for Respondents.

Judgment.—This second appeal arises out of a suit brought by certain inhabitants of Wazirabad with regard to a drinking well situated in that town, claiming that the well was constructed by their ancestors and had been dedicated to the use of the public, and that the defendant had no right to sell it which he intended to do. The trial Court, finding that the plaintiffs had failed to establish their claim, dismissed the suit. On appeal the learned District Judge allowed the plaintiffs to produce additional evidence, documentary as well as oral, and mainly on the strength of an entry in the register of houses that was thus received in evidence he came to the contrary conclusion and decreed the plaintiffs' suit.

On behalf of the defendant-appellant it is urged that there was no good ground for admitting additional evidence and that the register in question was inadmissible in evidence not being a public document or a document prepared by a Government officer in the discharge of his official duty. The first objection is untenable. The learned District Judge had a discretion in the matter which he does not appear to have exercised unjudicially.

As regards the second the said register of houses was prepared in 1856 and again in 1866 and in both the well in dispute was shown as "shamilat shahr." Now the question is: Was the register a public document as defined in S. 74, Evidence Act, or was it an official book falling within the purview of S. 35 of that Act? There is no evidence to show that the registers were prepared by a public servant in the discharge of his official duty. The registers are kept in the record room of the Deputy Commissioner's office at Gujranwala, but the mere fact that they are kept in a public office does not lead to the inference that they are public documents. In *Nittyanund Roy* v. *Abdar Raheem* (1) a Division Bench of the Calcutta High Court held that certain measurement records produced from the Collectorate were not public documents within the meaning of S. 74 where there was nothing to show that they were the record of measurements made by any Government officer. As already stated, there is nothing to show that these registers were prepared by any Government officer, or by any public servant whose duty it was to prepare them. Nor is there anything to show that the entries therein were made after due enquiry so that a presumption of correctness should attach to them. This being so, they are inadmissible in evidence.

The learned District Judge based his finding mainly on the said entries. It cannot be divined what his finding would have been if he had excluded them from consideration.

I, therefore, accept the appeal, set aside the judgment and decree of the lower appellate Court and remand the case for re-decision of the appeal on the basis of the evidence on the record that is admissible. The costs to abide the event.

R.K. *Case remanded.*

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(1) [1881] 7 Cal. 76.

A. I. R. 1928 Lahore 641 (1)

DALIP SINGH, J.

Ganga Ram—Defendant—Petitioner.

v.

Fateh Din—Plaintiff—Respondent.

Civil Revn. Petn. No. 313 of 1927, Decided on 3rd February 1928, from decree of Sr. Sub-Judge, Layallpur, D/- 5th February 1927.

Punjab Tenancy Act (16 *of* 1837), *S.* 77 (3) (k)—*Suit against lessee of land for one year by his partner for refund of earnest-money on lessee's falling to give him his share in the produce—Suit is cognizable by civil Court.*

Where an alleged partner of a lessee of land for one year filed a suit against the lessee for the recovery of the earnest-money paid by him, as the latter failed to pay him his share in the produce:

Held, that the suit did not fall under S. 77 (3) (k), Punjab Tenancy Act, but was cognizable by a civil Court.

Ram Chand Manchanda — for Petitioner.

Muhammad Akbar—for Respondent.

Judgment. — The plaintiff in this case alleged that he was a partner with one Ganga Ram who had taken on lease squares of land from Khan Bahadur Bahadur Shah for one year for Rs. 4,900. The plaintiff had become a partner in this enterprise and he had, therefore, paid Rs. 300 to the defendant by way of earnest-money. The plaintiff alleged that the defendant had not given him his share of the produce and he brought this suit for the recovery of this earnest-money of Rs. 300 and interest thereon.

The trial Court decreed the suit for Rs. 477 giving interest at the rate of 1 per cent. per mensem. The appellate Court modified the decree and gave the plaintiff a decree for Rs. 300 only with proportionate costs, the costs of the appeal being borne by the parties.

In revision it is urged that the suit was a suit cognizable only by a revenue Court because it falls under S. 77 (3) (k), Tenancy Act. I do not see how this clause at all governs this class of suits. *Sundar Singh* v. *Kesar Singh* (1) is cited as authority in support of the proposition. That was not a case of partnership between two tenants and the reasoning is based on the definition of the term "landowner" including every person other than a tenant or assignee of land revenue. Ganga Ram was clearly only a tenant and not a landowner. Counsel admits that he was a lessee, but says there is some distinction between being a tenant and a lessee. He had not been able to explain to me what this distinction is. Further the suit is not for a share of the produce and, therefore, the clause does not apply; nor has the ruling *Sundar Singh* v. *Kesar Singh* (1) got any bearing on the point.

I, therefore, dismiss the revision with costs,

S.J. *Revision dismissed.*

(1) [1904] 80 P. R. 1904.

A. I. R. 1928 Lahore 641 (2)

DALIP SINGH, J.

Mt. Kisso—Plaintiff—Appellant.

v.

Behari Lal—Defendant—Respondent.

Second Appeal No. 2037 of 1927, Decided on 2nd February 1928, from decree of Dist. Judge, Amritsar, D/- 1st June 1927.

Civil P. C., O. 17, *R.* 1—*Party undertaking to produce his own witnesses—Witnesses not produced—Court is not bound to give further extension of time.*

Where a plaintiff has undertaken the burden of producing his own witnesses, it is not for the Court to give him further extension of time if owing to some circumstances he finds himself in a position in which he cannot produce those witnesses. [P 642 C 1]

B. D. Qureshi—for Appellant.

Ram Lal Anand—for Respondent.

Judgment.—In this suit issues were struck on the 25th January 1927, and the 23rd February 1927 was fixed for evidence. The plaintiff asked for one witness, namely, the defendant, and put in process-fee for him. On the 23rd the Mukhtar of the plaintiff stated that he did not wish to examine the defendant as his witness. On the same day he put in an application stating that he had hoped to bring his witnesses with him but he had been engaged in another case on the 21st, 22nd and 23rd, and, therefore, had not been able to go to this village to fetch the witnesses. He also stated in the application that certain persons against whom a case had been brought under S. 417, I. P. C. were preventing his witnesses from attending and, therefore, he asked that the witnesses might now be summoned by process of.

Court. The trial Court held that there was no sufficient reason for granting the application and, as the plaintiff had produced no evidence and the burden of two issues struck was on her, it, therefore, dismissed the suit.

On appeal the learned District Judge also dismissed the appeal holding that the mukhtar, even if he was busy on the 21st, 22nd and 23rd, could have made arrangements for the production of his witnesses.

In second appeal it has been contended that it was an unforeseen circumstance, namely, the fixing of the date in the criminal hearing for the 21st, 22nd, etc., which prevented the mukhtar from going to fetch his witnesses and that the plaintiff's case is a good one because the khana shumari papers and certain receipts, some of which are alleged to be in the handwriting of the defendant, would prove the plaintiff's case. So far as the khana shumari papers are concerned, the patwari could not have been brought by the plaintiff's mukhtar with him and would have had to be summoned in any case; and as the plaintiff had never thought of summoning him, I see no reason why she should be allowed to summon him now.

As regards the so-called receipts, these were documents which were in the possession of the plaintiff, and there is no reason why they were not put in on or before the first hearing in compliance with the provisions of O. 13, R. 1, Civil P. C. In the circumstances, therefore, it seems to me that as the plaintiff had undertaken the burden of producing her own witnesses it was not for the Court to give her further extension of time because owing to some circumstances about which I may add there is no affidavit on the record at all, she found herself in a position in which she could not produce those witnesses.

I, therefore, dismiss the appeal with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 642

TEK CHAND, J.

Dayal Singh Man—Decree-holder—Appellant.

v.

Hara Singh-Karta Singh and *another*—Judgment-debtor—Respondents.

Misc. First Appeal No. 1504 of 1927, Decided on 7th December 1927, from order of Senior Sub-Judge, Lyallpur, D/- 16th May 1927.

Legal Practitioners — Vakalatnama giving power to compromise —Pleader need not have instructions from the parties to compromise.

Where the vakalatnama given to a pleader clearly authorized him to enter into a compromise on behalf of his client, and the pleader compromised the suit on the instructions not from the client himself but from a third person who was subsequently appointed as his mukhtar by the client,

Held: that the compromise was binding on the party. [P 643 C 2]

Mohsin Shah—for Appellant.

Gobind Das—for Respondents.

Judgment.*—On 8th March 1925 the appellant obtained a decree for Rs. 66,924-12-0 together with interest at 9 per cent. from the date of suit till realization and costs against the defendant. The decree was transferred to Lyallpur for execution. Certain sums were paid by the judgment-debtor to the decree-holder in discharge of the decree but, while making the payments, the judgment-debtor did not specify whether the payments were to be appropriated towards interest or the principal. The decree-holder claimed that he had appropriated these payments first towards interest and the surplus towards the principal. The judgment-debtor's contention was that the payments should have first been appropriated towards the principal.

On 2nd January 1926 an application signed by counsel for both parties was filed, stating that they had gone through the accounts and had agreed that the total sum due to the decree-holder on that date was Rs. 25,030 besides interest that had accrued due from 14th May 1925. This settlement was certified before the Court on that date and the execution proceedings proceeded on that basis. Further payments were made subsequent to that date, and on 7th October 1926 another application

* [No Letters Patent Appeal had been filed.]

was presented signed by the judgment-debtor's mukhtar and the decree-holder's counsel Lala Ram Lal stating that they had mutually settled the accounts and Rs. 13,895 was the sum due to the decree-holder on that date to which was to be added interest on the principal amount from 16th June 1926. The decree-holder's pleader Lala Ram Lal, while signing this application, wrote that he had done so at the request of one Sardar Narain Singh. On 12th November 1925, Sardar Narain Singh styling himself as the mukhtar of the decree-holder filed an application through Lala Ram Lal stating that the application of 7th October had been filed under a misapprehension and that Lala Ram Lal had signed it on the authority of Sardar Narain Singh who was not the duly authorized agent of the decree-holder on that date but who had been given a power-of-attorney on 1st November 1926. The decree-holder also wanted to go back upon the settlement of 2nd January 1926, and applied that the accounts from the beginning should be gone into de novo and the payments made, be appropriated first towards interest and then towards the principal. This contention was repelled by the learned Senior Subordinate Judge who held that the plaintiff was bound by the settlements which had been duly certified by his counsel on 2nd January and 7th October 1926.

An appeal has been preferred to this Court by the decree-holder and Mr. Mohsin Shah has contended that as at the time of making the various payments the judgment-debtor had not stated that the payments were on account of interest or principal the decree-holder was entitled under the law to appropriate them first towards the interest and then to apply the surplus towards the principal. This proposition is not controverted by Mr. Gobind Das who appears for the judgment-debtor but he argues that the question does not arise in the present proceedings. The real question is whether the appellant, decree-holder, is entitled to go back from the settlements which were duly certified by his counsel. Mr. Mohsin Shah urges that accounts once settled can be reopened on the ground of error or fraud. In this case, however, no fraud is alleged nor has any error been pointed out except in the mode of appropriation and the dispute between the parties as to that matter had been duly settled by them by compromise in the Court below. On the present record no valid reason has been shown for going behind these settlements. As regards the application of 2nd January 1926 Mr. Mohsin Shah has not been able to urge any valid argument for upsetting it, but, as to the settlement of 7th October 1926, he has contended that the decree-holder had not agreed to it personally, and his counsel Mr. Ram Lal signed the document on the authority of Narain Singh who was not the duly authorized agent of the appellant on that date. In my opinion this contention has no force. Mr. Ram Lal had been engaged by the appellant to conduct the case for him and the vakalatnama given to him clearly authorized him to enter into a compromise on behalf of the appellant. The fact that he acted on instructions from Narain Singh and not from the decree-holder himself does not affect the matter in any way. Moreover, it is significant that this very Narain Singh who is alleged to have acted without authority on 7th October 1926, was formally appointed mukhtar by the decree-holder on 1st November 1926, and it was he who instructed Lala Ram Lal to file an application on 12th November 1926 to repudiate the settlement which Lala Ram had made under his instructions. On these facts the decree-holder-appellant has obviously made out no case to go behind the settlement of 7th October 1926. The appeal accordingly fails and is dismissed with costs.

S.J. *Appeal dismissed.*

A. I. R. 1928 Lahore 643

TEK CHAND, J.

Nizam Din and *others*—Defendants—Appellants.

v.

Mohammad Iqbal and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2679 of 1926, Decided on 12th December 1927, from decree of Addl. Dist. Judge, Lahore, D/- 3rd July 1926.

(a) *Evidence Act, S. 35—Correctness of entry on a copy indicating the date on which it was completed challenged — Report of the copyist in an inquiry about its correctness made departmentally is not relevant without the copyist being cited as a witness.*

Under S. 35 the entry made on the copy indicating the date on which it was completed

is relevant but when an enquiry as to the correctness of such an entry has been started on its accuracy having been challenged by a party and in such enquiry a report is made departmentally by a copyist to his superior officer, such report is wholly outside the purview of S. 35 and cannot be referred to as legal evidence without the copyist being cited as witness and called upon to depose to the statements made in the report : 31 *All.* 457 (*P. C.*) ; 24 *Mad.* 427 and *A. I. R.* 1923 *Mad.* 332, *Dist.* [P 645 C 2]

(*b*) *Limitation Act, S. 5—Delay of one day in filing appeal owing to the mistake of pleader's clerk was condoned.*

The mistake of a legal practitioner or his clerk causing delay of one day was found sufficient cause within the meaning of S. 5 for condoning the delay. [P 646 C 2]

Moti Sagar and *Mohsin Shah* — for Appellants.

Zafrulla Khan and *Bashir Ahmad*— for Respondents.

Judgment.—The plaintiffs' suit for possession of land was decreed by the Subordinate Judge on 30th November 1925 and the defendants preferred an appeal to the District Judge, Lahore, on 8th January 1926, i. e., on the 39th day after the delivery of the judgment of the trial Court. The plaintiffs-respondents objected that the appellants were entitled to an extension of eight days only on account of the time spent in obtaining copies of the judgment and decree appealed against and that the appeal was out of time by one day. This objection was upheld by the learned Additional District Judge (L. Topan Ram) who was of opinion that no sufficient cause for extending time under S. 5, Lim. Act, had been made out. The defendants have preferred a second appeal to this Court and two questions have been argued before me.

It is contended by Mr. Mohsin Shah for the appellants that the learned Additional District Judge should have in the peculiar circumstances of this case held that the appeal had been presented within time and secondly that even if this Court agreed with the view taken by him that the appeal had been filed beyond the period of limitation, it should be held that the learned Additional District Judge has not exercised his discretion according to sound judicial principles in refusing to extend time under S. 5.

As regards the first of these contentions Mr. Mohsin Shah's contention is that the application for the copy of the trial Court's judgment was made on 9th December 1925 and that for the copy of the decree was made on 14th December 1925, that both these copies were as a matter of fact completed on 23rd December 1925 and were delivered to his clients on that date. He, therefore, claims that he is entitled as of right to deduct the period from 9th December to the 23rd December, (i. e., 15 days) under S. 12, Lim. Act. The endorsements on the copies of the judgment and the decree of the trial Court, which the defendants-appellants actually filed with the memorandum of appeal in the District Court show, however, that the former was completed on 16th December and the latter on 15th. According to these dates the appellants were entitled to deduct eight days only and this is the period which has been allowed to them by the Additional District Judge. An examination of the endorsements on the copies shows that the revising and attesting officer of the copying department had not complied with R. 17, Cl. (2), printed at p. 34, Vol. 3 of the rules and orders of this Court, in as much as he had not entered on the last page the date on which he attested the copies nor did he give the date on each sheet of the judgment as he should have done. This defect led the defendants to contend that the endorsements by the copyists on the copies showing that they had been completed on 15th and 16th December 1925 respectively, were incorrect and that the copies had really been completed on 23rd. Accordingly the office of the District Judge called for a report from the officer in charge of the copying department to state on what date the copies had actually been attested. The said officer in turn called for a report from the copyist concerned and on 17th February 1926 he reported to the District Judge that the copy of the decree was ready on 15th and that of the judgment on 16th December. Along with his own report he sent the report which had been submitted to him by the copyist.

On the case coming up before the Additional District Judge on 31st March 1926 an objection was raised on behalf of the plaintiffs-respondents that the appeal was barred by time. On that date affidavits were filed, by Sayad Mohsin Shah, advocate for the appellants and

by Muhammad Ali, clerk of Sh. Abdul Aziz, advocate and Abdul Karim, one of the appellants. In the first of these affidavits Sayad Mohsin Shah deposed that he had prepared and signed the memorandum of appeal on 5th January 1926 and had handed it over to his clerk Muhammad Hussain for filing it in Court, but that the said clerk, being under a bona fide mistake that the period to be excluded should count till the 23rd December 1925 when the copies were delivered to the clients, presented it in Court on 8th January 1926. The other two affidavits stated that the deponents had actually gone to the copying department of the Small Cause Court on 16th, 17th and 18th December but had been told that the copies were not ready and that the copies were actually delivered to them on 23rd December. The allegations made in these affidavits were not admitted by the respondents and the case was adjourned to 21st April. 1926 to enable the appellants to lead evidence in support thereof. On that date the defendants examined Abdul Karim plaintiff, Muhammad Ali, Clerk of Sh. Abdul Aziz, advocate, Muhammad Hussain, clerk of Lala Hari Chand, advocate and Sardar Harnam Singh Pleader, but the plaintiffs led no evidence. The Additional District Judge enquired from counsel for both parties if they wanted to produce the copyist concerned but neither of them expressd his willingness to do so. An affidavit was also filed by Muhammad Hussain, clerk of Sayad Mohsin Shah repeating the statement made in his master's affidavit. The learned Additional District Judge held that the defendants-appellants had failed to prove that the copies were not ready on 15th and 16th December 1925 as noted thereon and that the defendants-appellants were entitled to a deduction of eight days only and consequently the appeal was time-barred. He also held that even if the allegation contained in the affidavit of Sayed Mohsin Shah and his clerk were correct, a mistake of law made by the plaintiffs' advocate's clerk did not amount to sufficient cause justifying extension of the period of limitation under S. 5.

In deciding that the copies had actually been prepared on 15th and 16th December 1925 the learned Additional District Judge has in his judgment relied inter alia upon the report which the copyist had submitted on 17th February 1926 to the revising officer of the Small Cause Court and which the latter had forwarded to the District Court. The appellants' counsel contends that this report is not legal evidence in the case and the learned Additional District Judge was in error in relying upon it. I have heard lengthy arguments on this point from both counsel and agree that the contention put forward on behalf of the appellants is sound. Mr. Zafar Ullah Khan for the respondents urges that this report is admissible under S. 35, Evidence Act, and in support of his contention he has relied upon three rulings. *Parbati Kunwar* v. *Chandra Pal Kunwar* (1), *Raman* v. *Secy. of State* (2) and *Rathanamasari* v. *Secy. of State* (3). The facts of these cases were, however, entirely different. The Privy Council judgment related to replies as to existence of a custom given to questions put by the officers who had been specially deputed by Government for the purpose. The *Raman* v. *Secy. of State* (2) case was explained in *Malikarjuna Dugget* v. *Secy. of State* (4) and relates to a wholly different set of facts, while the second Madras case was cited but not followed by this Court in *Secy. of State* v. *Sarala Devi* (5).

Section 35, Evidence Act, makes relevant an entry in any public or other official book, register or record stating the fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in the performance of a duty specially enjoined by the law of the country in which such book, register or record is kept. Under this section the entry made on the copy indicating the date on which it was completed is certainly relevant but when an enquiry as to the correctness of such an entry has been started on its accuracy having been challenged by a party and in such enquiry a report is made departmentally by a copyist to his superior officer, such report is wholly outside the purview of S. 35 and cannot be referred to as legal evidence without the copyist being cited as witness and called upon to depose to the statements made in the

(1) [1909] 31 All. 457 = 4 I. C. 25 = 36 I. A. 125 (P. C.).
(2) [1901] 24 Mad. 427=11 M. L. J. 315.
(3) A. I. R. 1923 Mad. 332.
(4) [1912] 35 Mad. 21=14 I. C. 401.
(5) A. I. R. 1924 Lah. 548=5 Lah. 227.

report. I must, therefore, hold that the learned Additional District Judge acted illegally in relying upon the report.

Both counsel were agreed that if this report were to be held inadmissible in evidence, the finding of the learned Additional District Judge as to the date on which the copy was actually completed could be reopened in second appeal and that I should examine the remaining evidence and come to an independent finding thereon. Accordingly I have examined the evidence of the witnesses produced by the appellants to prove the above allegations and have reached the conclusion that the appellants have entirely failed to prove that the copies were not ready on 15th and 16th December as noted thereon. The evidence of the appellant Abdul Karim and of Mohammad Ali, clerk of Mr. Abdul Aziz does not strike me as satisfactory while the other two witnesses Muhamad Ali, clerk of L. Hari Chand and Sr. Harnam Singh pleader are very vague as to their facts. I, therefore, hold that the copies had been completed on 15th and 16th December and that the defendants-appellants were legally entitled to a deduction of eight days only.

The next question to be decided is whether the learned Judge was right in refusing to condone the delay of one day under the peculiar circumstances of this case. Mr. Zafar Ullah Khan for the respondents contends that the mistake of a legal practitioner or his clerk is not sufficient cause within the meaning of S. 5 and that in any case the learned Additional District Judge having refused to exercise his discretion, this Court ought not to interfere in second appeal. A large number of authorities have been cited by both counsel which I have examined, but which I do not propose to discuss at length, as each case has to be decided according to its peculiar circumstances. It is true that ordinarily this Court will not interfere with the exercise of discretion by the lower appellate Court, but there may be cases in which interference by this Court might be not only justified but absolutely necessary. The affidavit filed by Mr. Mohsin Shah in this case sets out the facts clearly and no counter-affidavit has been filed by or on behalf of the respondents. Indeed Mr. Zafar Ullah Khan stated before me definitely that he was not prepared to argue that the averments in Mr. Mohsin Shah's affidavit were incorrect. An examination of the memorandum of appeal actually presented in the District Court shows that the stamps were purchased on 5th January 1926 and Mr. Mohsin Shah actually signed the memorandum of appeal on that date. These facts support the statement made in his affidavit. In these circumstances the case is on all fours with that reported as *Mt. Putli* v. *Mt. Jowala Devi* (6), where Shah Din and Scott-Smith, JJ., held a similar mistake on the part of the appellants' counsel, who had prepared the grounds of appeal and had given them to his clerk several days before the expiry of the period of limitation, to be sufficient cause within the meaning of S. 5. Similarly in *Icchar Singh* v. *Natha* (7) Campbell and Dalip Singh, JJ., condoned the delay of one day in filing the appeal caused by the mistake of an advocate and his munshi.

Following these authorities I was inclined to hold that the learned Additional District Judge had not exercised his discretion in a sound and judicial manner and to set aside his order refusing to condone the delay of one day. But at the conclusion of the arguments in the present case Mr. Mohsin Shah brought it to my notice that his appeal to the District Judge on the merits was really concluded by a decision of Dalip Singh, J., in Civil Appeal No. 3144 of 1925 in which the same point was involved and to which most of the persons now arrayed as the appellants or respondents were parties. In that case the rights of the parties had been determined against the plaintiffs and that decision had been affirmed by the Letters Patent Bench. Having regard to this circumstance I think that no useful purpose will be served by remanding the case.

I, therefore, dismiss the appeal, but having regard to all the circumstances of the case, I leave the parties to bear their own costs throughout.

N.K. *Appeal dismissed.*

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(6) [1912] 7 P. L. R. 1912 = 16 I. C. 488 = 126 P. W. R. 1912.

(7) A. I. R. 1926 Lah. 693.

A. I. R. 1928 Lahore 647

TEK CHAND, J.

Mangat Rai—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 534 of 1928, Decided on 14th April 1928, from order of Sess. Judge, Ambala, D/- 20th February 1928.

(a) *Criminal P. C., S. 540 — Discretion should be exercised by the Magistrate with a great deal of caution.*

The discretion given to Magistrate under S. 540 has to be exercised with a great deal of caution. [P 648 C 1]

Where, after the defence was closed and arguments were heard the Magistrate felt on the records as they stood that some points had been left obscure and in order to elucidate them it was necessary to recall certain witnesses and to examine a new witness, and when this evidence had been recorded, he took the precaution of asking the accused if he wanted to add anything to his previous statement and on his replying in the negative he heard further arguments and then proceeded to decide the case.

Held : that there was no illegality in the procedure adopted nor had the petitioner been prejudiced in any way by it : 75 *I. C.* 541, *Rel. on* ; *A. I. R.* 1924 *Lah.* 104 and *A. I. R.* 1925 *Lah.* 531, *Dist.* [P 648 C 2]

(b) *Evidence Act, S. 133— Accomplice is the person who joins his associates with the intention of taking part in the crime—Informer is the person who joins his associates for purpose of carrying information to police.*

In criminal cases the distinction between an informer and an accomplice assumes at times considerable importance, and in order to determine whether a witness who first associated with wrongdoers and subsequently gave information to the police belongs to the first category or is an accomplice whose evidence cannot be accepted without corroboration, it has to be seen whether the witness had entered into the conspiracy for the sole purpose of detecting and betraying it or whether he is a person who concurred fully in the criminal designs of his co-conspirators for a time and joined in the execution of those till either out of fear or for some other reasons he turned on his former associates and gave information to the police. If at the time when he joined the conspiracy he had no intention of bringing his associates to book, but his sole object was to partake in the commission of the crime, he cannot be called an informer but is an accomplice ; and his position is not modified simply because later on he turns round and carries information to the police : *A. I. R.* 1928 *Lah.* 193, *Rel. on.* [P 649 C 1]

(c) *Evidence Act, S. 157—To bring a statement under S. 157 prosecution must establish by clear and unequivocal evidence the proximity of time between the taking place of the fact and the making of the statement.*

Section 157 provides an exception to the general rule excluding hearsay evidence and in order to bring a statement within the exception the duty is cast on the prosecution to establish by clear and unequivocal evidence the proximity of time between the taking place of the fact and the making of the statement. [P 650 C 2]

(d) *Evidence Act, S. 54—Past good character does not lead to presumption of innocence but to prove guilt of such a man evidence against him must be of an unimpeachable character.*

The mere fact that a person has enjoyed the confidence of his superiors or that he had in fact led a life of honesty during the past, is no reason to suppose that he will not succumb to temptation at the close of his career, but before a man of this type and such antecedents is adjudged guilty the evidence against him must be of an unimpeachable character. [P 651 C 1]

B. R. Puri and Shamair Chand—for Petitioner.

O'Connor—for the Crown.

Judgment.—The petitioner Mangat Rai, Head Clerk to the Officer-in-charge of the Animal Transport Section of the Indian Army Service Corps Record Office, Dagshai, has been convicted under S 161, I. P. C., for having received on 14th September 1927 from one Dost Muhammad (P. W. 6), Pensioner-Risaldar of mauza Nahr Kahuta in the Rawalpindi District the sum of Rs. 200 as illegal gratification, for having shown him favour in the discharge of his official duties as a public servant and has been sentenced to undergo rigorous imprisonment for nine months and to pay a fine of Rs. 350. His appeal to the Sessions Judge, Ambala, having been unsuccessful he has preferred a petition for revision to this Court.

The first point raised by his learned counsel is that the trial was vitiated by reason of the Magistrate recording fresh evidence after the case for the defence had been closed. The relevant facts appear to be as follows :

On 8th October 1927, the evidence of seven witnesses for the prosecution was recorded and the petitioner charged. These witnesses were then cross examined on 3rd December and defence evidence recorded on 7th December, on which date the "case was closed" and the hearing adjourned to 19th December for arguments. Arguments were heard on that date and judgment reserved. On 22nd December 1927, instead of pronouncing his judgment the learned

Magistrate recorded an order briefly summarizing the case for the prosecution as well as that for the defence and wound up as follows :

As the case at present stands, I might come to some conclusion from deductive argument on these points, but such reasoning is open to continual doubt and would form the ground for endless appeals. It is possible by examining the parties concerned to settle the points definitely, and for this reason I shall recall Dost Muhammad, who will be ordered to produce all correspondence he had at any time with the accused, Colonel Steele will be recalled and asked to bring all letters he received from Colonel Collins bearing on this case and the District Magistrate will be asked to issue a commission to Colonel Collins (in the form attached) questioning him on the interview it is alleged he had with Dost Muhammad and Qaim Din.

Interrogatories were accordingly issued to Colonel Collins at Rawalpindi, and Colonel Steele (P. W. 1) and Dost Muhammad (P. W. 6) were recalled and examined in Court. At the close of this evidence the Magistrate asked the accused, if, in view of the further evidence recorded, he had anything to add to his former statement and he replied in the negative. Mr. Puri argues that the procedure adopted by the Magistrate was illegal and prejudicial to the petitioner and vitiates the trial. In support of his contention he has relied on *Allu* v. *Emperor* (1) and *Shugan Chand* v. *Emperor* (*A. I. R.* 1925 *Lah.* 531), in both of which retrials were ordered. The facts of the present case are, however, wholly dissimilar and do not fall within the rule laid down in the rulings cited. In this case the action taken by the trial Magistrate is covered by S. 540, Criminal P. C., which authorized him to summon and examine or recall and re-examine any person at any stage of the case if his evidence appeared to him essential to the just decision of the case. It is no doubt true that the discretion given to Magistrates under this section has to be exercised with a great deal of caution, as pointed out by the Calcutta High Court in *Natabar Ghose* v. *Adya Nath Niswas* (2), but I do not think that the learned trial Magistrate has, in the present case used it in any improper manner. After examining the record as it stood at the time he felt that some points had been left obscure and in order to elucidate them it was necessary to recall certain witnesses and to examine a new witness, and when this evidence had been recorded, he took the precaution of asking the accused if he wanted to add anything to his previous statement and on his replying in the negative, he heard further arguments and then proceeded to decide the case. There is no illegality in the procedure adopted nor has the petitioner been prejudiced in any way by it. I hold, therefore, that there is no force in this objection and overrule it.

Coming now to the merits, it has been satisfactorily established by the evidence and indeed no arguments were addressed to me by Mr. Puri on this point that two currency notes of Rs. 100 each were given by Dost Muhammad (P. W. 6) to the petitioner at his house at Dagshai on 13th September 1927, and that these notes were recovered from him almost immediately by Mr. Abdul Salam, Magistrate 1st Class (P. W. 5) and Chaudhri Ghulam Rasul, Deputy Superintendent, C. I. D. (P.W. 2) who arrived on the spot by arrangement with Dost Muhammad and his companion Qaim Din. As remarked by the learned Sessions Judge a "trap" had been laid for catching the petitioner redhanded and the plan appears to have been carefully prepared and successfully carried out.

The factum of the receipt of money by the petitioner being thus established the next question for decision is whether it was received innocently, as alleged by him, or as illegal gratification for favour having been shown in his capacity as a public servant to Dost Muhammad in the matter of his application for grant of land. The case for the prosecution is that when Dost Muhammad's application reached this office and he saw the petitioner, the latter demanded a bribe of Rs. 800 and after a good deal of haggling Dost Muhammad agreed to pay him Rs. 400 in two instalments, i. e., Rs. 200 when the Deputy Commissioner of Rawalpindi had signed the application and Rs. 200 when the land was actually granted. It is alleged that in consequence of this arrangement these two currency notes (of Rs. 100 each) were given towards the first instalment. The prosecution seek to prove these allegations by the evidence of Dost Muhammad (P. W. 6) and Qaim Din

(1) A. I. R. 1924 Lah. 104=4 Lah. 376.
(2) A. I. R. 1923 Cal. 690.

(P. W. 7). The learned Sessions Judge was of opinion that these witnesses were "informers" or "spies" and not "accomplices" and that no corroboration of their testimony was necessary. Mr. Puri has assailed this position as legally unsound and has urged that both Dost Muhammad and Qaim Din were accomplices and according to the well-established rule of practice their evidence should be accepted only if it is corroborated in material particulars by other independent testimony. The test to determine whether a person is a spy or an accomplice has been recently laid down in the following terms by this Court in *Karim Baksh* v. *Emperor* (5), decided on 9th December 1927, where the Indian and English authorities on the subject were considered at length :

> In criminal cases the distinction between an informer and an 'accomplice' assumes at times considerable importance, and in order to determine whether a witness who first associated with the wrongdoers and subsequently gave information to the police belongs to the first category or is an accomplice whose evidence cannot be accepted without corroboration, it has to be seen whether the witness had entered into the conspiracy for the sole purpose of detecting and betraying it or whether he is a person who concurred fully in the criminal designs of his co-conspirators for a time and joined in the execution of those till either out of fear or for some other reason he turned on his former associates and gave information to the police. If at the time when he joined the conspiracy he had no intention of bringing his associates to book but his sole object was to partake in the commission of the crime, he cannot be called an informer but is an accomplice; and his position is not modified simply because later on he turns round and carries information to the police.

It was conceded by Mr. O'Connor for the Crown that the test laid down above is correct, and that applying it to the present case, it must be held that the real position of the witnesses Dost Muhammad and Qaim Din is that of accomplices and not of spies, as erroneously held by the learned Sessions Judge.

Mr. O'Connor, however, argued that as pointed out by the learned Sessions Judge while dealing with the case in the alternative, that if corroboration of the testimony of these witnesses be necessary, it is found in the following three facts:

(1) In January 1927, Dost Muhammad and Qaim Din saw Colonel Collins at Rawalpindi and told him that the petitioner wanted a bribe of Rs. 400.

(2) The petitioner gave a chit (Ex. P. G.) in his own handwriting to Dost Muhammad containing his Ambala address.

(3) The payment and recovery of currency notes for Rs. 200 in the manner already described.

The first point requiring decision is as to the admissibility of the evidence of Colonel Collins which is admittedly based on hearsay. It is contended for the Crown that this evidence was rightly admitted under S. 157, Evidence Act, which provides that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, *at or about the time when the fact took place, or before any authority legally competent to investigate the fact* may be proved. It is conceded that Colonel Collins was not an authority legally competent to investigate the fact but it is argued that the statement was made by Dost Muhammad "about the time" when the negotiations between him and the petitioner had been completed. As neither of the Courts below had discussed in detail the evidence on this point, I found it necessary to examine the record carefully to determine if the alleged negotiations had been completed so shortly before the making of the statement by Dost Muhammad to Colonel Collins, that it could be said to have been "on or about" the time when that fact took place. Now both these witnesses have made vague and contradictory statements as to the time of their visits to Dagshai and the place where the bribe was demanded and the amount fixed. In his statement (Ex. P. E.) recorded by Sub-Inspector Barkhurdar Khan of the C. I. D. on 6th September 1927, Dost Muhammad stated that his first visit to Dagshai was in January 1926, and that he saw Colonel Collins soon after. In his examination-in-chief at the trial he deposed that this visit was in 1926, but he mentioned neither the month nor the date. When cross-examined after the charge, he declared that he did not remember the month of his visit to Dagshai, but it was in the end of the year 1926. He then corrected himself by saying that he had made a mistake as to the date in his statement (Ex. P. E.) recorded by Barkhurdar Khan and that what he really meant to say was January 1927. At the close of the trial he was examined again as a Court witness on 6th February 1928, and on that occasion he stated that his memory was not accurate as "all this

(3) A. I. R. 1928 Lah. 193.

happened two years ago," which would be early in 1926. Further, in his statement (Ex. P. E.) he put his second visit to Dagshi in March 1927, and stated that it was at this meeting that Mangat Rai had given him the chit containing his Amballa address (Ex P. G.) and had asked him to correspond at that address. When examined in Court on 8th October 1927, he was positive that the chit (Ex. P. G.) had been given to him at the time of the first visit and that his second visit was in the beginning of 1927. When cross examined on 3rd December 1927, he fixed the second visit "two or three months after the first" but stated that he did not remember the date. His companion Qaim Din (P. W. 7) in the statement (P. F.) recorded by Barkhurdar Khan fixed the date of the first visit in January 1926, but stated that the second visit was 15 months later in March 1927. In his examination-in-chief in Court on 8th October 1927, he deposed that the first visit was in "the last year" and that the second was "two or three months after the first." In cross examination on 3rd December 1927, he stated, however, that the first visit was in the end of 1926, and the second visit six months later.

The discrepancy as to the date of the second visit is brought out more prominently in the statement of Dost Muhammad dated 3rd December 1927, when he deposed that this visit was in consequence of a certain letter having been received from the Sitapur office, asking him to procure his discharge certificate and that it was with the object of getting that certificate that they went to Dagshai. The letter in question has been produced as P. W. 6/1 and bears the date 18th May 1926. This would show that the second visit was in 1926 and not in 1927.

Again as to the place where the bribe was demanded Dost Muhammad stated on 3rd December 1927, that the petitioner asked for the bribe in the office when he and Qaim Din met him for the first time. This is contradicted by Qaim Din, who is positive that the petitioner did not ask for the bribe in the office but asked them to see him at his house in the evening and it was there that the demand was first made and the amount settled.

The above review of the evidence shows that the prosecution have not been able to definitely fix the date when the bribe was demanded and negotiations completed. It is variously given as being in the beginning of 1926, May 1926, end of 1926, January and March 1927. Having regard to the discrepant nature of this evidence I am not prepared to hold that the statement alleged to have been made by Dost Muhammad to Colonel Collins was made "at or about the time when the fact took place." It must be borne in mind that S. 157, provides an exception to the general rule excluding hearsay evidence and in order to bring a statement within the exception the duty is cast on the prosecution to establish by clear and unequivocal evidence the proximity of time between the taking place of the fact and the making of the statement. I hold, therefore, that the evidence of Colonel Collins is inadmissible and must be kept out of consideration. (The judgment then dealing with the evidence used as corroborative evidence, proceeded.) I hold, therefore, that no corroboration of the testimony of Dost Muhammad and Qaim Din is forthcoming on the record.

As a last resort Mr. O'Connor contended that under S. 133, Evidence Act, it is not illegal to base a conviction on the uncorroborated testimony of accomplices and even if the evidence of corroboration is to be rejected, the petitioner might still be held guilty on the statements made by Dost Muhammad and Qaim Din. I have, however, discussed their evidence above and have pointed out several contradictions in their statements. I may also note another glaring discrepancy in this evidence. Qaim Din deposed that before the second visit to Dagshai Dost Muhammad had told him that he had received a letter from the petitioner that his papers were ready. When questioned at the trial Dost Muhammad, however, denied having received any such letter. On the other hand he stated that he had been informed in his village by one Mughal that he had received a message from the petitioner through one Dittu that the papers were ready and that he should go to Dagshai. It is further significant that the identity of these two persons has not been disclosed and none of them appeared as a witness at the trial.

It will thus be seen that the evidence which Dost Muhammad and Qaim Din had given is not of the type on which implicit reliance can be placed without any in-

independent corroboration. Moreover, while judging of the probabilities of the case, we cannot ignore the evidence of Colonel Steele (P. W. 1) Officer-in-charge of the I. S. C. Record, and Mr. Griffin (D. W. 1) the Officer-in-charge of the Section in which the petitioner worked, of Colonel Rennison D. A. D. of S. & T. Corps who had just recommended him for the title of Rai Sahib; and of Colonel H. L. Alexander, Director of Purchase and Intelligence, Indian Stores Depot, with whom he had served in several fronts during the War and at whose instance he had been specially "mentioned in the despatches," that the petitioner is a man of "exceptional capability" who had throughout his service been believed to be a man of character and unimpeachable honesty. It is no doubt true, that the mere fact that a person has enjoyed the confidence of his superiors or that he had in fact led a life of honesty during the past, is no reason to suppose that he will not succumb to temptation at the close of his career, but before a man of this type and such antecedents is adjudged guilty the evidence against him must be of an unimpeachable character. As shown above the evidence produced by the prosecution in this case is discrepant, vague and inconclusive and, in my judgment, wholly insufficient to bring home the guilt to the petitioner.

This being my view of the evidence, I do not think it necessary to discuss the legal point raised by Mr. Puri that the petitioner was not a 'public servant' as defined in S. 21, I. P. C., but was (to use the language of Sir Henry Rattigan in *Ahad Shah* v. *Emperor* (4) "a mere Babu" and consequently S. 161 was inapplicable.

For the foregoing reasons I accept the petition for revision, set aside the conviction and sentence and direct the petitioner to be set at liberty forthwith.

N.K. *Conviction set aside.*

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(4) [1918] P. R. 1918 Cr.=96 P. L. R. 1918=45 I. C. 150=26 P. W. R. 1918 Cr.

A. I. R. 1928 Lahore 651

TEK CHAND AND JOHNSTONE, JJ.

Mahant Sital Das—Plaintiff—Appellant.

v.

Shromani Gurudwara Prabandhak Committee, Amritsar and *another*—Defendants—Respondents.

Misc. First Appeal No. 240 of 1928, Decided on 15th June 1928 from order of Sikh Gurudwar Tribunal, Lahore, D/- 21st January 1928.

(a) *Sikh Gurudwara Act (Punjab Act 8 of 1925), S. 34 (1)—Order by Tribunal under Civil Procedure Code is not appealable unless it is covered by S. 34 (1) though such order by ordinary civil Court would be appealable.*

Sub-S. (1), S. 34, has taken away from an aggrieved party the right to appeal against orders passed by the tribunal under the provisions of the Civil Procedure Code, even though such orders, if passed by an ordinary Court would have been appealable under S. 104 or O. 43, Civil P. C., unless they come within the purview of sub-S. (1), S. 34. [P 652 C 2]

(b) *Sikh Gurudwara Act (1925), S. 34 (1)—Order of interim injunction is not a final order.*

The expression "final" is not defined in the Sikh Gurudwara Act. But there is no doubt that in S. 34 (1) it is used to signify orders which are not of an interlocutory nature. An order of interim injunction to a party is merely provisional in its nature. It is in no sense of the term, a "final order" determining a matter decided by the Tribunal under the provisions of the Act: 23 *All.* 220 (*P. C.*); *A. I. R.* 1924 *Lah.* 571 (*F. B.*); and *Bozson* v. *Altrincham Urban District Council*, (1909) 1 *K. B.* 547, *Appl.* [P 652 C 2; P 653 C 1]

Jivan Lal Kapur—for Appellant.

Man Singh and *Bhagat Singh*—for Respondents.

Tek Chand, J.—The appellant Sital Das, ex-Mahant of Gurdwara Ker Bawawali in the Gujrat District, which is a notified Sikh Gurdwara under (Punjab) Act 8 of 1925, and in respect of which a consolidated list of properties had been duly published in the Punjab Gazette, presented to the Local Government a petition under S. 5 of the Act claiming that the jagir money and the lands mentioned in the list did not appertain to the Gurdwara, but belonged to him personally. This petition was in due course forwarded to the Sikh Gurdwara Tribunal for disposal in accordance with the provisions of the Act. On the Sheromini Gurdwara Parbandhak Committee and the local Committee of management of the Gurdwara Ker Bawawali denying the appel-

dant's claim the Tribunal framed an issue to determine the nature of the property. On the same day the respondents presented an application under O. 39, R. 1, and O. 40, R. 1, Civil P. C., praying that, as it was necessary to prevent the appellant from appropriating the jagir money and the mesne profits of the land pendente lite, a receiver may be appointed and a "letter of request" issued to the Deputy Commissioner, Gujrat, not to pay the jagir money to the appellant. This application was resisted by the appellant on the ground that the Tribunal was a Court of limited jurisdiction, which had been established to determine certain specified matters only, and had no power to receive petitions under O. 39 and O. 40, Civil P.C. and to pass orders thereon. It was also urged that no case has been made out on the merits for the appointment of a receiver or issuing a "letter of request" to the Deputy Commissioner.

On the legal point the learned President (Skemp, J.) and the two members of the Tribunal were not agreed. The former was of opinion that the appellant's objection was sound and that the application should be thrown out in limine, on the ground that sub-S. (9), S. 12 of the Act did not empower the Tribunal to issue the orders prayed for as such orders were not necessary

> for the purpose of deciding the claim of the appellant under S. 5 to the properties in dispute.

On the other hand, the other two members (Messrs. Munna Lal and Kharak Singh) held that a narrow interpretation should not be put on sub-S. (9) aforesaid and that orders under O. 39 and O. 40, being merely incidental to the decision of the 'matter' pending before them, could in appropriate cases be passed by the Tribunal. On the merits they held that this was not a fit case for the appointment of a receiver and rejected the prayer in that behalf, but thought that it was necessary to preserve the jagir money pendente lite. Instead of sending "a letter of request" to the Deputy Commissioner as prayed for, they however directed that an interim injunction be issued to the appellant

> directing him not to realize the jagir money from the treasury pending the decision of the petition under S. 5 by the Tribunal.

From this order Mahant Sital Das has presented an appeal under O. 43, R. 1 (r), Civil P. C., to this Court.

On behalf of the respondents a preliminary objection has been raised that an order passed by the Tribunal issuing a temporary injunction is not appealable under O. 43 (1), Civil P. C., or any other provision of the law. The law as to appeals against orders passed by the Tribunal is contained in S. 34, Sikh Gurdwara Act (8 of 1925) and we have to see whether in reference to that section an appeal lies in this case. S. 34 reads as follows :

> 1. Any party aggrieved by a final order passed by Tribunal determining any matter decided by it under the provisions of this Act may, within ninety days of the date of such order, appeal to the High Court.
>
> 2. No appeal or application for revision shall lie against an order of a Tribunal except as provided for in sub-S. (1).
>
> 3. An appeal preferred under the provisions of this section shall be heard by a Division Court of the High Court.

As stated already the appeal before us has been preferred under O. 43, R. 1 (r), Civil P. C., but sub-S. (2), S. 34 explicitly lays down that

> no appeal or application for revision shall lie against an order of a Tribunal except as provided for in sub-S. (1).

There is no manner of doubt that this sub-section has taken away from an aggrieved party the right to appeal against orders passed by the Tribunal under the provisions of the Civil Procedure Code, even though such orders, if passed by an ordinary Court, would have been appealable under S. 104 or O. 43, Civil P. C., unless they come within the purview of sub-S. 1, S. 34. It follows, therefore, that the appeal against the order in question, if competent at all, should have been preferred under S. 34 (1) of the Act and not under O. 43, R. 1 of the Code. The appeal is, therefore, not properly constituted and must fail on this ground alone.

But I do not want to rest my decision on a technicality, as I am of opinion that the order under appeal is not a "final order"

> determining any matter decided by it (the Tribunal) under the provisions of the Act.

The expression "final" is not defined in the Sikh Gurdwaras Act, but there is no doubt that in S. 34 (1) it is used to signify orders which are not of an interlocutory nature. The expression is found in the Civil Procedure Code and other legislative enactments in India and in England and has been uniformly interpreted as meaning

an order which finally decides any matter that is directly at issue in the case in respect of the rights of the parties : see *Radha Kishan* v. *Collector of Jaunpur* (1).

The point in that case arose in reference to S. 109, Civil P. C., which provides that

" * * * an appeal shall lie to His Majesty in Council from any decree or final order passed on appeal by a High Court * * *.

Again a Full Bench of our own Court in *Sultan Singh* v. *Murli Dhar* (2), following *Rahim Bhoy* v. *Turner* (3) and *Sayyed Muzhar Hossein* v. *Bodha Bibi* (4), has held that a " final order " is an order comprising the decision upon a cardinal issue in a suit, that issue being one that goes to the foundation of the suit and one that can never, while the decision stands, be questioned again in the suit.

The view expressed in these rulings is in accord with that taken in England, where in reference to O. 58, R. 3, Judicature Act, Lord Alverstone, C. J., with the concurrence of the Lord Chancellor (Lord Halsbury), has laid down the test in these terms :

Does the judgment or order, as made, finally dispose of the rights of the parties ? If it does, then it ought to be treated as a final order; but if it does not, it is then an interlocutory order: *Bozson* v. *Altrincham Urban District Council* (5): see also *Standard Discount Co.* v. *La Grangee* (6) and *Salaman* v. *Warner* (7).

Applying this test to the case before us, the order in question must be held to be one of a purely interlocutory character. The interim injunction issued is merely provisional in its nature. It is not intended to conclude a right and is not decisive of the contentions of the parties on the merits of the litigation. Its sole object is to preserve the jagir money unimpaired till the decision of the litigation, to be disposed of in accordance with the orders which will eventually be passed by the Tribunal on the appellant's application under S. 5. It is in no sense of the term, a " final order "

determining a matter decided by the Tribunal under the provisions of the Act.

In the Civil Procedure Code itself such orders are described as being interlocutory (S. 94) and temporary (O. 39), and the Calcutta High Court in *Darma Coal Co.* v. *Benares Bank* (8) has definitely ruled that an order of the High Court, made in reversal of the order of the Court of first instance, refusing to issue a temporary injunction, was not a " final order " within the meaning of S. 109, Civil P. C.

After giving the matter my careful consideration I am of opinion that the preliminary objection must be sustained and it must be held that the order passed by the lower Court is not appealable.

Before closing this judgment I think it necessary to mention that both counsel wanted to have an expression of an opinion on an argument which they had addressed to us by analogy, viz. whether or not an order passed by the Tribunal issuing a perpetual injunction or appointing a receiver was appealable But as that question does not directly arise in this case and is not necessary for a decision of the question before us, I decline to go into it and this judgment ought not to be taken as expressing any opinion thereon.

The appeal is incompetent and must be dismissed. But having regard to all the circumstances of the case, I would leave the parties to bear their own costs in this Court.

Johnstone, J.—I concur.

D D. *Appeal dismissed.*

(1) [1901] 23 All. 220 (227)=28 I. A. 28 (P. C.).
(2) A. I. R. 1924 Lah. 571=5 Lah. 329 (F. B.).
(3) [1891] 15 Bom. 155=18 I. A. 6 (P. C.).
(4) [1895] 17 All. 112=22 I. A. 1 (P. C.).
(5) [1903] 1 K. B. 547=72 L. J. K. B. 271=51 W. R. 337=19 T. L. R. 266=67 J. P. 397.
(6) [1878] 3 C. P. D. 67 (71)=47 L. J. C. P. 3=26 W. R. 25=37 L. T. 372.
(7) [1891] 1 Q. B. 734=39 W. R. 547=60 L. J. Q. B. 624.
(8) [1915] 21 C. L. J. 281=28 I. C. 569.

**A. I. R. 1928 Lahore 653

SHADI LAL, C. J., AND BROADWAY, J.

Ralia Ram and *others*—Defendants—Appellants.

v.

Hira Lal—Plaintiff—Respondent.

Letters Patent Appeal No. 80 of 1928, Decided on 8th May 1928, from judgment of Harrison, J., D/- 3rd February 1928, in Civil Appeal No. 2177 of 1927.

(a) Civil P. C., O. 34, R. 6—Direction in decree for personal remedy, if sale proceeds would be insufficient, is not invalid.

Although the personal remedy cannot be enforced under R. 6 until after the sale has failed to satisfy the debt, a provision in the decree that, if the proceeds of the sale are not sufficient to pay the mortgage-debt, the mortgagors should pay the balance personally, cannot be held to be invalid: *A. I. R. 1918 P. C. 159, Foll.*

[P 654 C 2]

(b) *Evidence Act, S. 115—Mortgagor not raising issue of limitation as to personal remedy at the hearing cannot raise it after sale when the proceeds are found insufficient and mortgagee applies under Civil P. C., O. 34, R. 6.*

Where a suit was brought in 1924 to recover money secured under a mortgage of 1915 from the mortgaged property as well as from mortgagor personally and defendants confessed judgment:

Held: they could not after the sale proceeds were found insufficient and mortgagee applied for personal remedy, be allowed to raise the issue of limitation. [P 654 C 2]

**(c) *Civil P. C., O. 34, R. 6—Claim to recover principal personally, barred—Claim to interest thereon for six years immediately preceding suit is not barred.*

Even where the mortgagee's claim for the principal amount is barred, the mortgagee is not debarred from recovering from the mortgagors personally the interest which accrued due during the six years immediately preceding the institution of the suit. [P 654 C 2]

Balwant Rai—for Appellants.

Mehr Chand Mahajan and *Bhawani Singh Puri*—for Respondent.

Shadi Lal, C. J.—On 11th March 1924, the plaintiff Hira Lal brought an action for the recovery of a certain sum of money due on account of principal and interest on the foot of a mortgage which the defendants Ramjas Rai and Rallia Ram had executed in his favour on 20th April 1915. The mortgagee claimed to recover the money from the mortgaged property as well as from the mortgagors personally. The mortgagors confessed judgment, with the result that the Subordinate Judge allowed the claim in toto and passed a preliminary decree for Rs. 13,895-13-3. The judgment-debtors failed to pay the money within the prescribed period, and on 15th January 1926 a final decree for sale was made in terms of O. 34, R. 5, Civil P. C.

The net proceeds were, however, found to be insufficient to satisfy the claim of the plaintiff, and he accordingly asked the Court to pass a decree under O. 34, R. 6, Civil P. C., for the realization of the balance from the mortgagors personally. This power was granted by the trial Judge, and his judgment has been upheld by Harrison, J.

The defendants have preferred this appeal under Cl. 10, Letters Patent, and Mr. Balwant Rai on their behalf argues that as it has been held that the personal remedy for the principal sum is barred by limitation, the prayer for the realization of interest from the defendants personally is equally barred. I am unable to accede to this contention. As stated above, the plaintiff had, in his plaint, claimed to recover the whole of the debt from the defendants personally as well as from the mortgaged property, and the latter did not demur to that claim. Indeed, they confessed judgment, and though the trial Judge did not state in express terms, but he intended to say, that, if the proceeds of the sale were not sufficient to pay the mortgage-debt, the mortgagors should pay the balance personally. It is true that the personal remedy could not be enforced until after the sale had failed to satisfy the debt, but such a provision in the decree cannot be held to be invalid: vide: *Jeuna Babu* v. *Parmeshwar Narayan* (1). The defendants by confessing judgment prevented the plaintiff from showing that the period of limitation had been extended under Ss. 19 and 20, Lim. Act, and it is not open to them now to say that the personal remedy is barred by time.

Conceding for the sake of argument that the claim for the principal amount is barred, I am not prepared to hold that the mortgagee is not entitled to recover from the mortgagors personally the interest which accrued due during the six years immediately preceding the institution of the suit. It may be that the personal remedy for the principal debt could not be enforced after the expiry of six years from the date of the mortgage, but the debt being a charge on immovable property was not extinguished. As the debt existed even after the expiry of six years, the personal liability for the payment of interest under the covenant contained in the instrument of mortgage arose in the seventh year and also in each of the subsequent years until the expiry of the period for the recovery of the debt from the mortgaged property. There is some plausibility in the proposition that when the principal cannot be realized, the interest, which is only an accessory to the principal, is equally unrealizable. It is, however, clear that this rule can apply only when the liability for the principal debt is altogether extinguished and no remedy to realize it is available. I accordingly hold that the mortgagee is entitled to a personal decree

(1) A. I. R. 1918 P. C. 159=47 Cal. 370=46 I. A. 294 (P. C.).

for the interest which accrued due during the six years before the institution of the suit.

For the foregoing reasons I dismiss the appeal with costs.

Broadway, J.—I concur.

D.D. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 655

ADDISON, J.

Ram Chand—Defendant—Appellant.

v.

Ram Rattan and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 2331 of 1927, Decided on 29th February 1928, from decree of Addl. Judge, Hoshiarpur, D/- 6th June 1927.

* (a) *Limitation Act, S. 12—Time expiring during vacation — Copy applied for during vacation but after limitation—Appeal filed the next day of obtaining the copy — Appeal was held to be in time.*

Time for filing an appeal expired during the vacation. The appellant applied for the copies of judgments and decree after the prescribed period but while the right of appeal was subsisting (before the Court was opened) and obtained the copies two days after the Courts opened. The appeal was filed on the next day of obtaining the copies.

Held: that copies can be applied for at any time when the right of appeal still subsists even though the application is made after the expiry of the period prescribed. The appeal was, therefore, in time: 89 *I.C.* 437. *Rel. on*; 79 *P R.* 1916, *Dist.* [P 656 C 2]

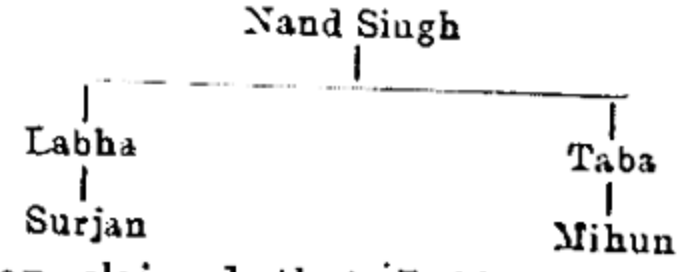
(b) *Civil P. C., O. 41, R. 31—Appellate judgment—The Judge should state his own reasons and should not confine himself to approving of the reasons of the Court of first instance.*

The Judge of an appellate Court must state in his judgment his own reasons and should not confine himself to approving of the reasons of the Court of first instance. The reason is that the judgment must show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discretion in deciding them. The proper form of the order to be made in second appeal in such cases is to set aside the decree of the lower appellate Court and send back the case to that Court in order that the appeal may be disposed of according to law. [P 657 C 1]

Nand Lal—for Appellant.

Nanak Chand and *Shambu Lal Puri*—for Respondents.

Judgment.—These are two connected second appeals. In one suit Surjan, son of Labha, sued Ram Chand and his brother for possession of a certain residential property. The plaintiff alleged that he had been in possession up to five years before suit when he went to Jullundur to earn his livelihood. On his return to the village he found that during his absence defendants had illegally taken possession of the property. The defendants denied that the property belonged to the plaintiff and alleged that they had been in possession from time immemorial. They further alleged that they erected structures on the site more than 12 years back, that the claim of the plaintiff was time barred, and that the plaintiff was estopped from suing as he stood by when the buildings were made. The following pedigree table was set up by the plaintiff:



Surjan claimed that Labha and Taba were recorded as owners in the settlement papers of 1852, and that he and Mihun succeeded to the property in suit along with an adjoining piece of land which is in dispute in the other suit. According to Surjan he sold the property in the other case, which was his own share, to Ram Rattan, the plaintiff in the other case, in 1895. Surjan himself after that sale lived with Mihun, his cousin. Mihun was murdered in 1916 and Surjan succeeded Mihun as owner of the unsold half. Surjan continued to live there for some time after 1916 till he went to Jullundur. It was then that Ram Chand and his brother illegally took possession.

In the other suit Ram Rattan sued Ram Chand and certain others for permanent injunction that they should not prevent him from building walls on a vacant site which was his property and which had been purchased by him from Surjan as already described. The real contesting defendant was Ram Chand. He claimed the vacant site as his own and pleaded that as he was in possession the suit for injunction was incompetent. He further pleaded his own adverse possession from time immemorial.

In Surjan's suit the trial Judge held that Labha and Taba were owners in 1852, that Surjan sold his half-share in 1895 to Ram Rattan and continued to live with Mihun in the other half till 1916 when Mihun was murdered and

also continued to live there after Mihun's murder for some time further, i. e., it was found that Surjan was the owner of the land in dispute in that suit and had been in possession within 12 years. He further found that the property in dispute was not built by Ram Chand and his brother but by Mihun and Surjan and that though Surjan did not hold any agricultural land in the village at present, he did so originally and that he was full owner of the property and had not abandoned possession by going to Jullundur for a short period. The trial Judge, therefore, decreed Surjan's suit for possession.

In Ram Rattan's suit the trial Judge held that the sale to him by Surjan in 1895 was proved and that the portion sold to Surjan's original half of the property, held by Mihun and Labha He further found that Ram Rattan had leased the house then standing on this property in 1904, 1911, 1913 and 1915 to certain persons and paid the chowkidara tax for this house in 1913. Some time after 1915, he held that the house on this part of the site fell down and it became a vacant site. After that date, therefore, possession followed title and the defendants had not established adverse possession. He, therefore, granted Ram Rattan a decree for a perpetual injunction restraining the defendants from preventing him from building walls on the site.

Against this decision in Ram Rattan's suit Ram Chand alone appealed and against the decision in Surjan's suit Ram Chand and his brother appealed. The Additional District Judge who heard the appeals briefly stated what the true cases were and then went on to hold that the evidence established the ownership of Surjan with respect to the property in the two suits At this point his judgment ceased and he then went on as follows: The ownership of Surjan with respect to the property in the two suits

is supported by sufficient oral evidence on the files of the two cases and I agree entirely with the finding of the lower Court in both the suits to the effect that both these plots belonged ultimately to Surjan, who duly sold the southern portion to Ram Rattan and is entitled to recover the northern portion for himself while Ram Rattan has justly been given a decree for a permanent injunction against Ram Chand and his colleagues, who unlawfully prevented him from building the walls *AB* and *BC* thereon. Both the appeals are hereby dismissed with costs.

Against this decision these two second appeals have been preferred in the one case by Ram Chand and in the other case by Ram Chand and his brother.

A preliminary objection was taken that the second appeal in Ram Rattan's case is barred by time. On account of the vacation, under S. 4, Lim. Act, the appeal could be instituted in this Court on the 19th September 1927 and in point of fact both the appeals were so instituted. In Ram Chand's appeals, however, copies of the lower appellate Court's judgment and decree were not put in till the 22nd September. It was argued that as an application for the copies was not made till the 7th September after 90 days had expired, no allowance could be made for the time taken in getting the copies of the lower appellate Court's judgment and decree. As against this it was contended that copies could be applied for at any time when the right of appeal still subsisted and that as an application for copies was made on 7th September and the copies were dispatched on the 21st September and were put in this Court on 22nd September the time from the 19th September to 21st September must be excluded, and the copies having been put in on the 22nd September, the appeal was within time. This question has been the subject of two conflicting judgments of this Court delivered by different Judges in Chambers. One judge held in *Guran Rakha* v. *Bindraban* (1) that as the day when the 90 days for the appeal had expired was a holiday and the copies were not applied for till the next day, no allowance could be made for the time required to get the copies. A different view was, however, taken by another Judge in *Naman* v. *Gurditta* (2). The subject is discussed at length at p. 118 of Rustomji's Law of Limitation, 4th edn. where the first decision of this Court is doubted and where numerous decisions of other Courts taking the same view as the second decision of this Court are given. There is no doubt that on the authorities the appellant could have applied for copies even on 19th September and have excluded the time taken in getting those copies. In my judgment this is the correct view and I hold that copies can be applied for at any time when the right of appeal still subsists even though the application is made

(1) [1916] 79 P. R. 1916=125 P. L. R. 1916=35 I. C. 233=55 P. W. R. 1916.
(2) A. I. R. 1926 Lah. 121.

after the expiry of 90 days and that the time requisite to get these copies must be excluded. It follows that in the present case the appeal in Ram Rattan's case is not time barred and I so hold.

On the merits the learned counsel for the appellants contended in both the appeals that there was no judgment of the lower appellate Court within the meaning of O. 41, R. 31, Civil P. C. In my judgment this is correct. Under the rule in question reasons for the decision of the lower appellate Court are essential. In the case of the two appeals in question the Additional District Judge did give reasons that Surjan at one time owned both the plots. After that all he did was to say that he agreed with the findings of the trial Judge that the suits should be decreed. Although the questions of possession and adverse possession were very important points in the appeal and were taken before him, he had not even specifically mentioned that adverse possession was not established in Ram Rattan's case or that in Surjan's case Surjan was in possession within 12 years. He contented himself by saying that he agreed entirely with the findings of the lower Court. This is most unsatisfactory. The Judge of an appellate Court must state his own reasons and should not confine himself to approving of the reasons of the Court of first instance. The reason is that the judgment must show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discretion in deciding them. The subject is discussed at p. 951 of Mulla's Code of Civil Procedure, 8th edn. The proper form of the order to be made in second appeal in such cases is to set aside the decree of the lower appellate Court and send back the case to that Court in order that the appeal may be disposed of according to law. This must be done in the present cases.

I accordingly accept both the appeals, set aside the orders of the Additional District Judge and remand both the cases to the District Judge of Hoshiarpur under O. 41, R. 23, Civil P. C., to decide the appeals in his Court according to law. Court-fees in both appeals will be refunded: other costs will abide the event.

N.K

Appeals accepted.

1923 L/83 & 84

A. I. R. 1928 Lahore 657

SHADI LAL, C. J. AND AGHA HAIDAR, J.

Chandu and *others*—Accused — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 760 of 1927, Decided on 10th January 1928, from order of Sess. Judge, Hissar, D/- 17th June 1927.

(a) *Criminal P. C., S. 154 — First information report not containing names of prosecution witnesses--Prosecution story does not necessarily become suspicious—Criminal trial.*

The mere fact that in the first information report the names of the witnesses, who ultimately support the prosecution, are not given, is not a matter which would throw suspicion upon the story for the prosecution. [P 659 C 1]

(b) *Criminal trial — Prosecution need not prove motive for every crime.*

It is not at all necessary for the prosecution, in order to establish a charge of crime, to prove a motive for it, much less the adequacy of that motive. [P 659 C 1]

G. C. Narang and *N. C. Pandit* — for Appellants.

J. M. Mackay for *Govt. Advocate*—for the Crown.

Judgment. — Six persons, namely, Chandu, Ram Singh, Khayali, Jaimal, Girdhari and Behari, who were originally charged under S. 302 read with S. 149, I. P. C., with the murder of Ram Karan, deceased, have been convicted by the Sessions Judge of Hissar of the offence of culpable homicide not amounting to murder under S. 304-II, I. P. C. Chandu, Ram Singh and Khayali have each been sentenced to ten years rigorous imprisonment including three months' solitary confinement, while Girdhari, Behari and Jaimal have been each sentenced to seven years rigorous imprisonment including three months solitary confinement. The six convicts have appealed to this Court and a lady named Mt. Har Kaur has put in an application for enhancement of the sentences passed upon the appellants.

With the exception of Girdhari and Behari, who are strangers, the remaining four accused as well as the deceased Ram Karan and the witness Nathu (P. W. 4) and Chuni (P. W. 5) are all descended from a common ancestor. In fact Chandu and Khayali were the first cousins, and Jaimal and Ram Singh the nephews of Ram Karan, deceased. The case for the prosecution is that there was enmity

between Ram Karan and his cousins and nephews. It was partly due to the partition of the family property, which took place about 15 years ago, and latterly, some two years ago, Chandu and Khayali were convicted of some excise offence, and they suspected that Ram Karan had got up the case against them. In fact they very frankly stated, when they were being prosecuted under the Excise Act, that they were on inimical terms with Ram Karan.

Ram Karan was a native of Chani Khushal in the Hissar District. Early in the morning, on 17th April 1927, he left his house for the jungle in order to answer a call of nature. His son Nathu (P. W. 4) handed him a lota. In the narrow lane in front of Ram Karan's house two bullock carts were standing close to the house of Gagan (P. W. 6). Ram Karan remonstrated that the carts were obstructing the way. The boy Nathu (P. W. 4), after handing over the lota, had walked back to the house. Soon afterwards he heard the cries of "Marlo marlo," Nathu immediately came out accompanied by another person named Mangla and saw that his father was lying in the chauk and the six accused persons were beating him with lathis. It is said that Jaimal had a kulhari with him. The boy at once went up to the roof of the house and raised an alarm which attracted a number of people to the spot. Among the people attracted there were Gagan (P. W. 6), Chuni (P. W. 5), Lakhma (P. W. 7) and Mohru (P. W. 8). All these persons saw the assault. The evidence is to the effect that, even after Ram Karan had been felled by the blows which he received, his assailants continued to shower blows upon him. He received no less than 14 injuries, four of them being on the head. One of these injuries must have been caused with a terrific blow which smashed his jaw and knocked out ten of his teeth. Chuni and Gagan tried to intervene but in their blind fury the assailants did not spare them even, with the result that they received some injuries. Mohru and Lakhma were present but remained standing at a distance, Soon afterwards Ballu, lambardar, (P. W. 9), came and made inquiries as to who the assailants were. The boy Nathu and other persons present gave him the names of the assailants. Ballu immediately sent for Chetia, chaukidar (P. W. 3), and told him to go at once to the police station at Hansi, which was at a distance of two kos from the scene of the occurrence, and lodge the first information report. The report, which was made with great promptitude at 9 a. m. within a couple of hours of the incident narrated above, gives clearly the names of the six appellants as being the assailants of Ram Karan. At the time when Chetia started to make the report, Ram Karan had not died though he had become senseless and soon afterwards succumbed to his injuries. The Sub-Inspector arrived at the scene of the occurrence soon afterwards and found Ram Karan already dead. He dispatched the dead body to the headquarters for post mortem examination and took up the investigation.

Now, this story is fully corroborated by the evidence of five eyewitnesses, namely, Nathu, Gagan, Chuni, Lakhmu and Mohru. The evidence of Chuni is very important because he is related to Ram Karan as well as to the four appellants, namely, Chandu, Khayali, Jaimal and Ram Singh. He had no reason whatsoever to implicate his relations in a serious crime unless they were really guilty. His actual presence at the scene of the occurrence is put beyond doubt by the fact that in his attempt to separate the assailants he himself received injuries. Gagan (P. W. 6) also received injuries in the attempt to save Ram Karan from the onslaught of the assailants, and it cannot be doubted for one moment that he was present at the time of the occurrence and actually saw the murderous attack. He belongs to the same brotherhood as Ram Karan and the six appellants and the same is the case with Lakhmu and Mohru (P. Ws. 7 and 8). These witnesses had no motive to give false evidence in order to implicate absolutely innocent persons of their own brotherhood. In the first information report the chaukidar is reported to have stated :

> to-day after sunrise, there arose a fight between the parties of Ram Karan and Khayali.

A good deal of capital was attempted to be made out of this unfortunate word "fight" and the injuries received by Chuni and Gagan were also invoked in aid in order to build up an argument of despair, namely, that there was a free fight between the party of Ram Karan consisting of himself, Chuni and Gagan on the one side and the appellants on the other side

and that Ram Karan's party got the worse of it. We need hardly say that there is no foundation whatsoever for this argument. Chetia, Chuni and Gagan all gave evidence in the case and no question was put to them nor was even a suggestion thrown out in the course of their cross-examination in support of this theory of an alleged fight. The utter hollowness of this defence is further apparent from the fact that four of the accused, namely, Ram Singh, Chandu, Khayali and Behari, pleaded alibi on their defence.

It was further argued that there were factions in the village and that the witnesses, who have come forward to support the prosecution, belonged to Ram Karan's faction. This argument does not advance the case for the defence any further. On the other hand, it lends support to the story of the prosecution in that it assumes that the relations between Ram Karan on one side and Chandu, Jaimal, Ram Singh and Khayali on the other were strained.

It was argued very strenuously that although Ballu lambardar (P. W. 9), has stated in his evidence that he gave the names of the witnesses to the chaukidar the chaukidar did not mention any such names in the report. The chaukidar may have neglected the instructions of Ballu or it may be due to his mental lethargy that he did not mention the names of the witnesses. The mere fact that in the first information report the names of the witnesses, who ultimately support the prosecution are not given, is not a matter which would throw suspicion upon the story for the prosecution.

It was further argued that no motive has been proved by the prosecution which would justify the attack upon Ram Karan on the morning of 17th April 1927, by the appellants. In the first place it is not the duty of the prosecution to prove motive for every crime. In fact there are both Indian and English authorities which make it perfectly clear that it is not at all necessary for the prosecution in order to establish a charge of crime to prove a motive for it, much less the adequacy of that motive. No one can prove the inner workings of human mind, especially if it happens to be the abnormal mind of a criminal. In the present case, however, it cannot be said that there was a total absence of motive for the crime. It may be that the old partition was considered by the cousins and they have been consequently smarting under the sense of a real or imaginary injury. Then we have the comparatively recent conviction of Chandu and Khayali under the excise laws which both these persons imputed to Ram Karan as the prime mover. As already stated, there is no evidence to show what actually transpired before these appellants opened their attack upon their solitary victim, namely, Ram Karan. Ram Karan is dead and the only persons, who could throw any light upon the actual events which led up to the assault are the appellants and they are naturally reticent.

We are considerably impressed by the argument in support of the application for enhancement put forward by Mr. Shamair Chand. The facts established would bring the case against the six appellants well within the purview of S. 302, I. P. C. The assault was a brutal one both in its intensity and ferocity. There were six men all armed with dangs while their victim, Ram Karan, was unarmed. A number of blows were directed against the most vital part of Ram Karan's body, namely, his head, and the assailants did not pay any attention to the importunities of Chuni and Gagan who tried to intervene but continued their assault, even after wounding Gagan and Chuni as Ram Karan lay helpless on the ground. We do not agree with the reasonings of the learned Sessions Judge when he says that there was no common intention to cause death or to cause such bodily injury as was likely in the ordinary course of nature to cause death. The facts narrated above show that the six appellants must have known very well that Ram Karan could not possibly survive the concerted attack made by them. However, as under the circumstances we are not inclined to impose the capital penalty upon any one of the appellants under S. 302, I. P. C., and the lesser penalty under the same section, namely, transportation for life, would not in its actual working have entailed, a much more severe sentence of imprisonment upon the three principal assailants, namely, Chandu, Ram Singh and Khayali, than the one already imposed upon them by the Court below, we do not consider it desirable to alter the charges and to formally convict the appellants under S. 302, I. P. C. We, therefore, maintain the

convictions and sentences which have been passed upon the six appellants and dismiss the appeal.

In view of our observations we have already made, the application for enhancement of sentences necessarily fails.

S.J. *Appeal dismissed.*

A. I. R. 1928 Lahore 660

AGHA HAIDAR, J.

Gulab and *another*—Accused— Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 665 of 1927, Decided on 11th November 1927, from order of 1st Class Magistrate, Attock, D/- 30th May 1927.

Criminal P.C., S. 439— Reference by District Magistrate to High Court for enhancement of sentence —Procedure is irregular—Proper procedure is to instruct law officer of the Crown to file application for revision.

A reference for enhancement of sentence by a District Magistrate to the High Court is irregular and not warranted by law. The proper course for him to adopt is to instruct the law officers of the Crown in the High Court to file an application for revision asking for the enhancement of the sentence. [P 660 C 1]

Abdul Ghani Khan—for Appellants.

B. H. Bevan Petman for *Govt. Advocate*—for the Crown.

Judgment.— Three persons, namely, Gulab, Dalli and Shah Sufaid, had been challaned by the police under S. 397, I. P. C., Dalli has been acquitted by the learned trying Magistrate, and Gulab and Shah Sufaid have each been convicted under S. 394 and sentenced to a term of five years' rigorous imprisonment and a fine of Rs. 100. They have appealed to this Court through Mr. Abdul Ghani Khan.

The District Magistrate, Campbellpore, has made a reference to this Court for the enhancement of the sentence of the appellants by convicting them under S. 397, I. P. C. The procedure adopted by him appears to be irregular and not warranted by law. The proper course for him to adopt would have been to instruct the law officers of the Crown in the High Court to file an application for revision asking for the enhancement of the sentence. However, a learned Judge of this Court was pleased to issue notice on 28th July 1927 to the accused to show cause why the sentence which has been passed upon them, should not be enhanced. The notice has been duly served. Both the appeal and the reference are before me for disposal.

The story for the prosecution is mainly as follows :

Four persons, namely, Fazal (P. W. 5), Muhammad (P. W. 6), Ghazan (P. W. 29) and Abdulla (P. W. 30), (complainants), had gone to a cattle fair and were returning from it after selling their bullocks. They had the proceeds of the sale with them. These four persons passed a night at the village called Kalu Kotha and in the morning started on their homeward journey. When they reached a spot near the forest bungalow of the village Jabbi three persons, namely Gulab, Shah Sufaid and Dalli, met them. Gulab and Shah Sufaid, according to these witnesses, were armed with revolvers, while Dalli had a hatchet. Gulab, Shah Sufaid and Dalli put some questions to Fazal and his party regarding some dacoity at Fatehjang and immediately after Dalli gave a kulhari blow to Abdullah who fell down. Upon this Dalli took a sum of Rs. 62 from Fazal (P. W. 5) and Gulab and Shah Sufaid robbed Ghazan. Muhammad one of the bullock sellers, managed to make good his escape and reached the village Jabbi. In the meantime the accused, after robbing Abdullah, Fazal and Ghazan, ran away having given a blow to Ghazan also who was disabled and fell down. While the accused were running away, Fazal went to the village Humak and asked some people who were working in the fields for assistance. Some of these people joined Fazal in the pursuit. At the village Jabbi the party of Fazal requested Chanan Shah to assist them in the pursuit of the robbers, and Shah Murtaza, the son of Chanan Shah, and some others joined the pursuing party. When they reached the foot of a hill called Kawa Garh the pursuing party overtook the accused. Shah Murtaza, who was soldier on leave and carried a gun with him, fired at the accused as they were climbing the hill. The accused returned fire with their revolvers. Shah Sufaid and Gulab were injured by the shots fired from Shah Murtaza's gun. Upon this Shah Murtaza, who, as a man of action, had in the meantime constituted himself the leader of the pursuing party, asked the accused persons to sur-

render their weapons. The accused gave up the weapons as well as a sum of Rs. 90 in nine currency notes of Rs. 10 each. The accused were natives of the village Bolianwal on the other side of the hill Kawa Garh and, as some people from the village Bolianwal came near the scene of encounter apparently to rescue Gulab and his confederates, Shah Murtaza and the pursuing party together with the four complainants, returned towards Campbellpore where Shah Murtaza saw Sardar Dost Mohammad Khan who took them to Captain Richardson (P. W. 35). The latter reported the matter to the District Magistrate. The District Magistrate called the Sub-Inspector of Police, Mirza Ghulam Ghauns (P. W. 41) who recorded the statement of Fazal (P. W. 5) and sent up the case to the Fatehjang police station for investigation.

There is overwhelming evidence on the record to support the prosecution story in its main features. Apart from the consideration of the evidence of the numerous witnesses for the prosecution to me it appears that the evidence of the complainants, Fazal, Ghazan, Muhammad and Abdulla is quite sufficient to justify the conviction of the appellants in the present case. They are ordinary traders who were absolute strangers to the accused and it cannot for a moment be believed that they would implicate innocent persons in a serious crime. The learned counsel for the appellants did not refer me to the evidence of any one of the witnesses for the prosecution or for the defence but contented himself simply by criticizing the judgment of the learned Magistrate. At the end of the argument I asked him to suggest any reason why these four persons, the bullock sellers, should not be believed, and he very frankly had to admit that he could not. This, in my opinion, is quite sufficient to justify the conviction of the appellants.

Some evidence was produced by the accused in their defence suggesting that the whole trouble arose because Shah Murtaza lost heavily while gambling with Gulab. I need hardly say that this evidence is absolutely unconvincing.

Now the question is as to what section of the Indian Penal Code applies and whether the appellants should be convicted of an offence under S. 397, I. P. C., and their sentence enhanced. The trying Magistrate, by a very unsatisfactory process of reasoning, came to the conclusion that the revolvers were really thrust upon the accused and that they belonged to Shah Murtaza who was a naik in the army. There is no evidence whatsoever that Shah Murtaza possessed these revolvers, much less that he had any opportunity of foisting them upon the accused. It may be noted that one of the pistols is what is called, Webly IV Service Revolver. This revolver is not given to every soldier who may be employed in the army, but the military authorities use considerable discrimination and give it only to a few selected soldiers. In any case Shah Murtaza is not proved to have been given this revolver by the military authorities. The other revolver is a private one. I am not prepared to assume that Shah Murtaza came by these revolvers by any unlawful means as there is no evidence on the record for such an assumption.

There is another matter which deserves some consideration. According to the prosecution the complainant's party consisted of four persons, while the accused were only three. Unless the accused were armed with dangerous weapons it does not stand to reason that they could have attacked and overpowered Fazal and his three companions. It is true that, out of these four complainants, one was a man sixty years old. According to the trying Magistrate the other three were "lads of about 25 or 30." Now to speak of the three bullock sellers, whose ages ranged from 25 to 30, as mere lads is nonsense. I would prefer to call them, unless they were suffering from bodily infirmity, as strong, healthy, powerful young men. The conclusion is irresistible that the accused were armed with deadly weapons and could, therefore, successfully overpower and rob the complainants. The learned Magistrate has also remarked that, if the accused were really armed with revolvers they would have certainly injured some of the pursuing party, seeing that there was evidence that shots were exchanged between the pursuers and the pursued at a point blank range of some seventeen or eighten paces. This again is not very convincing. When the accused were pursued by a number of persons they must have been in a panicky and nervous condition and it is just possible that, although they fired their revolvers,

they did not hit any body. The evidence of Mr. Morris, Foreman of the Ordinance Department, Rawalpindi, is clear that the two revolvers had been recently fired.

There is another way of looking at the matter. These revolvers must be expensive weapons. At any rate, their price would be a big sum for Shah Murtaza, who is only a naik in a camel corps. According to the prosecution, a sum of Rs. 90 in currency notes was handed over to Shah Murtaza by the accused men when they surrendered at the foot of the Kawa Garh hill.

This money was delivered by Shah Murtaza to the police. Now this sum is not negligible for a man of Shah Murtaza's position and it does not stand to reason that Shah Murtaza for the mere fun of securing the conviction of the accused would throw away this sum of Rs. 90 and the two valuable revolvers. In my opinion the accused had these two revolvers and used them. Their conviction, therefore, under S. 394, I. P. C., was erroneous. The accused ought to have been convicted under S. 397, I. P. C. This being so, the minimum sentence under S. 397 is seven years' rigorous imprisonment. I, therefore, alter the conviction and sentence, and in lieu thereof order that the accused be convicted under S. 397, I. P. C., and sentenced to seven years rigorous imprisonment each. The order as to fine passed by the trial Magistrate shall be maintained.

S.J. *Sentence enhanced.*

A. I. R. 1928 Lahore 662

JAI LAL, J.

Gurdas Mal and *another* — Defendants —Appellants.

v.

Baij Nath and *others* — Plaintiff and Defendants—Respondents.

Second Appeal No. 2076 of 1927, Decided on 19th April 1928, from decree of Dist. Judge, Gujranwala, D/- 5-5-1927.

(a) *Registration Act, S.* 17 (2) (6) — *Once the contents of the document have been admitted, question of its admissibility does not arise.*

Where the contents of a document requiring registration, but not registered, have been admitted, the question of its admissibility or otherwise does not arise. [P 663 C 2]

In a suit for partition of joint property the parties entered into a written compromise which was filed in Court and the suit dismissed in accordance therewith. The compromise provided the manner in which the joint property in suit was to be divided between the parties and, in order to adjust the difference between the prices of the properties which fell to the shares of the two contesting parties, it was provided that a certain sum would be paid by *D* and *G* to *B* and his brothers. A subsequent suit was instituted by *B* against *G* and *D* for the recovery of the amount. In the plaint the relevant terms of the compromise were recited and it was alleged that the amount in suit was payable by the defendants to the plaintiff a month after the date of the compromise. The defendants in their written statement stated that "with reference to para. 2 of the plaint there was no condition as to the payment of amount after one month." In appeal *G* and *D* contended that the compromise was not admissible for want of registration.

Held: that as the terms of the agreement had been admitted by the defendants, the question of the admissibility or otherwise of the compromise did not arise: 1 *Lah.* 436, *Rel. on.*

[P 663 C 1]

(b) *Limitation Act, Art.* 120—*Suit to recover amount due under a compromise in a suit for partition — Article applicable is* 120 *and not* 111.

Under a compromise in a suit for partition of joint property, in order to adjust the difference between the prices of the properties which fell to the share of the two contesting parties, a certain sum was to be paid by *D* to *B*. The amount was to be paid after one month. *B* brought a suit to recover the amount. *D* contended that the suit was time barred according to Art. 111.

Held: that it was not a case of sale and amount in suit could not be described as purchase money. Therefore Art. 111 did not apply, but the case was governed by Art. 120.

[P 663 C 2]

Badri Das—for Appellants.

Mehr Chand Mahajan — for Respdts.

Judgment.—This is the defendant's appeal from the decree, dated 5th May 1927, of the District Judge of Gujranwala, passed in a suit brought by the plaintiff for the recovery of Rs. 633-5-4 against the defendants.

It appears that in a suit for partition of joint property the parties entered into a written compromise on 21st August 1922, which was filed in Court and the suit dismissed in accordance therewith. The compromise provided the manner in which the joint property in suit was to be divided between the parties and, in order to adjust the difference between the prices of the properties which fell to the shares of the two contesting parties, it was provided that Rs. 633-5-4 would be paid by Duni Chand and Gurdas Mal to Baij Nath and his three brothers.

The suit out of which this second appeal has arisen, was instituted by Baij

Nath against Gurdas Mal and Duni Chand on 3rd October 1925 for the recovery of the above amount. In para. 2 of the plaint the relevant terms of the compromise were recited and it was alleged that the amount in suit was payable by the defendants to the plaintiff a month after the date of the compromise. The defendants in their written statement in para. 2 merely stated that

> with reference to para. 2 of the plaint there was no condition as to the payment of amount after one month.

They must, therefore, be deemed to have admitted the other allegations made in para 2 of the plaint. The suit was defended mainly on the ground that it was barred by time. It was dismissed by the trial Court, but on appeal the District Judge has decreed it.

The main questions have been discussed before me. One is of limitation and the other is of admissibility of the compromise for want of registration. It will be convenient to dispose of the second point first.

No objection to the admissibility of the compromise for want of registration was taken in the trial Court. The matter was not even raised before the District Judge. It has been raised for the first time in the grounds of appeal to this Court. Whether this question could be raised under the circumstances is a matter which I need not decide, but I hold that, in view of the fact that in para. 2 of their written statement, the defendants must be taken to have admitted the existence of the agreement and the terms thereof, the question of the admissibility of the compromise does not arise. *Bisheshar Lal* v. *Mt. Bhuri* (1), cited by the appellants, does not help them at all. On the other hand there is a remark in that judgment which clearly supports the view that I have taken in this case. In that case the document was held to be inadmissible in evidence for want of registration. The defendant had not admitted the contents thereof, but when he was put in the witness-box a question was asked from him whether he admitted the execution of the document and he replied in the affirmative. It was contended that the defendant having admitted the execution of the document the objection as to its inadmissibility for want of registration was not open to him. The learned Judges held that the mere admission of the execution of the document did not debar the party from objecting to its admissibility for want of registration and they distinguished certain cases which were cited on behalf of the party who wanted to rely on the document. In those cases it was held that if the contents of the document have been admitted then the objection to its admissibility is not open to the party so admitting. As in this case the terms of the agreement have been admitted by the defendants the question of the admissibility or otherwise of the compromise does not arise.

With regard to limitation: the counsel for the appellant contends that Art. 111, Sch. 1, Lim. Act, governs the case. That article provides a period of limitation of three years for a suit by a vendor of immovable property for personal payment of unpaid purchase money. I am unable to understand how the plaintiff in this case can be said to be a vendor of immovable property and how the defendants can be called purchasers of that property. The transaction in this case was one of partition of joint property. It was not a case of sale and amount in suit could not be described as purchase money. I am, therefore, unable to hold that Art. 111 applies to this case. No other article of the Limitation Act was relied upon by the learned counsel and I am aware of none which applies to the circumstances of the case. It follows, therefore, that Art. 120 governs this case and admittedly the suit is within limitation according to that article. It is not necessary to discuss the next question whether the acknowledgments relied upon by the respondent save the limitation. The learned District Judge has held that they do, with this exception: that such acknowledgments do not save limitation as against Duni Chand, defendant, because it has not been established that they were made either by him or under his authority. I am inclined to think that the conclusion of the learned District Judge, that they bind Gurdas Mal, is correct. For this reason also the suit was not barred by time as against Gurdas Mal, but, as I have held that Art. 120 governs the case, no question of acknowledgment arises, I dismiss this appeal with costs.

N.K. *Appeal dismissed.*

(1) [1920] 1 Lah. 436=56 I. C. 595.

A. I. R. 1928 Lahore 664

DALIP SINGH, J.

Hari Kishan and *others*—Accused—Petitioners.

v.

Malik Kanshi Ram—Complainant—Respondent.

Criminal Revn. No. 1520 of 1926, Decided on 3rd December 1927, made by Sess. Judge, Shahpur.

Criminal P. C., S. 139-A—Magistrate should weigh the evidence as it stands and find if the evidence is reliable.

Where a right of public way is denied and the person denying as well as the person complaining produce evidence the Magistrate should take the evidence as it stands and see whether, on the face of it, if there was no evidence to the contrary, he could come to the conclusion that the evidence was false and was, therefore, unreliable. It is not a correct procedure that he should weigh the evidence produced by both sides and then come to the conclusion which he believes or which he prefers : *A. I. R.* 1926 *Pat.* 170, *Rel. on.* [P 665 C 2]

Ram Lal Anand—for Petitioners.

Ram Chand Manchanda—for Respondent.

Facts.—Malik Kanshi Ram, on 13th February 1925, complained under S. 133, Criminal P. C., that he and the accused (six persons) were the joint owners of the vacant sites as shown at Nos. 6 and 13 on the plan filed by him, that the accused has put walls on the boundaries of plot 6 which have obstructed the public ways marked Nos. 2 and 7 going from Pipliwala well and Baghwala well to the abadi, that this obstruction should be removed under S. 133, Criminal P. C., and the walls should be demolished. The accused denied the existence of any public right in respect of the way through plot 6. The complainant produced 11 witnesses, and the accused produced four witnesses in support of their respective positions. The accused further pleaded that the so-called way was never recorded in any revenue records. The Magistrate came to the conclusion that the evidence produced by the accused was not reliable. The accused, on conviction by Chaudhury Pir Mohammad exercising the powers of a Magistrate of the 1st Class in the Shahpur District were directed by order, dated 15th April 1926, under S. 137, Criminal P. C., to demolish the walls erected by them. The proceedings are forwarded for revision on the following grounds :

Grounds.—The principles laid down as applicable to such cases in a number of rulings, e. g., *Phalla* v. *Niaz Ahmad* (1), *A. I. R.* 1923 *Oudh* 152, *A. I. R.* 1924 *All.* 1, *Abdul Wahid Khan* v. *Abdulla Khan* (2) and *A. I. R.* 1925 *Cal.* 268, are that the provisions of S. 133, Criminal P. C., are not intended to be applicable to a case where there is a bona fide dispute as to the existence of public way ; that such a dispute should be left to be determined by a civil Court; that these summary powers were primarily intended to be exercised in cases where there was no question that the way was one vested in the public, and when that question is seriously disputed and its decision becomes a difficult matter of mixed fact and law, the Magistrate clearly had jurisdiction to exercise his discretion by declining to decide it and sending the parties to the civil Court ; that private property cannot be converted into public merely because it looks as though it ought to be, and because to do so would be convenient to a section of the public who have enjoyed permissible user over it.

All these principles have been overlooked by the learned Magistrate. He has inspected the spot, but it is admitted that the alleged public way passes through the admittedly private property of the parties. It is also clear from the revenue records that the revenue authorities never recognized this *pag dandi* (a footpath) to be a regular thoroughfare and never recorded it as such during any settlement The fact that people pass through the property of the accused, which was lying as a waste land, as a short-cut, does not necessarily establish the right of the public to its user. A difficult matter of mixed facts and law was involved in this case which ought to have been referred to a civil Court.

In a recent case, *A. I. R.* 1926 *Patna* 170, *Thakursao* v. *Abdul Aziz* (3), it was held that all that the Magistrate has to find out, is whether the denial by the respondent, is bona fide or a mere pretence. He can proceed to make his order absolute only when he is satisfied that the denial is a mere pretence. If he finds that the denial is bona fide, his

(1) [1921] 63 I. C. 828.
(2) A. I. R. 1924 All. 1=45 All. 656.
(3) A. I. R. 1926 Pat. 170=4 Pat. 783.

jurisdiction is ousted and he has no authority to enquire further. The Magistrate is not entitled to demand that the evidence shall be sufficient to satisfy him that no public right exists. The only condition is that upon the material before him, the Magistrate must have no reason to think the evidence false. The Magistrate has no jurisdiction to weigh the evidence and to determine on which side the balance leans. In the case under reference the Magistrate has clearly discussed the evidence of both sides and tried to weigh it. There is clear room for difference of opinion. It cannot possibly be said that the denial by the respondent was a mere pretence and if the denial is held to be bona fide, that was enough to oust the jurisdiction of the Magistrate.

In view of the authorities quoted, it is recomended, therefore, that the order of the Magistrate making the conditional order, given to remove the obstruction from the way, absolute, may be set aside and the complainant referred to the civil Court.

Order.—This case has been referred by the learned Sessions Judge on the ground that the learned Magistrate in proceedings under S. 133, Criminal P. C., is not entitled to proceed under that section and the following sections where there is a bona fide dispute about the right of the public to pass over a certain path. This I do not consider is the law: see *Abdul Wahid Khan* v. *Abdullah Khan* (2), *Ramsagar* v. *Alek Naskar* (4) in which the matter has been discussed at great length. The rulings are under the old law and even under that law the latest pronouncements of the Courts are in favour of the view that the Magistrate has jurisdiction. S. 139-A, which has been recently enacted now lays down that the Magistrate in such an enquiry has to find if there is any reliable evidence in support of the denial of the party alleged to cause the obstruction.

As to what the learned Magistrate has to do, to determine that question, the only authority which I have been able to find is *Thakursao* v. *Abdul Aziz* (3). It is there pointed out that reliable evidence is evidence of reliable persons. I take it that what is really meant is not that the Magistrate should weigh the evidence produced by both sides and then come to the conclusion which he believes or which he prefers, but the Magistrate should take the evidence as it stands and see whether on the face of it, if there was no evidence to the contrary, he could come to the conclusion that the evidence was false and was, therefore, unreliable. I have read the evidence given in this case and I do not see that on the face of it this evidence is unreliable or of unreliable persons. The order of the Magistrate shows clearly that he proceeded to weigh the evidence and to inspect the spot and then came to the conclusion that the evidence given by the petitioners was unreliable. This, in my opinion, was a wrong exercise of the powers given under S. 139-A. Although a Magistrate has jurisdiction to decide whether the evidence is reliable or not, in this particular case the Magistrate has failed to notice how he had to arrive at that finding. I, therefore, accept the reference and set aside the order of the learned Magistrate making the conditional order to remove the obstruction absolute.

R.D. *Reference accepted.*

(4) A. I. R. 1922 Cal. 59=49 Cal. 682 (F. B.).

A. I. R. 1928 Lahore 665

TEK CHAND, J.

Khurshid Haq — Defendant — Appellant.

v.

Ramditta Mall—Respondent.

Second Appeal No. 1160 of 1927, Decided on 29th November 1927, from decree of Dist. Judge, Gurdaspur, D/- 12th March 1927.

Negotiable Instruments Act (26 *of* 1881), *S.* 80—*Pro-note silent as to interest—Interest is claimable from date of note.*

The liability on a promissory note payable on demand arises from the date of the note from which date the time of limitation begins to run and not from the date on which a demand is made for payment. Where therefore such a note is silent as to interest, interest is claimable under S. 80, Negotiable Instruments Act, at 6 per cent. from the date of the note: *A. I. R.* 1926 *Bom.* 241, *Foll.*: 23 *Mad.* 18, *Diss. from.* [P 666 C 1]

Mehr Chand Mahajan—for Appellant.

Fakir Chand—for Respondent.

Judgment.—The main point urged in this second appeal is concluded by the findings of fact arrived at by the learned District Judge. The plaintiff-respondent sued the defendant-appellant for recovery of Rs. 807-2-0 due on foot of a pro-note which was admittedly executed

by the defendant in favour of the plaintiff for Rs. 650. The defence set up was want of consideration. The trial Court accepted this plea and dismissed the suit, but on appeal the learned District Judge, after carefully going through the evidence and examining the story set up by the defendant-appellant in all its aspects, came to the conclusion that he had failed to prove that the pro-note had been executed without consideration. Mr. Mehr Chand for the appellant has tried to attack this finding, but he has been unable to point out any substantial error in procedure which would justify interference by this Court on second appeal. It must, therefore, be held that the defendant has failed to prove that the pro-note was without consideration.

The second point urged by Mr. Mehr Chand is that in the pro-note no rate of interest is mentioned and as the plaintiff has failed to prove that he made any demand from the defendant before the institution of the suit, no interest was legally payable. In support of his contentions he relies on a decision of the Madras High Court reported as *Best* v. *Haji Muhammad Sait* (1). There are, no doubt, certain observations in that ruling which support Mr. Mehr Chand's contention, but so far as I am aware the vew taken there has never been accepted as correct by this or any other Court. The question was recently considered by a Division Bench of the Bombay High Court in *Framroz Eduljee Dinshaw* v. *Mahomed Essa* (2) where Macleod, C. J. (Coyajee, J., concurring) held that the liability on a pro-note payable on demand arises from the date of the note from which date the time of limitation begins to run and not from the date on which a demand is made for payment. Where therefore such a note is silent as to interest, interest is claimable under S 80, Negotiable Instruments Act, at 6 per cent. from the date of the note. Following this ruling I hold that the learned District Judge was right in allowing plaintiff interest at 6 per cent. from the date of pro-note till realization.

No further point was urged. The appeal fails and is dismissed with costs.

S.J. *Appeal dismissed.*

(1) [1900] 23 Mad. 18.
(2) A. I. R. 1926 Bom. 241=50 Bom. 266.

A. I. R. 1928 Lahore 666

HARRISON AND ZAFAR ALI, JJ.

Bank of Upper India, Ltd.—Defendant—Appellant.

v.

Fitzholmes, Homstead, Simla—Plaintiff—Respondent.

First Appeal No. 124 of 1927, Decided on 30th January 1928, from decree of Sr. Sub-Judge, Simla, D/- 10th November 1926.

Civil P. C., S. 47 — Liquidator of decree-holder bank buying property of judgment-debtor at auction sale—Suit by judgment-debtor for declaration that the sale is void is barred.

Where a suit was filed by a judgment-debtor for a declaration that the auction sale was null and void, inasmuch as the auction purchaser, the liquidator of the decree-holder bank was not competent to bid for and purchase any property as liquidator under the company law even with the permission of the executing Court.

Held: that the suit was barred under S. 47. [P 669 C 1]

Muhammad Amin Khan—for Appellant.

Judgment.—This was a suit by a judgment-debtor of the name of P. W. Fitzholmes for a declaration that the sale of his estate consisting of Carlton Hotel and the Craigs Court situated in Simla that had been confirmed by the executing Court was null and void, inasmuch as the auction purchaser, Mr. Hunter, the liquidator of the decree-holder, the Bank of Upper India in liquidation, was not competent to bid for and purchase any property as liquidator, even though he had obtained the permission of the executing Court to do so. Thus the plaintiff's contention was that the liquidator had no power under the Indian Companies Act to purchase the estate. Mr. Hunter pleaded, inter alia, that the suit was barred by S. 47, Civil P. C. The trial Court, i. e, the Senior Subordinate Judge of Simla, overruled this plea on the ground that

he was for the moment sued not as a party to the suit but because he was a liquidator

and

that the suit was filed under company law against the liquidator for his actions as a liquidator.

Eventually the learned Senior Subordinate Judge found that the liquidator acted beyond his powers in bidding for and purchasing the property and he further came to the conclusion that the sale was for that reason null and void.

The liquidator has come up to this Court in first appeal

Mr. Bishan Narain accepted service of the notice of appeal on behalf of the plaintiff-respondent, but he appeared before us to-day to represent, that he had not yet received instructions from the respondent and asked for an adjournment. He further stated that he had not yet been engaged by the respondent; but this was not consistent with having accepted service on his behalf. In these circumstances we were unable to allow an adjournment and Mr. Bishan Narain withdrew.

Turning now to the liquidator's contention it is quite clear to us that the suit was not entertainable. Whatever should be the nature of the dispute that may arise in execution proceeding between the judgment-debtor and the decree-holder or his representative, it must be decided by the executing Court, and if either party should be dissatisfied with the decision of that Court his only remedy is by way of appeal against that decision. In the present case assuming for the sake of argument that the liquidator's act of bidding at the auction was ultra vires, the judgment-debtor was in no way precluded from urging this before the executing Court, and decision of that Court on that point could be questioned by the party aggrieved thereby by an appeal to the High Court. S. 47 is comprehensive enough to cover all disputes that may arise between a decree-holder and his judgment-debtor in execution proceedings, and the contention now raised by the judgment-debtor should have been raised in the executing Court. We therefore find that the suit was not competent and should have been dismissed on that ground.

The appeal is accordingly accepted and the suit dismissed with costs throughout.

S.J. *Appeal accepted.*

A. I. R. 1928 Lahore 667

BHIDE, J.

Gul Muhammad Khan and *another*—Plaintiffs—Appellants.

v.

Sheikh Gulam Dastgir and others—Defendant and Plaintiffs—Respondents.

Second Appeal No. 2073 of 1927, Decided on 8th March 1928, from decree of Additional District Judge, Jullundur, D/- 4th June 1927.

Civil P. C., S. 100—Transaction whether mortgage or sale depending upon surrounding circumstances in addition to construction of terms of document—Question is one of fact and second appeal does not lie.

Where the question whether the transaction was a mortgage or sale does not depend merely upon the construction of the terms of the document but also upon the surrounding circumstances, the question is one of fact and not of law and so no second appeal is competent : 16 *P. R.* 1907 ; 36 *P. R.* 1899 and 120 *P. L. R.* 1916, *Foll.* : 45 *P. R.* 1895, *not Foll.* : 19 *P. R.* 1905, *Dist.* [P 668 C 1]

Nand Lal—for Appellants.

Zafrullah Khan—for Respondents.

Judgment. — This second appeal arises out of a suit for pre-emption with respect to 34 kanals and 4 marlas of land. The land in dispute was mortgaged by defendant 2 in favour of defendant 1 for Rs. 1,000 by a deed dated 27th March 1925. The plaintiff alleged that the transaction was in reality a sale and sued for pre-emption. The trial Court found that the transaction was a mortgage and dismissed the suit with costs. This decision was affirmed by the learned District Judge on appeal. The plaintiff has filed a second appeal and the sole point for decision is whether the transaction in dispute was a sale or a mortgage. This appears to me to be a "question of fact" and not of law and consequently no second appeal is competent. On behalf of the appellant the only authorities in point which were referred to are *Tikaya* v. *Dharam* (1) and *Bishen Singh* v. *Mt. Paro* (2). The first ruling is no doubt in favour of the appellant but the view taken therein by Stogden, J., was dissented from in *Budha Mal* v *Gulab* (3). In fact it appears from the latter ruling (vide p. 181) that Stogden, J., himself expressed doubts subsequently about the correctness of the view taken by him in *Tikaya* v. *Dharam* (1). In *Bishen Singh* v. *Mt. Paro* (2) the question raised before me does not appear to have been argued at all and consequently the attention of the learned Judges was apparently not invited to the point. In *Sunder Das* v. *Dhanpat* (4) it was held following *Budha Mal* v. *Gulab* (3) that the question whether a transaction is a mortgage or a

(1) [1895] 45 P. R. 1895.
(2) [1905] 19 P. R. 1905=78 P. L. R. 1905.
(3) [1899] 36 P. R. 1899.
(4) [1907] 16 P. R. 1907=127 P. W. R. 1907=104 P. L. R. 1908.

sale is one of fact and not of law. The learned counsel for the appellant has drawn my attention to several authorities which lay down that the true construction of the terms of a document is a question of law and not of fact; but in the present case the question whether the transaction was a mortgage or sale does not depend merely upon the construction of the terms of the document but also upon the surrounding circumstances: cf. *Jagdish* v. *Mansingh* (5). In such circumstances it has been held that the question is one of fact "and not of law" *Ahmad Khan* v. *Alam Khan* (6). I must, therefore, hold that no second appeal is competent. I dismiss the appeal with costs.

S.J. *Appeal dismissed.*

(5) [1895] 100 P. R. 1895 (F. B.).
(6) [1916] 120 P. L. R. 1916=37 I. C. 297=115 P. W. R. 1916.

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* A I. R. 1928 Lahore 668

SHADI LAL, C. J., AND JOHNSTONE, J.

Hari Ram Shah and *others*—Plaintiffs—Appellants.

v.

Mahin Shah and *others*—Defendants—Respondents.

First Appeal No. 1291 of 1922, Decided on 8th May 1928, from decree of Sr. Sub-Judge, Shahpur, D/- 14-3-1922.

* *Transfer of Property Act, S. 60—Mortgagee entitled to take possession of mortgaged property if principal and interest not paid within a certain period—Suit by mortgagee for possession—Redemption cannot be asked in such suit.*

Where a mortgagee brings a suit for possession in pursuance of a condition in the mortgage deed, that if principal and interest are not paid off in a certain period the mortgagee can take possession of the mortgaged property, the mortgagor or persons claiming through him cannot claim to redeem in such suit: *A. I. R.* 1922 *P. C.* 17, *Expl.*; 66 *P. R.* 1912; *A. I. R.* 1924 *Lah.* 21 and 56 *I. C.* 348, *Rel. on.*: *A. I. R.* 1925 *Oudh.* 235, *not Foll.* [P 669 C 2]

Jagan Nath Aggarwal, *S. L. Puri*, *Hem Raj* and *Sardha Ram*—for Appellants.

M. L. Puri, *R. C. Soni*, *Devi Dayal*, *N. C. Mehra*, *Muhammad Amin*, *Badri Das*, and *Nanak Chand*—for Respondents.

Johnstone, J.—The plaintiffs in this case are the lineal descendants of Kanshi Ram deceased. On 6th October 1898, Kanshi Ram and Sukh Dial took a mortgage in equal shares without possession, of 1,094 bighas of land from two brothers, Jiwan Mal and Wazir Chand and advanced Rs. 3,500. Interest was fixed at 14 per cent per mensem and if a default occurred, the deed provided for compound interest at Re. 1-9-0 per cent per mensem. Amongst other conditions in the mortgage-deed was one that, if principal and interest were not paid off in ten years, the mortgagees could take possession of the whole land. The share of Sukh Dial was redeemed and is not now a subject of controversy.

Two main complications occurred after the execution of the deed:

(a) It had been provided by the deed that the mortgagors should not alienate any portion of the mortgaged land, but might sell portions in order to pay off the debts after two years. The mortgagors made certain alienations: they sold 600 kanals to Rai Sahib Lala Maya Das, the father of defendants 4 to 6, and another plot of about the same area to defendant 7 and a third plot of 200 kanals to defendant 9. The matter did not rest there for Rai Sahib Maya Das mortgaged some of the land he had acquired to defendant 10, while defendant 7 transferred his piece of land by sale to defendant 8. Finally the mortgagors exchanged some of the mortgaged land with other land.

(b) The second complication in the case has arisen from the fact that at the last settlement the village of Deowal, which contained the mortgaged area, was divided into two villages, one of which retained the old name and the other was named Chabba. This event has caused some confusion in the tracing out of the mortgaged lands

The plaintiffs sued for possession, in accordance with the provisions of the mortgage-deed, of the half-share of the lands mortgaged now in the possession of the original mortgagors or their transferees by sale, exchange or mortgage. The defendants resisted the claim on various grounds, but in view of what follows it is unnecessary to detail them here.

The trial Court considered, for reasons which are explained in its judgment that it was desirable to ascertain the charges on the different portions of the lands in suit, and in the result it passed

a decree to the effect that the plaintiffs should get possession ; but it postponed the execution of the decree until the plaintiffs should realize their money due from the lands in possession of certain defendants, and directed that, in the event of those defendants paying within three months the decree should not be executed against any of the defendants.

The plaintiffs have appealed to this Court and the grounds of appeal may be conveniently summarized under four heads :

(1) That the decree should have been for possession simpliciter.

(2) That the charges on the property have been wrongly decided.

(3) That one particular khewat number has been erroneously entered in the decree.

(4) That they should have been awarded costs on the market value of the property fixed by them at Rs. 75,000 in their plaint and not objected to by the defendants.

The lower Court pointed out that some defendants had paid considerable sums of money, while others had wrongly retained money, and that a decree for possession simpliciter would relegate them all to the same position. This matter has been stressed by some of the counsel for the defendants in the course of arguments before us. On the other hand, Mr. Jagan Nath has contended on behalf of the plaintiffs that there is clear authority for the view that a decree for possession only was the proper decree to pass. The first authority on which he relied was *Kuman* v. *Sultani Mal* (1). In that case the lower Courts had, as here, entered into an elaborate examination as to the amount of the lien, and it was held by the Division Bench that, if the plaintiff was to have possession, it was sufficient that he should have a decree for possession as mortgagee simpliciter, " the matter of the amount of the lien being left to be decided upon redemption." That ruling was followed in *Khota Ram* v. *Nawaz* (2). A similar decision was given in *Gokul Parsad* v. *Sitla Parsad* (3), where the mortgagors were not permitted to redeem their mortgages in a suit for possession brought by the mortgagees.

This view was not taken in *Bakhtawar Singh* v. *Bakhtawar Singh* (4), where the lower Court had passed a decree similar to the one now under appeal before us. No allusion was made to *Gokul Parsad* v. *Sitla Parsad* (3) and the judgment professed to follow *Muhammad Sher Khan* v. *Swami Dayal* (5). All that was held by their Lordships of the Privy Council in the last-named case was that a mortgagor had statutory right to redeem whether or not the mortgage was one in which by S. 93, T. P. Act, the rights and liabilities of the parties were to be determined by their contract. There is nothing in that decision, as far as I can ascertain, which supports the contention that mortgagors and persons holding from them can claim to redeem in a suit brought by the mortgagees for possession in accordance with the terms of the mortgage-deed. It is, no doubt, desirable that a multiplicity of suits should be avoided, but the defendants have had many years within which to sue for redemption, and in view of the previous decisions of this Court it must be held that the plaintiffs were entitled to a decree for possession simpliciter. I find no force in the distinction sought to be drawn by the defendant's learned counsel, namely, that in the present suit there was a default in the payment of principal and interest, whereas in *Kiman* v. *Sultani Mal* (1) the default was in the payment of interest only. The same principle certainly applies.

In consequence of the conclusion just reached it is unnecessary for us to discuss the questions regarding the amounts of the charges on the different portions of the lands in dispute. Those questions will have to be decided when the defendants seek to redeem the property.

It was next contended by Mr. Jagan Nath that the decree wrongly shows Khewat No. 114 Chabba as one of the areas for which possession is granted. No mention was made of that number in the plaint, at p. 2 of the printed book, nor was that number stated in the first part of the decree itself. We have been referred in this connexion to pp 23 to 27 of the

(1) [1912] 66 P. R. 1912=148 P. L. R. 1912 =13 I. C. 559=82 P. W. R. 1912.
(2) A. I. R. 1924 Lah. 21=4 Lah. 76.
(3) [1919] 56 I. C. 348.
(4) A. I. R. 1925 Oudh. 235.
(5) A. I. R. 1922 P. C. 17=44 All. 185=49 I. A. 60 (P. C.).

printed book, where a chart of jamabandis and Record of Rights are given. The original Khewat number was 117. In the Settlement of 1906-07 two numbers were formed, i e, 186 (Sc. Deowal) and 114 Chabba. A reference to pp. 40 and 41 of the printed paper-book shows that 114 Chabba became 198 Chabba and it is clear that the lower Court accidentally entered the older number for the the latter one when the decree was drawn up.

On the question of the plaintiff's costs in the lower Court I see no reason to interfere. It may be that the market value of the property was what is stated by the plaintiffs in their plaint, but the plaintiffs so long delayed in bringing their suit that I consider that the amount of costs awarded is not unreasonable.

Defendant 5 has preferred cross-objections with regard to one khata number, 135, but his counsel has not made out a case for a modification of the decree in that respect.

The result is that the appeal is accepted and the decree of the lower Court is varied to this effect: that the plaintiffs will get possession of the lands mentioned in the decree No. 198 Chabba being substituted for No. 114 Chabba. The cross-objections are dismissed. The plaintiffs will get their costs in this Court in equal proportions from the defendants who have contested the appeal.

Shadi Lal, C. J.—I concur.

A L./R.K. *Appeal accepted.*

A. I. R. 1928 Lahore 670

ZAFAR ALI AND JAI LAL, JJ.

Mt. Ilahi Jan—Vendee—Defendant—Appellant.

v.

Rahman Ullah and *another*—Plaintiff and Vendor-Defendant—Respondents.

Second Appeal No. 2634 of 1927, Decided on 23rd April 1928, from decree of Dist. Judge, Ambala, D/- 9th August 1927.

(a) *Appeal—Forum—Pre-emption suit.*

The amount which determines the jurisdiction of the appellate Court is the amount found by the trial Court as the price payable by the pre-emptor; *A. I. R.* 1926 *Lah.* 376; *A.I.R.* 1928 *Lah.* 157 and *A.I.R.* 1923 *Lah.* 107, *Appl.*: 101 *P. R.* 1900, *not Foll.* [P 671 C 2]

(b) *Suits Valuation Act, S.* 11—*Appellant not prejudicially affected by hearing the appeal by the Court of inferior jurisdiction—Second appellate Court should not interfere.*

Where there has been no prejudice to the appellant by the hearing of the appeal by a Court of inferior jurisdiction, when, as a matter of fact, it lay to a Court of superior jurisdiction, the order of such inferior Court should not be interfered with in second appeal: [P 671 C 2]

D. C. Ralli—for Appellant.

Jagan Nath Aggarwal—for Respondent 1.

Jai Lal, J.—Rahmat Ullah, respondent filed a suit to pre-empt a house purchased by the appellant Mt. Ilahi Jan. The price of the house mentioned in the deed of sale was Rs. 7,000; but the plaintiff alleged that the house was really sold for Rs. 2,000. The trial Judge held that Rs. 7,000 was actually paid and that the market value was about the same. He therefore passed a decree for pre-emption on payment of Rs. 7,000.

From this decree an appeal having been lodged by the plaintiff in the Court of the District Judge of Ambala, an objection was raised on behalf of the vendee that that Court had no jurisdiction to entertain the appeal, as according to the finding of the trial Court, and also according to its decree the value of the subject-matter was Rs. 7,000. This objection was overruled by the learned Judge who heard the appeal and came to the conclusion that Rs. 2,000 was the amount that had been actually paid by the vendee and that the same was the real price of the house in suit. He, therefore, varied the decree of the trial Court by reducing the amount payable by the plaintiff to Rs. 2,000.

Against this decree of the District Judge, the defendant Mt. Ilahi Jan appeals to this Court and it is contended on her behalf that the District Judge had no jurisdiction to entertain the appeal and that is the only point debated before us.

The learned District Judge in support of his view has relied upon *Imam Din* v. *Ghulam Mahomed* (1) which certainly supports it But the later view of the Chief Court of the Punjab and also of this Court appears to be to the contrary. In *Jaswant Ram* v. *Moti Ram* (2), a Full Bench of this Court held that in a suit for the pre-emption of a mortgage it is

(1) [1900] 101 P. R. 1900.
(2) A. I. R. 1926 Lah. 376=7 Lah. 570 (F.B.).

the amount fixed by the trial Court as really due from the mortgagor to the mortgagee which determines the forum of appeal even if, according to the valuation as originally fixed by the plaintiff, the appeal lay to another Court. The learned Chief Justice, in the course of his judgment, remarked that

> in a redemption suit the subject-matter is not the immovable property mortgaged by the debtor to his creditor, for the property admittedly belongs to the mortgagor and the dispute between the parties relates not to the ownership of the property, but to the amount which the mortgagor should, before recovering the property, pay to the mortgagee. In other words, it is the mortgagee's interest in the property.

The respondent's counsel relied upon this observation in support of his contention that that case is distinguishable from the present case. Later, however, his Lordship remarked as follows :

> In this province, it has been repeatedly held that a Court cannot grant a decree for possession of immovable property on payment of a sum of money which exceeds the pecuniary limit of its jurisdiction, vide inter alia *Muhammad Afzal Khan* v. *Nand Lal* (3) and *Abdul Rahman* v. *Charagh Din* (4), and there is no cogent reason for departing from this rule which has been followed for many years.

This remark fully applied to this case which involved a decree in favour of the plaintiff for possession of immovable property on payment of an amount fixed by the Court.

In the present case, the question of the jurisdiction of the trial Court does not arise because admittedly the Senior Subordinate Judge had jurisdiction to entertain the suit without regard to the value of the subject matter ; but the course of appeal did depend upon such valuation. Similarly, in *Budha Mal* v. *Rallia Ram* (5) a Division Bench of this Court held that in a suit for rendition of accounts, where the plaintiff had valued his relief approximately at Rs. 1,100 but was granted a decree for Rs. 11,000, odd, it was the amount ascertained by the trial Court to be due to the plaintiff which should be regarded as the value of the suit for purposes of determining the forum of appeal. The principle underlying this judgment applies to this case. *In Chiragh Din* v. *Seraj Din* (6) it was held that where in a pre-emption suit the trial Court decreed the claim on payment of Rs. 60, the price paid by the vendee, plus Rs. 71-2-0 representing compensation for improvements effected by the vendee, an appeal from the decree would lie to the Court which was competent to hear the appeal on the assumption that the valuation of the suit was Rs. 60 and not Rs. 60 plus Rs. 71-2-0 and that the latter amount should not be taken into consideration in determining the value of the suit in a pre-emption case for purposes of jurisdiction. The point involved in the present case did not directly arise in the reported case ; but the ratio decidendi was that the amount which determines the jurisdiction of the appellate Court is the amount found by the trial Court as the price payable by the pre-emptor. It seems to me, therefore, that the appeal lay to this Court and not to the District Judge.

It is, however, contended by the respondent's counsel, that S. 11, Suits Valuation Act, governs this case, and that the appellant has not been prejudicially affected by the disposal of the appeal by the District Judge and that this Court therefore should not interfere with the decree of the District Judge. There seems to be force in this contention especially because the District Judge has found that the value of the property was Rs. 2,000 and that the same was the amount paid by the vendee. This finding was not contested before us. In this connexion, it may be mentioned that the finding of the Senior Subordinate Judge as to the market value of the property was not so definite as it should have been. Admittedly if the view of the District Judge as to the value of the house and the price paid therefor is correct then the appeal lay to him.

In the peculiar circumstances of this case, it is not necessary for us to decide whether the hearing of the appeal by a Court of inferior jurisdiction when, as a matter of fact, it lay to a Court of superior jurisdiction, does by itself prejudice the party who has taken objection to such jurisdiction. It is a matter on which there is a considerable conflict of opinion between the various Courts. I hold that there has been no prejudice to the appellant by the assumption of jurisdiction by the District Judge and would dismiss this appeal, leaving the parties to bear their own costs in this Court.

N.K. *Appeal dismissed.*

(3) [1908] 16 P. R. 1908=146 P. L. R. 1908=73 P. W. R. 1907.
(4) [1908] 19 P. R. 1908 (F. B.).
(5) A. I. R. 1928 Lah. 157=9 Lah. 23.
(6) A. I. R. 1923 Lah. 107=3 Lah. 356.

A. I. R. 1928 Lahore 672

TEK CHAND, J.

Mt. Talia Bibi—Decree-holder—Appellant.

v.

Nur Din—Judgment-debtor—Respondent.

Misc. Second Appeal No. 1501 of 1927, Decided on 24th November 1927, from order of Addl. District Judge, Lahore, D/- 3rd March 1927.

Civil P. C., O. 21, Rr. 99 and 103—Order directing the decree-holder to file a suit against persons offering resistance—Failure to file a suit does not make it conclusive.

The provisions of O. 21, Rr. 97 to 103 are of a restrictive nature and strict compliance with them is necessary. They take away the common law right of the decree-holder or the persons who offer resistance in their own rights to have their respective claims adjudicated upon in a regular civil suit and therefore they must be strictly construed and if in a particular case it is shown that the provisions of any of these rules have not been strictly complied with the penal consequence barring the suit cannot legally flow therefrom. [P 673 C 2]

An order passed by the Subordinate Judge, on an application by the person obstructing, directing the decree-holder to file a suit against the persons in possession and obstructing decree holder to take possession is not one which is passed under O. 21, R. 99, and the failure of the decree-holder to file such a suit does not under O. 21, R. 103, make it conclusive as between the decree-holder and those persons. [P 674 C 1]

B. D. Kureshi—for Appellant.

Duni Chand—for Respondent.

Tek Chand, J.—This is an appeal arising out of proceedings in execution of a decree, which was obtained as far back as 25th March 1918, by the appellant Mt. Talia Bibi against Nur Din respondent, for possession of a kotha situate in the city of Lahore. The decree-holder commenced proceedings in execution soon after the decree was passed, but for more than six years the judgment-debtor managed to have the execution delayed by putting forward all kinds of objections. After these objections had been rejected the executing Court, on 24th March 1923, issued a warrant for delivery of possession. The bailiff who went to execute the warrant found one Muhammad Din and certain other persons in possession. These persons refused to surrender possession and alleged that they were not holding under Nur Din (judgment-debtor) but were the tenants of one Mt. Allah Rakhi, a washerwoman. On that date Mt. Allah Rakhi handed over a written application to the bailiff stating that she was the owner of the house, that she had not been made a party to the suit and that the persons actually in possession were her relations who were holding the house as tenants under her. The bailiff submitted this application to the Court along with his report dated 5th April 1925, stating that Muhammad Din, etc., had offered resistance, and asking instructions as to how he should proceed. The case came up before the Court on 14th April 1925, when Mt. Allah Rakhi filed a fresh application purporting to be under O. 21, R. 97, Civil P. C, in which she repeated her previous allegations and prayed that she be not dispossessed as she was not bound by the decree. This application was rejected by the Court on 22nd May 1925, on the ground that O.21 R. 97 governed applications filed by decree-holders or auction-purchasers and not by persons who claimed to be in possession in their own right and who had offered resistance. The Court, further, held that if the application was really intended to be one under O. 21, R. 100, it was premature as the applicant had not been actually dispossessed. Accordingly it issued a fresh warrant and directed that if the judgment-debtor offered resistance he should be arrested This order, however proved to be infructuous and another warrant had to be issued. Resistance was again offered, and this time the Court ordered that notices should issue to Shahab Din and Ghulam Muhammad, etc., who had offered resistance. It took considerable time to serve them, but eventually on 20th October 1925, the decree-holder and counsel for Shahab Din and Ghulam Muhammad were present and the following issue was framed:

Are Ghulam Muhammad and Shahab Din, etc., in possession as tenants under Nur Din.

The case was adjourned to 2nd November 1925 for evidence. It had to be adjourned once again, as a compromise was mooted, but the Court directed that if no compromise was effected by that date the parties must be ready with their evidence.

On 25th November it transpired that no compromise had been effected nor were any witnesses for the parties present. The Court refused to give to the decree-holder further opportunity to pro-

duce her evidence and ordered that no proceedings could be taken against the "trespassers" as it had not been proved that they were holding possession under Nur Din, judgment-debtor. The execution proceedings were accordingly consigned to the record room but it was remarked that if the decree-holder was so advised she could file a regular suit against Mt. Allah Rakhi or the "trespassers."

On 15th June 1926, the decree-holder without having instituted any suit against Mt. Allah Rakhi or the trespassers filed another application moving the executing Court to be put in possession alleging that Nur Din, judgment-debtor, was the real person in possession and that Mt. Allah Rakhi had told her that she had never been in possession at all nor had she anything to do with it. This application was dismissed *in limine* by the executing Court without notice to the judgment-debtor on the ground that it had, on 25th November 1925, directed the decree-holder to file a regular suit against Mt. Allah Rakhi or the persons who claimed to hold under her and as this had not been done, the executing Court was incompetent to proceed any further with the matter.

Against this order the decree-holder preferred an appeal to the Additional District Judge, Lahore, who held that the previous order of the executing Court, dated 25th November 1925, was really one passed under O. 21, R. 99, and that it had become final inasmuch as no appeal against it had been filed nor had any suit been instituted as required by O. 21, R. 103, Civil P. C. He was also of opinion that even if Nur Din, judgment-debtor, was, as a matter of fact, in possession at the time of the filing of the present application, the executing Court could not make an enquiry into this matter. He, accordingly, dismissed the appeal.

The decree-holder has preferred a second appeal to this Court and it is contended on her behalf that the lower Courts have erred in holding that the order of 25th November 1925, was conclusive of the rights of the parties and that it debarred the executing Court from taking further proceedings in execution of the decree.

The first question to be decided is whether the lower Courts are right in holding that the aforesaid order was passed under O. 21, R. 99, Civil P. C. Now it is clear that an order under that rule presupposes the filing of an application under O. 21, R. 97, which reads as follows:

> Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

It will be seen that this rule contemplates proceedings being started on an "application" made to the Court by the decree-holder or the auction-purchaser complaining of resistance or obstruction having been offered. The summary of the proceedings given above indicates that no such application was presented by the decree-holder in this case and, indeed, Mr. Duni Chand Kapur, who has argued the case on behalf of the respondent with considerable ability, admits that he is not able to point out any such application on the record. He, contends, however, that R. 97 does not say that the application must be in writing and that a decree-holder can orally move the Court to take action. But Mr. Duni Chand is unable to state when and at what stage this oral "application" was made. He relies on the circumstance that the decree-holder was allowed to summon witnesses and at one stage she stated that she did not want to proceed against Ghulam Muhammad and from these facts he asks me to conclude that proceedings were being taken at her instance. I am, however, unable to accept this contention. It is clear from the record that investigation into the rights of the persons who had offered resistance had been started by the Court suo motu on the receipt of a report from the nazir and not on any application oral or written made by the decree-holder.

The provisions of O. 21, Rr. 97 to 103 are of a restrictive nature and, in my opinion, strict compliance with them is necessary. They take away the common law right of the decree-holder or the persons who offer resistance in their own rights to have their respective claims adjudicated upon in a regular civil suit and, therefore, they must be strictly construed and if in a particular case it is shown that the provisions of any of these rules have not been strictly complied with, the penal consequence barring the suit cannot legally flow therefrom. Mr

Duni Chand has referred me to a Single Bench decision of the Rangoon High Court reported as *A. I. R* 1925 *Rang. p.* 374, where it was held that O. 21, R. 97, does not bar an investigation being ordered in anticipation of the obstruction offered by a person in possession. The point decided in that case does not arise here, but counsel argues that the ruling is of value as laying down that strict compliance with its terms is not necessary. It may be mentioned, however, that the decision in the *Rangoon* case is not in accord with *Sobha Ram* v. *Tulsiram* (1) and I may say, with all respect, that if it were necessary to decide the matter, I should be inclined to follow the latter decision.

I must, therefore, hold that the learned Additional District Judge was not right in holding that the order passed by the Subordinate Judge on 25th November 1925, directing the decree-holder to file a suit against the persons in possession was passed under O. 21, R. 99, and the failure of the decree-holder to file such a suit did not under O. 21, R. 103, make it conclusive as between the decree-holder and those persons.

The learned Additional District Judge has given another reason for holding that that order had become conclusive, viz. that no appeal against it had been filed. If, however, that order was (as supposed by the learned Judge) one under O. 21, R. 99, it was not appealable according to the view that has found favour in the Punjab: see inter alia *Gulabi Bibi* v. *Aslam Khan* (2). The failure to file an appeal against that order does not, therefore, affect the matter in any way.

I,must, therefore, hold that the grounds on which the decree-holder's application for execution has been dismissed are legally unsound. Accordingly I accept the appeal, set aside the orders of the Courts below and remit the case to the executing Court for enquiry and disposal in accordance with law. Costs shall abide the event.

N.K. *Appeal accepted.*

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(1) A. I. R. 1924 All. 495=46 All. 693 (F. B.).
(2) [1917] 57 P. R. 1917=101 P. L. R. 1917=41 I. C. 891=91 P. W. R. 1917.

A. I. R. 1928 Lahore 674

ZAFAR ALI, J.

Fazal Din—Defendant—Appellant.

v.

Muhammad Shafi and *others* — Plaintiffs and Defendants—Respondents.

Second Appeal No. 1482 of 1927, Decided on 13th December 1927, from decree of Senior Sub-Judge, Sialkot, D/-7th March 1927.

Minor—Decree against—Guardian not vigilant of minor's interests—Decree is not binding on the minor.

Where the guardian ad litem of the minor against whom a decree is passed has been guilty of gross negligence and laches in conducting the suit on behalf of the minor the decree so passed can be set aside : 1 *Lah.* 27 and *A. I. R.* 1925 *Lah.* 116, *Ref. to.* [P 675 C 2]

Mohsin Shah for *Shuja Din*—for Appellant.

Judgment.—The defendant-appellant Fazal Din or Fazla brought two suits—one against Mt. Muhammad Bibi and her four sons and the other against the said four minors and their uncle Lal Din. The minors' father was dead and their mother had remarried Lal Din. After the death of their father Mt. Muhammad Bibi leased out the minors' land to Fazal Din for five years, but she resumed it before the expiration of that period. The deed of lease was, however, inadmissible in evidence for want of registration and there was the further fact that the mother had no power to lease out the minors' land for so long a period. The former suit was for damages for dispossession before time and the other was based upon a bond. A ministerial officer of the Court was appointed the minors' guardian ad litem in both the cases and both were eventually decreed. In execution of the decree a house of the minors was attached. Lal Din was appointed their guardian for the execution proceedings and he objected that the house was not liable to attachment and sale as the minors were agriculturists. The house was, however, sold and it was purchased by the decree-holder himself The minors now sue to avoid the decrees and the sale. The trial Court decreed their suit in full. On appeal by Fazal Din the learned Senior Subordinate Judge came

to the conclusion that the decree in the bond suit was binding upon the minors but that the decree in the suit for damages was not because the guardian for that suit had been guilty of gross negligence inasmuch as he failed to raise necessary pleas and defend the action properly. With regard to the sale in execution the learned Subordinate Judge held that that too was not binding upon the minors as the guardian for the execution proceedings also had been guilty of gross negligence. Upon these findings the minors were restored to their original rights.

In second appeal preferred by Fazal Din his learned counsel, Mr. Mohsin Shah, has raised only two contentions, viz, (1) that a decree against a minor cannot be set aside on the ground that his guardian for the suit had been guilty of gross negligence in conducting the defence; and (2) that the minors were not entitled to avoid the sale in toto as they had benefited by it to the extent of the part of the sale proceeds paid to another decreeholder.

In support of (1) counsel relies on *Imam Din* v. *Puran Chand* (1) in which Scott-Smith, J., held that a decree against a minor cannot be set aside only on proof of fraud and collusion on the part of his guardian, but if the guardian neglected to support the case of the minor and there is nothing to show that he did so deliberately that circumstance alone would not entitle the minor to avoid the operation of the decree. This ruling was also cited before the Senior Subordinate Judge and he did not follow it in view of the later ruling of Scott-Smith, J., in *Nawabsingh* v. *Gurbakhsh Singh* (2), in which that learned Judge, considering *Ahmad* v. *Amir* (3), *Ismail* v. *Sultan Bibi* (4), *Jowla* v. *Hira Singh* (5), and *C. Punnayah* v. *R. Viranna* (6), came to a different conclusion. There can be no manner of doubt that the ministerial officer of the Court who was appointed guardian ad litem in the suit for damages took no steps whatsoever to defend the action and was guilty of laches. Similarly Lal Din who was the guardian in the execution case did not make any real effort to protect the minor's interests most probably because he was benefited at the expense of the minors inasmuch as the decree as against him was also satisfied by the sale of their house. The decision of the lower appellate Court on this point appears therefore to be correct.

The next question is whether the minors were benefited to any extent by the sale of their house. It may be observed that they were under no personal liability to pay anything and in no case they were liable to lose their house or any other ancestral property. If, therefore, the house sold in satisfaction of a decree in execution of which the house could not be sold they cannot be said to have benefited by the sale. This second contention, therefore, must also be overruled. The result is that the appeal fails and I dismiss it with costs.

S.J. *Appeal dismissed.*

(1) [1920] 1 Lah. 27=84 P. L. R. 1920= 55 I. C. 833=37 P. W. R. 1920.
(2) A. I. R. 1925 Lah. 116.
(3) [1898] 95 P. R. 1898.
(4) [1917] 103 P. R. 1918=6 P. L. R. 1918= 43 I. C. 354=155 P. W. R. 1917.
(5) [1903] 55 P. R. 1903.
(6) A. I. R. 1922 Mad. 273=45 Mad. 425.

A. I. R. 1928 Lahore 675

BHIDE, J.

Bhagwan Das and *another*—Appellants.

v.

Amritsar National Bank Ltd. and *others*—Respondents.

Misc. First Appeal No. 3219 of 1927, Decided on 10th April 1928, from order of Dist. Judge, Hoshiarpur, D/- 17th November 1927.

Civil P. C., O. 21, *R.* 92—*Insolvent.*

A judgment-debtor who has been adjudicated an insolvent cannot appeal from an order confirming sale of his property: 47 *I. C.* 152; 10 *S. L. R.* 53; 41 *All.* 243 and *A. I. R.* 1926 *Mad.* 556 (*F. B.*); *Foll.* [P 676 C 1]

Chandar Gupta for *Fakir Chand*—for Appellants.

H. C. Kumar for *Official Receiver* and *Madan Gopal Aggarwal*—for Respondents.

Judgment.—In execution of a decree certain properties of the appellant Bhagwan Das were attached and sold. Jodha Mal, the other appellant, was a mortgagee of some of the properties. On 18th July 1927 Jodha Mal's agent Lala Sri Krishan Das made a statement to the effect that he had no objection to the properties

being sold free of encumbrances and the amount realized being subsequently paid to him. The properties were accordingly sold. No objections were raised to the sale and the sale was duly confirmed.

A joint appeal has been filed on behalf of Bhagwan Das and Jodha Mal against the order confirming the sale. A preliminary objection is raised that the appeal is not competent as Bhagwan Das has been declared as insolvent and that Jodha Mal as a mortgagee has no right of appeal under S. 47, Civil P. C.

It appears that Bhagwan Das was adjudicated an insolvent on 2nd August 1927, before the confirmation of the sale The learned counsel for the respondent has based his objection on the provisions of O. 22, R. 8, Civil P. C., but in the present instance, Bhagwan Das was declared an insolvent before the appeal was filed and hence that rule does not seem to be in point. The real question for consideration appears to be, whether Bhagwan Das had any right of appeal, after his property had vested in the Receiver on his adjudication as an insolvent. It has been held in *Banamali Dutta* v *Lalit Mohan* (1) by the Calcutta High Court that a judgment-debtor who has been adjudicated an insolvent has no right to maintain an appeal against a decision in execution proceedings that certain properties belonging to him were fraudulently concealed by him from his creditors and that the proper person to appeal is the Official Receiver. The present case appears to stand on the same footing. In *Pragji Kala* v. *Assa Jalal* (2) it was held that after adjudication an insolvent cannot object to an execution sale: *Sakhavantali* v. *Radha Mohan* (3) and *A. I. R.* 1926 *Mad.* 556 are also analogous cases and lend support to the same view. I, therefore, hold that Bhagwan Das has no locus standi to maintain this appeal.

As regards Jodha Mal it was conceded that he has no right to appeal under S. 47, Civil P. C., but it was requested that the appeal may be treated as a revision. I see no good reason to adopt this course. There is no doubt that Jodha Mal's agent did state that the property may be sold free of encumbrances. Jodha Mal's grievance is that the learned District Judge has said in his order that the mortgage charge may be paid subject to the validity of the mortgage being determined by a competent Court. There is no specific mention of this point in the statement of Jodha Mal's agent dated 18th July 1927, but it appears from the learned District Judge's order that the intention was to leave this question of validity open. In any case this cannot affect the validity of the sale under appeal. I see no ground for interference in revision. I reject the appeal of both the appellants with costs.

D.R./R.K. *Appeal rejected.*

(1) [1918] 47 I. C. 152.
(2) [1916] 10 S. L. R. 53=35 I. C. 530.
(3) [1919] 41 All. 243=49 I. C. 816=17 A. L. J. 229.

A. I. R. 1928 Lahore 676

BROADWAY AND COLDSTREAM, JJ.

Budhoo—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1388 of 1927, Decided on 31st January 1928, from order of Addl. Sess. Judge, Ferozepore, D/- 5th November 1927.

Evidence Act, S. 24—Confession—Whether or not a confession is admissible in evidence is a matter which is to be decided after a full consideration of the evidence and the particular circumstances of each case.

It is not possible for a Court to say that the making of a confession appears to have been caused by any inducement, threat or promise except upon evidence before it. The inference may be suggested by the confession itself or by the evidence of the prosecution or by the evidence adduced by the accused person or by the surrounding circumstances which the Court is always bound to take into consideration, but the conclusion cannot be reached on surmise or conjecture. Whether or not a confession is admissible in evidence is a matter which is to be decided after a full consideration of the evidence and the particular circumstances of each case: *A. I. R.* 1923 *Pat.* 18, *Appr.*; *A. I. R.* 1925 *Lah.* 605, *Ref.* and *A. I. R.* 1925 *Cal.* 587, *Dist.* [P 677 C 2]

Nand Lal—for Appellant.

M. Sleem for *Govt. Advocate*—for the Crown.

Broadway, J.—One Amar Singh of mauza Sibian in the District of Ferozepore was murdered on the evening of 8th September 1926. On the following morning a report was made by Hira Singh, lambardar, who stated that he had been informed by one Sajjan that Amar Singh had been killed by Nidhan Singh, Gurdial Singh, Gurdit Singh and Budhu Mochi,

all of mauza Sibian. The police went to the spot and discovered that the four persons named could not be found in the village. Gurdit Singh and Budhu were ultimately arrested on 22nd December 1926. Gurdial Singh gave himself up to Sodhi Lal Singh on 25th December 1926. Nidhan Singh is still absconding. On 5th January 1927, Gurdial Singh made a confession before a First Class Magistrate and on 8th January 1927 Budhu did the same. These confessional statements implicated Sodhi Puran Singh and after further investigation Gurdial Singh was tendered a pardon and made an approver, while Puran Singh, Gurdit Singh and Budhu were committed to session to be tried for the murder of the deceased Amar Singh. The learned Additional Sessions Judge found that there was not enough reliable corroboration of Gurdial Singh approver's statement against Puran Singh and Gurdit Singh, who were accordingly acquitted. The approver's statement as against Budhu was held to be sufficiently corroborated by his own confession and, being found guilty, he was sentenced to death under S. 302, I. P. C. He has appealed and the case is also before the Court under S. 374, Criminal P. C.

Dr. Nand Lal on behalf of the appellant has taken us through the evidence in detail and has urged that the evidence in the case is not sufficient to warrant the conclusion arrived at by the learned Sessions Judge. He urged that the confession of the appellants was not a voluntary one and that, therefore, it was inadmissible under S. 24, Evidence Act. He referred to various authorities in support of his contention laying greater stress on *Emperor* v. *Panchkari Dutt* (1). I have had already occasion to quote from this authority in *Partab Singh* v. *Emperor* (2) and do not, therefore, think it necessary to discuss that case again. The circumstances that existed in *Panchkari Dutt's* case (1) do not exist in the one under consideration and as was pointed out in *Emperor* v. *Diwan Kahar* (3) it is not possible for a Court to say that the making of a confession appears to have been caused by any inducement, threat or promise except upon evidence before it. The inference may be suggested by the confession itself or by the evidence of the prosecution or by the evidence adduced by the accused person or by the surrounding circumstances which the Court is always bound to take into consideration but the conclusion cannot be reached on surmise or conjecture. Whether or not a confession is admissible in evidence is a matter which is to be decided after a full consideration of the evidence and the particular circumstances of each case and in the present instance all that has been pointed out by Dr. Nand Lal is that the appellant, having been arrested on 22nd December 1926, remained in the custody of the police until 8th January 1927, when his confession was recorded. Further it was urged that as the Sub-Inspector (P. W. 28) Khan Muzaffar Khan had stated that he had consulted the Court Inspector and had decided to suggest that one of the persons arrested should be made a witness, it must be inferred that an inducement was offered or a promise made to the appellant which led him to make his confession on 8th January 1927.

A reference to Muzaffar Khan's statement appears to me to raise the very opposite inference. He certainly states that on 19th January 1927, he had made up his mind after consulting the Court Inspector to propose the grant of pardon to either Gurdial Singh or Budhu. It is, however, perfectly clear from his statement that the consultation between him and the Court Inspector took place after 8th January 1927, when Budhu had made his confession. He, Muzaffar Khan, had after 8th January 1927, two confessions before him, the one made on the 5th by Gurdial Singh and the other made on the 8th by Budhu; and having regard to the fact that Sajjan, the man who had reported the matter to the lambardar, had, as he alleged out of fear, declined to give evidence as an eyewitness, it was only natural that the Sub-Inspector should have considered it advisable to attempt to get one of the two arrested persons who had confessed, to give evidence. There is nothing inherently improbable in the approver's statement nor in the confession of the appellant. The one or two differences in their statement, which have been emphasized by Dr. Nand Lal, are in my judgment, minor ones and wholly immaterial.

(1) A. I. R. 1925 Cal. 587=52 Cal. 67.
(2) A. I. R. 1925 Lah. 605=6 Lah. 415.
(3) A. I. R. 1923 Pat. 13.

The story told by the approver is that he and his companions all of whom had some sort of grudge against the deceased, had been hired by Sodhi Puran Singh to kill Amar Singh who had supplanted him as sarbarah lambardar in the village, that they had been promised Rs 600 for the deed and that on the day in question, 8th September 1926, they had discovered that Amar Singh had gone out in connexion with his agricultural pursuits and that it would be a convenient opportunity to waylay, on his return. Accordingly they had gone out armed with gandasas and a chhavi and ambushed him near a pond a short distance from the village. Gurdit Singh had caught the reins of his horse and then pulled him into the pond by his hair while the other three including the approver had hacked him to death with their weapons. After this the horse was tied at a little distance and Amar Singh's corpse dragged to one side. The approver and his companions spent the rest of the night in the village and early in the morning came to know that a report was to be made against them. They endeavoured to get Puran Singh to pay them Rs. 600, but being unable to get the money from him had absconded wandering about in various places till finally, Budhu and Gurdit Singh having returned to their village were arrested and the approver himself thought it advisable to give himself up to Sodhi Lal Singh, hoping that through his assistance he would get pardon.

I see no reason to doubt the approver's complicity in the murder of Amar Singh and agree with the learned Sessions J dge that his statement is sufficiently corroborated by Budhu's own confession and I would, therefore, dismiss the appeal and confirm the sentence of death.

Coldstream, J.—I concur.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 678

TEK CHAND, J.

Matu Mal—Defendant—Appellant.

v.

Banarsi Das and *others*—Plaintiffs and Defendants—Respondents.

Misc. Second Appeal No. 127 of 1927, Decided on 19th December 1927, from order of Dist. Judge, Ludhiana, D/- 29th October 1926.

Evidence Act S. 115—*Party giving a particular form to a document for avoiding stamp duty cannot take aid of the principle that deeds and contracts of the people of India ought to be liberally construed.*

A party who gives a particular form to a document in order to avoid stamp duty cannot invoke the aid of the principle that deeds and contracts of the people of India ought to be liberally construed and literal sense is not so much to be regarded as the real meaning of the parties : 40 *P. R.* 1913, *Dist.* [P 680 C 2]

Mehr Chand Mahajan for *Jagan Nath Aggarwal*—for Appellant.

Fakir Chand—for Respondents.

Judgment.* — In order to clearly understand the facts of this case it is necessary to refer to the following pedigree table :

Ghulla Mal
|
Mt. Chandi (daughter) (m) Bihari Lal
|

Nihal Chand (m) Mt. Gangi (daughter) — Mathra Das =(m) Mt. Kishen Devi
Mt. Durgi (daughter).

On the 2nd October 1883 Ghulla Mal mortgaged the house in dispute to one Jamita Mal for Rs. 700 for a term of 30 years. The mortgage-deed contained several onerous conditions, which it is not necessary to detail here. On the 8th May 1908 Jamita Mal's heirs alleging themselves to be full owners of the house sold it for Rs. 2,180 to Tulsi Ram, who in turn sold it to Kashi Ram Chetu Mal and the latter again sold it to Matu Mal defendant-appellant by a registered deed, dated 22nd December 1921, for Rs 3,500. Matu Mal is now in possession of the property and claims to be the owner.

In the meantime Ghulla Mal and Mt. Chandi had died and were succeeded by Mathra Das. On the 1st March 1909 a document (Ex. P.-3) was executed by Mt. Kishen Devi, widow of Mathra Das and Mt. Gangi, his sister, whereby they, describing themselves as the heirs of Ghulla Mal, purported to release the equity of redemption in the aforesaid house to Nihal Chand. This document was written on a stamp-paper worth Rs. 5 only and was described and registered as a deed of release.

On the strength of this deed Nihal Chand on the 18th June 1909, instituted a suit for redemption of the house im-

* [L. P. Appeal against this judgment was dismissed on 21st March 1928.]

pleading as defendants the heirs of the original mortgagee Jamita Mal and their assignees as defendants. The suit was dismissed on the preliminary point that on the plaintiff's own allegations the term of the mortgage had not expired and the suit was premature.

On the 3rd July 1921, Nihal Chand sold his rights in the equity of redemption to Joti Prashad and on the 23rd December 1921, both Nihal Chand and Joti Prashad instituted the present suit for redemption of the house against the original mortgagee Jamita Mal's heirs, the subsequent transferees (including Matu Mal and Mt. Kishen Devi and Mt. Gangi.) It is important to note that in the plaint the plaintiffs specifically stated that the deed executed by Mt. Kishen Devi and Mt. Gangi in favour of Nihal Chand on the 1st March 1909, (Ex P. 3) on which they based their title was a deed of release.

Mt. Kishen Devi originally admitted the plaintiffs' claim but subsequently she filed a second jawab dawa stating that she had not transferred her rights to Nihal Chand and that she was the victim of fraud. The other defendants contested the suit on various grounds, of which those material for our present purposes are that the deed of the 1st March 1909 relied on by the plaintiffs is ineffectual to pass any title to them inasmuch as:

(a) One of the executants, Mt. Gangi, being the sister of the last male holder, Mathra Das, had no rights to succeed to him.

(b) Mathra Das had left a son Durga Das who should be impleaded as a party.

(c) If Durga Das be not proved to be Mathra Das's son, his widow Mt. Kishen Devi could not by executing a deed of release in favour of a stranger like Nihal Chand invest him with any rights in the equity of redemption.

It is important to note that when this last objection was raised, the plaintiffs, realizing that the deed executed by the two ladies on the 1st March 1909, in favour of Nihal Chand, plaintiff, could confer no legal right on him, definitely took up the position that this deed, though styled as a deed of release, was in reality an "out-and-out sale," the consideration for which was the amount spent by Nihal Chand in defraying the marriage expenses of the daughter of Mt. Kishen Devi. At the trial the plaintiffs led evidence to prove that Nihal Chand had spent large sums of money on the marriage.

The trial Court in its judgment dated 7th July 1924 held that the plaintiffs had no locus standi to sue as the transaction of the 1st March 1909 was in reality a deed of release and not a deed of sale as alleged and that it conferred no title on Nihal Chand. It accordingly dismissed the suit.

The judgment was set aside on an appeal by Lala Topan Ram, District Judge, who ordered a re-trial on the ground that the trial was defective inasmuch as Durga Das, the alleged son and heir of Mathra Das had not been impleaded as a party. Durga Das was accordingly impleaded and fresh evidence led by both sides.

On remand the plaintiffs realizing the weakness of their evidence as to consideration, shifted their position once more and alleged that the deed of 1st March 1909, was neither a deed of release nor an out-and-out sale but was a gift. The learned Senior Subordinate Judge again dismissed the suit holding that Durga Das had not been proved to be the son of Mathra Das and that the deed of 1st March 1909 was really a deed of release and not a valid assignment of the equity of redemption.

On appeal by the plaintiffs the learned District Judge has, however, taken the contrary view and holding the deed to be a gift has held that the plaintiffs had a locus standi to sue and has remanded the case to the trial Court for decision of certain issues which had been undecided by the trial Court.

On second appeal, the first point urged by the defendant-appellant's counsel is that the suit was barred by limitation under Art. 134 as the mortgagee Jamita Mal representing himself to be the full owner of the mortgaged-property had sold it to Tulsi Ram in 1908 and then he had made subsequent alienations in which the house had been described as the property of the transferees. It was contended that this is a pure question of law patent on the face of the record and should be allowed to be raised for the first time in this Court. I am, however, unable to accede to this contention as, in my opinion, the decision of the question depends on facts which are not on the present record and to ascertain which a remand would be necessary.

I am, however, of opinion that the appeal should succeed on the short ground that the plaintiffs-respondents ought not to have been allowed to urge for the first time after remand that the deed of release dated 1st March 1909, in favour of Nihal Chand was in reality a gift. As already pointed out the document in question was executed as a release deed: it was written on a stamp-paper of Rs. 5, which is the duty payable on a release-deed, it was registered as a release-deed, and in the plaint the plaintiffs themselves described it as a release-deed. Subsequently when the defendants objected that a release-deed by Mt. Kishen Devi was ineffectual in law to confer any right on Nihal Chand or his assignee Joti Parshad, the plaintiffs took up the position that it was in reality a deed of sale, the consideration for which was the amount spent by Nihal Chand on the marriage expenses of Mt. Kishen Devi's daughter. At the trial evidence was led to prove the contention and witnesses came forward to depose that Nihal Chand had actually paid the expenses of the marriage in pursuance of this agreement. When that plea failed and the evidence was held to be unreliable the plaintiffs turned round and after remand stated that the deed in question was neither a release nor a sale but was in reality a gift. In my opinion the plaintiffs should not have been allowed to shift their ground in this manner.

The learned District Judge has referred to a Single Bench decision of the Chief Court reported as *Nidhan Singh* v. *Sham Singh* (1) and Mr. Fakir Chand for the respondents has relied strongly on it. It was decided there that

> deeds and contracts of the people of India ought to be liberally construed and literal sense is not so much to be regarded as the real meaning of the parties.

This ruling is, however, wholly distinguishable from this case and the passage cited must be taken as having reference to the peculiar facts of that case. In the present case, it is not merely a question of putting a liberal construction on the terms of a deed, but the real point is whether a literate person, residing in a town and belonging to one of the commercial classes also having special knowledge of the real nature of the transaction had deliberately taken up the position that the transaction was a sale for which consideration had actually passed, should be subsequently allowed to urge that the transaction was in reality one of a purely gratuitous character and that consideration was not intended to pass and did not in fact pass.

It is also important to note that before me Mr. Fakir Chand has not taken up the position that the document was described as a release-deed by inadvertence or owing to the ignorance of the scribe, but he has boldly asserted that the transaction was deliberately given the form of a release-deed to avoid payment of stamp duty. If this was so the plaintiffs cannot invoke the aid of the rulings which lay down that deeds executed by ignorant people in this country should be liberally construed.

Mr Fakir Chand has not sought to contest the finding of the trial Court that the plaintiffs had failed to prove that the transaction was one of sale, nor has he assailed the view of the lower Court that taken as a deed of release it was ineffectual to confer any legal title on Nihal Chand or his assignee Joti Parshad. He admits that one of the executants, Mt. Gangi, had no right whatever in the equity of redemption of the house which belonged to her deceased brother, and which on his death had vested in Mt. Kishen Devi. Mr. Fakir Chand also admits that Mt. Kishen Devi could validly release, relinquish or surrender her rights only in favour of a person, who was one of her heirs or had an interest vested or contingent in it and concedes that Nihal Chand is not such a person. I hold, therefore, that the lower Courts acted illegally in allowing the plaintiffs to set up an entirely new and inconsistent case after remand.

I wish also to point out that Mr. Fakir Chand has not suggested any valid reason for holding the document to be a deed of gift. The phraseology used in it is clear and explicit and there are no materials on the record which would indicate that the transaction was anything different from what it purported to be.

For the foregoing reasons I hold that the plaintiffs had no locus standi to maintain the suit. Accordingly I accept the appeal, set aside the order of the learned District Judge and dismiss the suit. Having regard to all the circumstances

(1) [1913] 40 P. R. 1913 =17 I. C. 524=24 P. L. R. 1913.

of the case and especially in view of the fact that both parties had put forward several frivolous pleas, I leave the parties to bear their own costs throught.

N K. *Appeal accepted.*

A. I. R. 1928 Lahore 681

ADDISON AND COLDSTREAM, JJ.

Chatru Malik—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 674 and 675 of 1927, Decided on 21st May 1928, from order of Sess. Judge, Multan, D/- 6th June 1927.

(*a*) *Evidence Act, S.* 114, *Illus.* (*b*)—*Conduct of the accused can be used for corroboration of approver.*

The evidence of an accused person's conduct may be used as corroboration of an approver's story: *R.* v. *Feigenbaum*, (1919) 1 *K.B.* 431, *Rel. on.* [P 685 C 2]

(*b*) *Penal Code, S.* 464—"*makes*" *means* "*creates*" *or* "*brings into existence.*"

The word "makes" means, creates or bring into existence : 38 *All.* 430, *Rel on.* [P 686 C 2]

A writing may purport to be a will although it turns out to be technically defective (41 *Mad.* 589, *Rel on.*), and therefore such a will, though incomplete and ineffective, cannot be said to have been not "made" within the meaning of S. 464. [P 686 C 2]

Moti Sagar and *J. L. Kapur*—for Appellant.

R. C. Soni—for the Crown.

Coldstream, J.—On 6th June 1923, Moti Ram a Government pensioner living in Multan, possessed of property valued at about a lakh of rupees, executed a will which was registered three days later. On 29th April 1926 he was struck by paralysis and on 29th May following he died.

On 28th July 1926 the Official Receiver of Multan was searching the shop of Tola Ram, an undischarged bankrupt, who practised as a petition-writer, in order to take possession of his property. While he was going through Tola Ram's papers he saw Tola Ram tear up a document. The Official Receiver took possession of the pieces. Next day he was asked by Hari Das, a cousin of Moti Ram, and some other persons whether he had come across a forged will purporting to be that of Moti Ram among the papers he had seen. He put the pieces of the torn document together and saw that the writing on this was apparently a deed thumb-marked by Moti Ram amending a previous will of 1923.

The document bore the signature of Dwarka Das and Chatru Malik as attesting witnesses. It was dated " Baisakh, equivalent to (—) May " a space for the day of the month being left vacant.

Moti Ram had three brothers, Shut Malik, Teju Malik and Loku Malik. Under the original will (Ex. P. H.), Loku Malik and Teju Malik and Radha Malik, son of Shut Malik, had been given nothing out of the estate, the main property of the testator having been bequeathed, after deducting certain bequests in favour of Moti Ram's widow, other female relations and charity, to the three grandsons of Shut Malik, whose son Radha Malik, their father, was specifically excluded from any benefit. The new will, which is Ex. P/A, included, however, a bequest of Rs. 5,000 to Teju Malik, of which a sum of Rs. 2,200 was stated to have been paid off already, leaving Rs. 2,800 as the net bequest. It also included a bequest of Rs. 4,000 to Radha Malik and left the residue of the estate not as previously willed to the sons of Radha Malik, but to be divided in three equal shares between the descendants of Teju Malik, Katu Malik, the son of Loku Malik, and the descendants of Radha Malik. Other noteworthy amendments made in the original will were an increase from Rs. 200 to Rs. 1,000 in the bequest to Moti Ram's servant Chela, the substitution of Radha Malik for Moti Ram's widow as guardian of Radha Malik's sons and a change in the provision for Moti Ram's widow who, according to the original will, was entitled to maintenance at the rate of Rs. 75 per mensem but under the amended will was to be given Rs. 4,000 in cash and maintenance at the rate of Rs. 35 per mensem.

The Official Receiver reported his proceedings to the Senior Subordinate Judge and this led to a judicial enquiry by Mr. Meehan, Magistrate, First Class, under the order of the District Magistrate. On 29th August 1926 Dwarka Das, who had signed the document Ex. P./A, as an attesting witness, offered to make a full disclosure. He was tendered a pardon and on his and other evidence, Chatru Malik, the second attesting witness, of the document Ex. P/A, Tola Ram, the petition-

writer, the scribe of the document, Teju Ram, the beneficiary under its provisions and two others Ram Kishan and Jassu Malik who were alleged to have conspired in the making of the document, were committed for trial at Sessions under Ss 467 and 467/109, I. P. C., for forgery and abetment.

The documentary evidence included two documents, Exs P/S and P/T, which the Official Receiver had found among Tola Ram's papers after he had made enquiries into the case. These were manifestly preliminary drafts of the final document Ex. P/A. The prosecution also produced Tola Ram's register of which the Official Receiver had taken possession when searching his shop. In this register the entry No 499 is dated 2nd May. On the next page there is in the margin a thumb-mark alleged to be Moti Ram's, but the space for the copy of the document entered is blank. The entry after this, No. 501, is dated 5th May.

The accused all denied their guilt. Tola Ram declared that he had written the document Ex. P/A on 4th May 1926 at the dictation of Moti Ram, after having written the two drafts Ex. P/S and P/T which he had corrected there and then according to Moti Ram's instructions. When he was reading the draft out to Moti Ram, Dwarka Das and Chatru Milik came into the room. They attested the will with their signatures. Teju was not present. Moti Ram was incapable of writing and therefore put his thumb-mark on the deed. Two or three days later Moti Ram returned the document to him, saying he was reconsidering the matter. The omission to date the will was due to Tola Ram's own inadvertence. He had left the space in his register for the copy of the document blank under Moti Ram's instructions as he had not time to copy out the document. Moti Ram himself had torn the document before he returned it to him and he attempted to destroy it in the Official Receiver's presence because Moti Ram had told him to tear it up and keep the matter to himself. He had not destroyed it before because he had been suffering from a weak heart. He attributed the charge against him to the enmity of Hari Das who had been excommunicated by his brotherhood.

Chatru Malik admitted that he and Dwarka Das had attested the document Ex. P/A, but they signed it at the instance of Moti Ram who was in his perfect senses and had thumb-marked it after Tola Ram had read it out. He explained that he had been falsely implicated by Hari Das and others who were Arya Samajists while he was a Sanatanist.

Teju Malik disclaimed any knowledge of the registered will, Ex. P/H, and stated that he had come to know of the existence of the document, Ex. P/A, only after its seizure at Tola Ram's shop. He admitted, however, that he had urged Moti Ram to make some provision for him and stated that Moti Ram had promised to do this. He had been sent by Moti Ram to fetch Lila Ram, the scribe of the registered will, but had brought Tola Ram as he could not find Lila Ram. He also pleaded an alibi, stating that he was in Hardwar on 9th June.

The Sessions Judge, believing the prosecution evidence and rejecting the evidence produced by these accused in support of their defence, convicted Tola Ram and Chatru Malik on both charges, inflicting a single sentence of six years' rigorous imprisonment on the former and three years' rigorous imprisonment with a fine of Rs. 500 on the latter whom he held to have been merely a tool of Tola Ram. Teju Malik, who was in his opinion clearly the person who inspired the forgery, was convicted of two offences under S. 467 read with S. 109, I. P. C., and sentenced to the single punishment of five years' rigorous imprisonment and Rs. 1,000 fine Ram Kishan and Jassu Malik who had denied knowledge of the matter were acquitted, not, however, because their plea of alibi was found established, but because the approver's story had not been corroborated so far as it concerned them by independent evidence.

The convicts appealed, Tola Ram and Teju Malik through Doctor Gokal Chand Narang (Criminal Appeal No. 675 of 1927), and Chatru Malik through Mr. Moti Sagar (Criminal Appeal No. 674 of 1927).

The appeals came before Dalip Singh, J., who, after noticing certain difficulties of fact and law, passed an order referring the appeal for hearing to a Division Bench.

We have been taken through the record by the counsel for the appellants and have heard Mr. Soni who opposed the appeals on behalf of the Crown.

The evidence has been very fully described and discussed in the exhaustive judgment of the Sessions Judge and the e is no need to refer to it in detail here. It consists principally of the deposition of the approver Dwarka Das, whose story is that on 9th June 1926 Jassu Malik, Ram Kishan, Teju Malik and Kattu Malik took him from his house to Ram Kishan's house where he was told that, in order to remove the injustice done to Teju Malik and Kattu Malik in Moti Ram's registered will, another will had been drafted by Tola Ram in consultation with Teju Malik and Kattu Malik. He was asked to attest the new document, Teju Malik and Kattu Malik promising to pay him Rs. 100 for his services. He went with Jassu Malik, Teju Malik, Ram Kishan and Kattu Malik to Tola Ram's shop where the document, Ex. P/A, was read out by Tola Ram. He attested it. It bore the thumb-mark of the executor, but had not been signed by Chatru Malik. The document was left with Tola Ram. Next day Teju Malik told Dwarka Das that Tola Ram wanted Rs. 300 for writing the deed and had been paid Rs. 100 so far. Four or five days after signing the will he, the approver, had gone to Hyderabad in Sindh where his son was at the time. About the 22nd August Teju Malik came to him there and informed him that the will had been seized and that a warrant for his (the approver's) arrest had been issued. He returned to Multan and remained in hiding for two days. On 29th August he petitioned to be given a pardon.

There is no reason why in this case the approver's evidence should be exempted from the well-established rule of practice followed by this Court that the testimony of an accomplice is not sufficient for the conviction of an accused without corroboration connecting that accused with the offence of which he is charged. The questions therefore before us for decision are: firstly, whether the approver's story is acceptable as substantially true as a whole; secondly, whether there is other sound evidence corroborating it in respect of each of the accused; and lastly, if the accused are proved to have acted as stated by the approver, for what, if any, offence is each accused punishable? Prima facie, the document Ex. P/A is in itself highly suspicious. Admittedly it was made when Moti Ram was suffering from a severe stroke of paralysis which disabled him physically and ended in his death The facts that it is not dated, that it was not produced by any of the beneficiaries or executors, that it was discovered in the possession of Tola Ram, that an attempt to des roy it was made when the Official Receiver proposed to take it from Tola Ram, and that it was not copied in Tola Ram's register although a thumb-mark was placed against the space left for it, all heighten the suspicion attaching to it. There is also a presumption that if it is a forgery, it was made by, or at the instance of, the persons benefited by the alterations it makes in the registered will. There is nothing incredible in the approver's story which as a whole is prima facie inherently probable.

In arguing the case before us, the learned counsel for the appellants have criticized at great length the medical and other evidence produced to prove that at the time when, according to Tola Ram and Chatru Malik, the document was written, thumb-marked, and attested, Moti Ram's condition was such as to preclude the possibility of its having been in fact authorized or executed by Moti Ram. Reliance has been placed by them upon the defence evidence produced on this point and it is contended that by the prosecution and defence evidence read together it has not been established beyond possibility of doubt that the document could not have been drawn up with his assent and, in accordance with brief directions such as might have been given by a man who was too ill to speak fluently. All this evidence has been carefully scrutinized by the learned Sessions Judge.

According to the defence version, both the drafts Exs. P/S and P/T and the document Ex. P/A were written out at Moti Ram's dictation. It is obvious from the comparison of these three documents with each other and the original will that the drafting of the final document Ex. P/A could not have been accomplished without continued reference to what had been written before.

Having considered the whole evidence of the matter before us, I am of opinion that the learned Sessions Judge's conclusions on the facts are justified by the evidence and correct. I find it proved by the evidence including that of Chela Ram (P. W. 20), Moti Ram's servant (who stood to gain were the document Ex. P/A acted upon), Doctor Vaina (P.W-8) who attended Moti Ram from 29th April till 5th May, Doctor Mehta (P. W. 11), Major Puri, Civil Surgeon (P. W. 7), Doctor Gopal Das (P. W. 9), who visited him regularly throughout his illness and never missed visiting him on more than two consecutive days, that Moti Ram could not have authorized or voluntarily executed the document Ex. P/A between the 2nd and 5th May. For reasons given by the learned Sessions Judge I reject the defence evidence on the point. Besides direct evidence as to Moti Ram's condition at the time, we have in support of the approver's story the suspicious circumstances already mentioned and the facts to which attention has been drawn by the Sessions Judge that, while a large number of the respectable witnesses attested the registed will the attesting witnesses of the document Ex. P/A are Dwarka Das and Chatru Malik, that none of the executors appointed under the registered will was informed of the new will except Teju Malik, and that Moti Ram's legal advisers who attested the registered will were not informed of it, nor was the presence of any medical man secured to certify Moti Ram's fitness to execute a will. I also agree with the Sessions Judge in finding that the defence evidence does not falsify the approver's statement that he was not in Multan when, according to the appellants he added his signature to the document.

It is to be noted that it has been proved by expert evidence that the thumb-impression on Ex. P/A and in Tola Ram's register are of one and the same person. As regards the resemblance between these signatures and Moti Ram's signature on the registered will, the expert evidence is that these thumb-marks are similar in type and general appearance to the signature on the registered will, but that he cannot swear to their being of the same person. It is not, however, disputed that the signature on the document Ex. P/A is Moti Ram's. The appellant's case is that Moti Ram himself put his thumb-mark on the document Ex. P/A. I also agree with the learned Sessions Judge's opinion regarding the evidence produced by the defence to prove enmity between Hari Das at whose instance the accused were proceeded against and the appellants. The alleged ex-communication of Hari Das took place fourteen years previously, and there is in my opinion no cogent ground for holding that Hari Das was inspired by personal enmity in insisting on the matter being brought to light.

Before considering the evidence against each of the accused individually it will be as well to dispose briefly here of their pleas of alibi, for, if these are established it is obvious that the evidence of the approver will be materially shaken. Doctor Gopal Chand Narang has attached importance to the alibi evidence of his client Teju Malik. This has been described in detail by the learned Sessions Judge. Teju Malik declared that he noted the numbers of the tickets issued to him on 6th June from Multan to Hardwar, on the 10th June from Hardwar to Lahore and on the 11th June from Lahore to Multan ; but this evidence has been broken down by the further examination of the clerk, D. W. 2, on 23rd May 1927, who deposes that the tickets from Hardwar to Lahore No. 89385 which Teju Malik declared was issued to him was a half-ticket. As regards this evidence about the ticket numbers I agree with the learned Sessions Judge's conclusions that the probable explanation is that Teju Malik somehow or other obtained the numbers of tickets sold on particular dates and used this knowledge to bolster up an alibi. The evidence of Teju Ram's Panda at Hardwar and the other witnesses who support his alibi has been rightly rejected by the Sessions Judge for the reasons he gives. As regards the pleas of alibi . . . . advanced by Ram Kishna and Jassu Malik, the acquitted accused, I find that their evidence is not incompatible with the truth of the approver's story.

For all these reasons I accept the approver's evidence as conclusively establishing that the document, Ex. P/A, was not executed by, or with the authority of, Moti Ram but was a fictitious document.

It is now to be considered how far the approver's story implicating the individual appellants is corroborated by other evidence connecting them with the forgery. As regards Teju Malik there is no direct corroboration of the approver's evidence implicating him. There are, however, the facts, that he and his family were beneficiaries along with Khattu Malik, his nephew under the new will (having received nothing under the registered will), Teju Malik personally being especially favoured with a bequest of Rs. 5,000 in cash. We have his own admissions that he was anxious to have the registered will amended in his favour and had elicited a promise to this effect from Moti Ram during his illness and that he had fetched Tola Ram at Moti Ram's instance because the scribe of the original will whom Moti Ram first asked him to summon could not be found. There is also the evidence of Chela Ram that Teju Malik asked him (witness) to show him the original will and that he had objected to Chela Ram's taking Moti Ram's papers from Moti Ram's Baithak to the latter's house where they would be safer. He was seen by Radho Ram, (P. W. 19), and Chela Ram (P. W. 20) going to Tola Ram's house during the period of Moti Ram's illness once or twice.

There is also the evidence of Radho Ram that on the morning of the day of Moti Ram's death, he saw an ink-roller, such as is used for taking thumb-impressions projecting from Teju Malik's pocket when he and Taju Malik were sitting beside Moti Ram who was asleep. The witness said that he took possession of the roller and told Chela Ram about it. Chela Ram has given evidence that he was informed about it by Radho Ram, but his evidence at the trial regarding the time at which, according to the information Radho Ram had taken possession of the roller was totally different from the time mentioned in his statement before the committing Magistrate. On being cross-examined on this inconsistency he collapsed. In view of the fact that the learned Sessions Judge has dismissed the story about the roller as a clumsy piece of fiction, I attach no importance to it. Certainly Teju Malik had ample opportunity for procuring the thumb-mark of the paralytic Moti Ram upon the document. There is no doubt that the evidence of an accused person's conduct may be be used as corroboration of an approver's story. If authority is required it is found in *R.* v. *Feigenbaum* (1), a judgment of the Court of criminal appeal. I have weighed the accepted evidence with care. Obviously it raises a very strong suspicion against Teju. It cannot, however, be said that it is inconsistent with his innocence, and it is, in my opinion, insufficient as corroborative evidence necessarily connecting him with the crime. I would, therefore, accept Teju Malik's appeal and acquit him, ordering the fine if paid to be refunded.

As regards Tola Ram, the proved circumstances afford strong corroboration of the approver's story so far as it implicates him. He wrote the deed and kept it in his custody from which it was taken by surprise and in spite of his effort to destroy it. There is also evidence that, after proceedings had begun in the committing Magistrate's Court, Tola Ram submitted a petition on 21st October 1926, to the Deputy Commissioner, Multan, stating that he would make a full disclosure of the true facts and produce evidence to prove them if he was given a free pardon. His explanation that he did this in consequence of a message from Malik Hari Das may or may not be true, but it does not lessen the force of this evidence of conduct which alone would raise a powerful presumption that he joined in the act for which he and his co-accused were being prosecuted. Finding that there is independent evidence connecting Tola Ram with the acts for which he was tried, I accept the approver's statement against him throughout.

Chatru Malik's case is peculiar in that there is no direct positive evidence of the approver implicating him. All that we have from the approver about Chatru Malik is that he (the approver) attested the document Ex. P/A on 9th June. Chatru Malik's attestation was not then upon the document. I may here dispose of the point taken by his counsel Mr. Moti Sagar, that the prosecution have failed to prove that the whole attestation entry upon the deed alleged to have been made by Chatru Malik was in fact written by him. As already

(1) [1919] 1 K. B. 431=88 L. J. K. B. 551=120 L. T. 572=26 Cox. C. C. 387=14 Cr. App. R. 1.

made clear, Chatru Malik has admitted his signatures. Moti Sagar, however, contends firstly : that a conviction cannot properly be based upon a mere admission of an accused person unles there is some evidence produced by the prosecution which has to be explained away, and, secondly, that Chatru Malik's admission relates only to the signature of his own name and not all the words of the entry.

As regards the first of these two contentions : it need only be remarked that the presence of Chatru Malik's signature upon the deed as an attesting witness is not a matter of mere admission by Chatru Malik but was proved by the evidence of Radho Ram (P. W. 19) who had employed him as a broker in his business, and as regards the second, that a glance at the writing of the attestation clause itself is sufficient to refute it. The words written are "*Atar Sakhi Chatru Mehra mukh wachni pooj Malik Moti Ram Mehra akhar wasiyat ute kite.*" The meaning of these words is attestation of Chatru Mehra at the instance of Malik Moti Ram Mehra, signature put upon the will.

It will be observed that the name "Chatru Mehra" comes not as an isolated signature, but in its proper sequence among the other words expressing in the ordinary form the fact of attestation.

I find it legally proved that Chatru Malik wrote the attestation, including his name upon the document Ex P/A. This fact taken along with the evidence which I have held to be proof that Moti Ram did not authorize or execute the document Ex. P/A establishes with certainty that the attestation by Chatru Malik was untrue, inasmuch as the attestation was not made at the instance of Moti Ram as it purported to have been made.

It remains to be decided whether the prosecution story having been established as regards the facts alleged against Chatru Malik and Tola Ram, these appellants were legally punishable upon the charges which they were tried.

It is first contended by counsel for the appellants that, as the document P/A was never completed and remained ineffective it could not be said to have been "made" within the meaning of S. 464, I. P. C. Reliance is placed on *Empress* v. *Riasat Ali* (2). a judgment which on this point was dissented from in *Emperor* v. *Krishtappa Khandappa* (3) in which reference was made by the learned Chief Justice of the Bombay High Court to the definition of document in S. 29 of the Code. I can see no reason for believing that the word "makes" in S. 464 means anything other than makes, that is to say, creates or brings into existence or that a person cannot forge a document which purports to be a will unless the will has been completed by the addition of the date. I find support for my view in the judgment of Pigott, J, in *Emperor* v. *Jawahar Thakur* (4). The document P/A undoubtedly purports to be a will executed by Moti Ram. Indeed the accused themselves declared that this is what it really was. The omission to fill in the date was due, it was asserted, entirely to forgetfulness on the part of Tola Ram. That the will had legal validity without the signature of a witness and that it had no such validity without an entry of the date appear to me to be facts entirely beside the point. A writing may purport to be a will although it turns out to be technically defective, see the judgment of Oldfield, J, in *Ramaswami Ayyar* v. *Emperor* (5).

On behalf of Chatru Malik it is urged by Mr. Moti Sagar that the attesting words alleged to have been written by Chatru Malik were no part of the document which was admittedly complete in form except for the date before Chatru Malik put his writing upon it as a witness. Therefore, Chatru Malik could not have been an abettor but was merely an accessory, if he was an accessory, after the fact. Having regard to the definition of document in the Code (and this is our only guide in the matter) it is to me perfectly clear that in this particular case the attestation written by Chatru Malik was not only a part of the document purporting to regard the attested will of Moti Ram but was in itself also a document.

I find it indubitably that Tola Ram in writing the document P/A, including the words 'Malik Moti Ram" above what purports to be the thumb-impression of Moti Ram, made the document

(2) [1881] 7 Cal. 352=8 C. L. R. 572.

(3) A. I. R. 1925 Bom. 327.

(4) [1916] 38 All. 430=34 I. C. 315=14 A. L. J. 643.

(5) [1918] 41 Mad. 589=43 I. C. 593=19 Cr. L. J. 177.

fraudulently with the intention of causing it to be believed that it was made by Moti Ram by whom Tola Ram knew it was not made. His action fell within the definition in Cl. 1, S. 464, I P. C., and he is punishable under S. 467, I. P. C.

The words and signature subsequently added by Chatru Malik can have had no other purport than to be evidence that he attested the will in Moti Ram's presence with the intention of causing it to be believed that the attested will was made by the authority of Moti Ram. It having been proved that the attested will was not so made it follows that Chatru Malik made a part of the document with the intention that the document (the attested will) was made by the authority of Moti Ram knowing that it was not so made. There can be no possible doubt of the fraudulent intention in his so attesting a deed purporting to be that of the paralytic or dead Moti Ram. I consider that he has been rightly convicted under S. 467, I P. C.

Viewing the attested will as one false document jointly made by Tola Ram and Chatru Malik, I would set aside the conviction and sentence under S. 109, I. P. C., in the case of both these appellants.

I think that the sentences are excessive, having regard to the possibility that the forgers had no intention of using the document having left it incomplete for so long, and I would, therefore, further accept the appeals of Tola Ram and Chatru Malik so far as to reduce the sentence passed on them to two years and one year's rigorous imprisonment respectively.

Teju Malik's bail bond is cancelled. Tola Ram and Chatru Malik will surrender to their bonds before the District Magistrate and serve out the sentences imposed upon them. The fine on Chatru Malik, if paid will be refunded.

Addison, J.—I agree.

A.L./R.K. *Appeals partly accepted.*

A. I. R. 1928 Lahore 687

FFORDE, J.

Narain Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1944 of 1927, Decided on 10th February 1928, from order of Addl. Sess-Judge, Lahore, D/- 11th November 1927.

Evidence Act, S. 114, Ill (a)—Long lapse of time between theft and discovery of stolen property—Onus to prove innocent possession is not on the accused—Penal Code, S. 411.

Where there is long lapse of time between the theft and the discovery of the stolen property (in this case over 15 months), the onus of proving innocent possession should not be cast on the accused : 62 *P. L. R.* 1916, *Rel. on*

[P 687 C 2]

Durga Das Kuller—for Petitioner.

Judgment.—The petitioner has been convicted under the provision of S. 411, I P. C, of having dishonestly received a stolen bullock and he has been sentenced to eight months' rigorous imprisonment. He now asks to have this conviction and sentence set aside on the ground that the onus of proving honest possession was cast upon him whereas the onus should have been placed upon the prosecution, of proving that he had received or retained the animal knowing it to have been stolen. Some animals were stolen from the house of one Sunder Singh on 13th February 1926, and of these one animal was discovered in the house of the petitioner in June 1927, i. e., over fifteen months after the theft. In the view of this long lapse of time between the theft and the discovery of the stolen property, the onus of proving innocent possession should not have been cast on the petitioner. If any authority were required for this proposition, I would refer to the judgment of Shadi Lal, J. (now Chief Justice Sir Shadi Lal) in *Mangaya Shah* v. *Emperor* (1). The fact that the petitioner when asked to explain his possession of the animal gave an explanation which has not been held to be satisfactory is not sufficient ground for his conviction. His grievance that he was asked to prove his innocence instead of the prosecution being required to affirmatively prove his guilt is a real one. Under these circumstances the conviction and sentence must be set aside and I direct that the petitioner be set at liberty.

N.K. *Conviction set aside.*

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(1) [1915] 41 P. W. R. 1915 Cr.=32 I. C. 660 =62 P. L. R. 1916.

A. I. R. 1928 Lahore 688

ZAFAR ALI AND JAI LAL, JJ.

Mt. Kishen Devi—Plaintiff—Appellant.

v.

Banwari Lal and *others*—Defendants—Respondents.

First Appeal No. 2437 of 1923, Decided on 30th March 1928, from decree of 1st Cl. Sub-Judge, Ludhiana, D/- 29th March 1922.

Limitation Act, Art. 39—Suit by a cosharer for recovery of his share of rent realized by other cosharers—Art. 89 and not Art. 62 applies.

Where by virtue of an arrangement some of the cosharers have been realizing rent of joint immovable property for division among other cosharers, the relationship between the latter and the former is that of an agent and principal; and a suit for realization of the share of rent by the cosharer is governed by Art. 89 and not Art. 62: 24 *All.* 27; *A. I. R.* 1923 *P. C.* 31; and *A. I. R.* 1922 *Mad.* 150 (*F. B.*); *Rel. on*: 24 *Cal.* 309; 32 *Cal.* 527 and *A. I. R.* 1924 *All.* 812; *Dist.* [P 688 C 2]

Shiv Charan Das and *Jagan Nath*—for Appellant.

Hargopal and *Nawal Kishore*—for Respondents.

Jai Lal, J.—The pedigree of the parties will be found at p. 76 of the printed paper-book. Mt. Kishen Devi, widow of Gauri Shankar, instituted a suit against the defendants some of whom are the sons and grandsons of an uncle of Gauri Shankar and the others are grandsons of his father's brother. Gauri Shankar and the remaining defendants were once members of a joint family and as such carried on joint business and acquired immovable property in various places. They separated long ago but the business and the immovable property remained joint. As the properties were situated in several places such of the joint owners as were either residing in such places or were actually there at the time used to realize the rents thereof which were finally divided between the parties according to their shares.

Gauri Shankar died on 1st February 1908 and since then the properties have remained joint between his widow, Mt. Kishen Devi and the defendants. It appears, however, that the defendants, taking advantage of the widowhood of Mt. Kishen Devi, have since the death of her husband been placing all sorts of obstructions in her way to prevent her from realizing her share of the rents and have also been raising objections to paying her share of the income. Consequently the suit out of which this appeal has arisen was instituted by Mt. Kishen Devi against the defendants on 13th January 1920, for partition of the joint immovable property and for the recovery of her share of the rents realized by the defendants together with interest thereon.

It has been found that Mt. Kishen Devi's share in the immovable property is $\frac{1}{4}$th, and there is no contest on this point before us. The trial Court has decreed her suit so far as the prayer for the partition of the joint immovable property is concerned, but has dismissed her claim with regard to her share of rent and interest thereon on the ground that Art. 62, Sch. 1, Lim. Act, governed this part of her claim and that she was therefore not entitled to recover more than three years' rent actually realized by the defendants immediately before the institution of the suit, and further that it had not been proved that any rent had been actually realized by the defendants within three years of the institution of the suit. Mt. Kishen Devi has presented this appeal against this part of the decree of the Subordinate Judge.

It seems to me that the view of the trial Court, that the article applicable was 62, is erroneous, the article which governs the case being Art. 89. It has been found that after the death of Gauri Shankar Mt. Kishen Devi succeeded to his interest in the joint property, and she has been awarded a decree for partition thereof which decree is not attacked before us. She must, therefore, be deemed to have become a joint owner in the property with the defendants who by virtue of an arrangement which existed in the lifetime of Gauri Shankar have been realizing the rent of the joint property for division among all the cosharers. Presumably therefore in the lifetime of Gauri Shankar the relationship between the cosharers who actually realized the rent and the other cosharers was that of an agent and principal. I am not prepared to hold that such relationship ceased to exist merely because after the death of Gauri Shankar obstructions were placed by the other cosharers in the way of Mt. Kishen Devi. In her plaint she has stated that up to a certain stage she actually realized her share of the rents, but that later the defendants

began to raise objections. At the trial the defendants did not deny her title to a ¼th share in the joint property but they stated that she was wasting the same. In the absence of clear proof to the contrary that the relationship of agency had terminated it must be assumed that it continued. There is no such evidence in this case and I hold, therefore, that the defendants realized the income of the joint property as agents of the plaintiff and are therefore accountable to her as such.

On behalf of the plaintiff reliance was placed on *Asghar Ali Khan* v. *Khurshid Ali Khan* (1), *Venkanna* v. *Agasthiah* (2) and *Yerukola* v. *Yerukola* (3). All these cases support the appellant's contention that Art. 89 applies to the present case. In the Madras case it was held that agency in such cases need not be express but may be implied, and that the ordinary presumption should be that one cosharer realizes the income of the joint property as an agent of the other cosharers. Following the above authorities I hold that Art. 89 was applicable to the present case and the plaintiff's suit was therefore not barred by time. On behalf of the respondents reliance was placed on *Banoo Tewary* v. *Doona Tewary* (4), *Mahomed Wahib* v. *Mahomed Ameer* (5) and *A. I. R.* 1924 *All.* 812. All these cases are distinguishable, because there a former cosharer had realized the income of the previously joint property after partition or a previously joint debt after division between the co-obligees, when he had ceased to be their agent by virtue of the partition or division.

The question does not really arise in view of my finding on the point of limitation, but even if the suit was barred except with regard to the rents realized within three years of the institution of the suit, the Court should have passed a preliminary decree for accounts and should not have dismissed it at the present stage. There can be no manner of doubt that the rent of the joint property was actually realized by the defendants. What was the actual amount so realized by them was a matter which was specially within their knowledge and they should have been directed to render proper accounts after the preliminary decree had been passed.

At this stage I might dispose of a preliminary objection that was taken by the respondents that Harbans Lal, respondent, one of the defendants in the suit, having died on 14th June 1925, during the pendency of this appeal and an application to bring on the record his legal representatives having been made on 15th December 1925, when it was barred by time, the appeal has abated. No good ground has been shown why such an application was not made within the time allowed by law. In view of the relationship of the parties I am not prepared to believe that the appellant did not know of the death of Harbans Lal. I consider, therefore, that the appeal has abated as against the representatives of Harbans Lal. The respondents' counsel then contended that the entire appeal had abated. With this I am unable to agree. The liability of the defendants is not joint. Each is accountable for what he has actually realized. Therefore the absence of Harbans Lal or his legal representatives from the record does not prevent the Court from deciding what amount of rent of the joint property was actually realized by the surviving respondents each of whom will be liable to the plaintiff for her ¼th share of the amount realized by him subject to any adjustment of account between him and the appellant.

The result is that I would accept this appeal, set aside the decree of the Subordinate Judge dismissing the suit with regard to her prayer for her ¼th share of the income realized by the defendants and interest thereon and would pass a preliminary decree in her favour against the respondents declaring that she is entitled to a ¼th share, subject to such deductions as the defendants may legitimately be entitled to claim, in the income of the joint property actually realized by each respondent respectively. The case will be remanded to the trial Court with directions to frame a preliminary decree and to proceed with the case in accordance with law. Court-fee on the memorandum of appeal paid in this Court shall be refunded to the appellant and other costs will abide the result.

Zafar Ali, J.—I agree.

A.L.R.K. *Case remanded.*

(1) [1902] 24 All. 27=28 I. A. 227=3 Sar. 142 (P. C.).
(2) A. I. R. 1923 P. C. 31.
(3) A. I. R. 1922 Mad. 150=45 Mad. 618 (F. B.).
(4) [1897] 24 Cal. 309.
(5) [1905] 32 Cal. 527=1 C. L. J. 167.

1928 L/87 & 88

Advocate High Court
Jammu & Kashmir

A. I. R. 1928 Lahore 690

DALIP SINGH, J.

Sadhu Ram and *others*—Plaintiffs—Appellants.

v.

Chuhar Khan and *another*—Defendants—Respondents.

Second Appeal No. 1360 of 1927, Decided on 4th January 1928, from decree of Addl. Dist. Judge, Jullundur, D/- 15th February 1927.

(a) *Civil P. C., S.* 100—*Second appeal.*

A finding, of fact which contradicts the other finding, is open to second appeal. [P 691 C 1]

(b) *Landlord and Tenant—Malguzars have no proprietary right in the land.*

The malguzar has no proprietary right in the land at all and the mere fact that settlement operations are conducted with him or the revenue is due from him does not confer any right to proprietary possession of the land on the malguzar: 108 *P. R.* 1892 and *A. I. R.* 1925 *Lah.* 391, *Foll.* [P 692 C 1]

Har Gopal for *Jagan Nath Aggarwal*—for Appellants.

Chandar Gupta for *Fakir Chand*—for Respondents.

Judgment.*—These three appeals can be disposed of in one judgment. The plaintiffs sued alleging that they were the owners of the land in dispute and that the defendants had dispossessed them within three years of the suit wrongfully. The defendants denied that the plaintiffs had been in possession and, on the other hand, claimed that the property was their own. It appears that the land in dispute whose area is 2 bighas 10 biswas 4 kanals 2 marlas along with 7 bighas 1 biswa was granted as a muafi to the predecessors-in-interest of the defendants in Sambat 1902 by Maharaja Dalip Singh.

In 1847 this land was recorded as the maufi of Jane Khan, etc., the predecessors-in-interest of the defendants. The muafi was only for life. In 1878, on the death of Jane Khan, the muafi was resumed, but the land was given to the descendants of Game Khan, father of Jane Khan, as malguzars. In the Settlement papers of 1851, 7 bighas 1 biswa are shown as ownership and muafi of Jane Khan and his brothers and 2 bighas 10 biswas, the land in dispute, are shown as the ownership of Waris and as the muafi of Jane Khan and his brothers. In 1851 Waris is shown as in possession of the land in dispute and his name is also entered in the proprietary column. In 1885 Umra and Idu, descendants of Waris, are shown as the owners, and the descendants of Game Khan are also shown in that column as malguzars. In the column of possession the words are khudkasht and in the column of batai the words are *yaftani Nathu weghera thekedaran muafi munzabta nisfa nisf ma nira.* In the column of malguzari there is an entry showing a malikana of two annas. It would appear from this entry then that owners, the descendants of Waris, were cultivating the land and were paying half and half batai to the malguzars and were also recovering two annas from the malguzars by way of malikana. It is said in the judgment of the learned District Judge that in the jamabandi of 1899-1900 Lachhman Das, the descendant of the plaintiffs, who derived title from Umra and Idu, is shown in the proprietary column and there is no mention of the malguzars.

In 1914, however, Game Khan' descendants applied to have their names recorded as malguzars, and their names were so entered by mutation No. 3359, decided on 27th August 1915, it being held that their names had been omitted by mistake. There was a dispute between the owners and the malguzars as to who had been in possession, but the Revenue Authorities found that the actual possession was with the malguzars. The malguzar had then said that they had acquired this possession by redeeming the land from the mortgagees who were also the owners in 1914. Since that date Game Khan's descendants are throughout shown as malguzars. In 1915 the possession is shown to be that of Nathu Khan, the malguzar, through his tenant. In the 1921-22 jamabandi the maliks, and the malguzars are shown in the proprietary column and possession is simply shown as that of Fattu *gher maurusi* and others; the batai continues to be half and half. In 1909 the sons of Lachhman Das mortgaged the land in suit with other land to one Mian Mal. It is stated in that mutation that possession is given to the mortgagee. The mortgagee, however, was their uncle.

[*L. P. Appeal preferred against this judgment was dismissed on 22nd March 1928.]

On 26th November 1921, the land was redeemed and again possession is alleged to have been given. But the learned District Judge has not accepted this mutation as showing that possession was actually transferred either in 1909 or 1921. Besides this the muafi file of 1879 shows that Khuda Bakhsh, the son of Waris, applied to have the settlement made with him after the resumption of the muafi in 1878. In that application he alleged that he had been in possession and had been paying batai to the malguzar, but that the malguzar had mortgaged his rights to some other person and, therefore, was no longer, according to Khuda Bakhsh, entitled to batai. In 1886 another application was made by Umra, son of Khuda Bakhsh, to be allowed to pay land revenue instead of batai. From these two applications it seems clear to me that the owners, namely, the descendants of Waris, were in possession until 1886. There is a mortgage-deed of 1877 in which Sandhi Khan, one of the descendants of Game Khan, mortgaged his share of the whole land, i. e. both the land which was by malkiyat of Game Khan and the land which was the muafi of Jane Khan to one Nabi Bakhsh. This mortgage was with possession, but it is not clear to me whether the the muafi land was also supposed to be mortgaged with possession, or whether the muafi rights were simply handed over, leaving the possession whatever it was on the spot existing as before.

The learned District Judge has found on all this evidence that the land in dispute had been in possession of Game Khan's descendants all along. He had previously found that the maliks are shown by the record to have paid the malguzar half the produce with straw while the malguzar paid malikana to the owner and land revenue and cesses to the Government. This finding seems to me to contradict the other finding about the possession of Game Khan's descendants. It is, therefore, though a finding of fact, open to attack in second appeal.

The trial Court dismissed the suit holding that the so-called maliks had really only been tenants under the malguzars and that, therefore, they had no right to possession of the land. The learned District Judge on appeal held that the malguzars were the taqarriridars or inferior owners, and the so-called maliks were the ala maliks, or superior owners, entitled only to a nominal malikana. This was not the case of either side. As I have already said he further held that possession all along was with Game Khan's descendants with a contradictory finding that the maliks paid half the produce with straw to the malguzars. The jamabandi of 1899 referred to by the District Judge has not been found by me on this record, but the facts stated therein are not controverted by either side. From all this documentary evidence it seems to me clear that possession, at any rate up to 1886, was with the maliks, i. e., the descendants of Waris and their successors-in-interest. There is nothing to show that there was any change of possession until 1914 when on the application of Game Khan's descendants it was found that his descendants were in possession on that date. The entry recorded in the Settlement bears this out. In 1921-22 the possession, according to the entry, might be either with the malguzars or with the maliks. On the whole, however, bearing in mind that the tenant is the same as the tenant shown in 1915 and that the plaintiffs themselves alleged dispossession in October 1921, I am inclined to think that possession remained with the malguzars. In 1923 the plaintiffs brought the present suit, and obviously the suit is within time from 1914 when the first possession of the malguzars can be said to be conclusively shown. I, therefore, hold that the plaintiffs have proved that they were dispossessed sometime within 12 years of the institution of the suit and that the suit is not barred by limitation.

It remains then only to decide what the relative positions of the malguzars and the maliks are. On this point I have been referred to *Santa Singh* v. *Budhwanti* (1) and *Bela Singh* v. *Lakshmi Das* (2) by counsel for the plaintiffs-appellants. Counsel for the defendants-respondents had referred me to *Budha Singh* v. *Kanshi Ram* (3), *Gujar Singh* v. *Bawa Uddham Singh* (4), Douie's Settlement manual, paras. 5, 99, 120 and 185 and the letter of the Financial Commissioners printed as Appendix 5, p. 10, of the Final report of the Revised Settlement of

(1) [1892] 108 P. R. 1892.
(2) A. I. R. 1925 Lah. 391=6 Lah. 132.
(3) [1903] 120 P. W. R. 1903.
(4) [1909] 86 P. W. R. 1909=4 I. C. 626.

Jullundur, dated 1913-17. The rulings applicable, in my opinion, are *Santa Singh* v. *Budhwanti* (1) and *Bela Singh* v. *Lakshmi Das* (2). The Punjab Weekly Reporter's rulings, *Budha Singh* v. *Kanshi Ram* (3) and *Gujar Singh* v. *Bawa Uddham Singh* (4), are cases of gifts of land as opposed to gift of muafi and, therefore, are not applicable in this case if one accepts the finding of the two Courts that a muafi grant of the land was made by Maharaja Dalip Singh to the ancestors of the defendants. From these rulings, namely, *Santa Singh* v. *Budhwanti* (1) and *Bela Singh* v. *Lakshmi Das* (2), it seems to me that the malguzars have no proprietary right in the land at all, and the mere fact that settlement operations are conducted with him or the revenue is due from him does not confer any right to proprietary possession of the land on the malguzar. Following these rulings then I hold that the plaintiffs are entitled to possession of the land in dispute and I, therefore, accept the appeals and decree all the three suits. As the matter is a difficult one and the plaintiffs on my finding did not move in the matter for 11 years, I leave the parties to bear their own costs throughout.

I may note that it was contended before me by counsel for the respondents that the land had been granted by Maharaja Dalip Singh and that it was a mistake on the part of the two Courts to say that only the muafi rights had been given. It is difficult for me to decide this question, because Ex. D.-A. on which reliance is placed is a piece of paper bearing no seal of a Court or any signs of compliance with the provisions of O. 13 and it is almost unintelligible to me and counsel for the defendants respondents could not really explain it. In the circumstances I cannot see any reason to vary the concurring finding of the Courts below that this was a grant of muafi, i. e., an assignment of land revenue and not a gift of land. Moreover this conclusion is strengthened by the fact that in 1877 the predecessors-in-interest of the defendants distinctly described this land as muafi and the ownership was said to be that of the predecessors-in-interest of the plaintiffs. This would not have occurred had they been owners of this land. No doubt if Ex D.-A. were construed as being a gift of land as distinct from a gift of muafi, the matter would be quite different and then the Punjab Weekly Reporter's rulings, *Budha Singh* v. *Kanshi Ram* (3) and *Gujar Singh* v. *Bava Uddham Singh* (4), might apply.

N.K. *Appeals allowed.*

A. I. R. 1928 Lahore 692

SHADI LAL, C. J.

Waryami and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 686 of 1928, Decided on 25th May 1928, from order of Sess. Judge, Montgomery, D/- 18th February 1928.

Indian Penal Code, S. 105—*Right of private defence—Trespass by cattle — Cattle can be chased even outside the fields trespassed—Cattle Trespass Act, S,* 10.

Certain cattle belonging to accused trespassed a field where they were grazing. An attempt was made by the owner of the field to seize them in order to take them to cattle pound. The cattle ran towards the field of the accused where the chasers followed them. The accused inflicted mortal injuries on one of the chasers, who consequently died. It was urged that the chaser had no right to pursue out of the field trespassed and the accused were entitled to a right of private defence.

Held: that notice of trespass being taken at once, the mere fact that the cattle had left the land, before they could be seized, did not deprive the owner of the field of the right of seizure conferred upon him by S. 10, Cattle Trespass Act, and no case for private defence was proved : *A. I. R.* 1925 *Nag.* 50, *Dist.*

[P 693 C 1]

Ghulam Mohy-ud-Din—for Petitioners.

C. H. Carden Noad—for the Crown.

Judgment.—The facts, which are relevant to the question of law debated before me, may be shortly stated. On the night of 17th September 1927 one Shahab-ud-Din received information that his crops were being damaged by cattle. Thereupon, Shahab-ud-Din, accompanied by certain persons, went to the spot and found bullocks grazing in his maize field. He and his companions attempted to sieze the cattle in order to take them to the cattle pound, but the bullocks ran away towards the fields of their owners, who are the petitioners before me. While Shahab ud-Din and his friends were chasing the bullocks, Chanan Singh, who was at that time watering his field, also joined them ; but he lagged behind and was mercilessly beaten by the prisoners Ghulami and Waryam with dangs. The

other two prisoners were standing at a short distance instigating the assault. Chanan Singh received mortal injuries to which he succumbed on the following day.

Now it is contended by the learned counsel for the petitioners that after the cattle had left the field upon which the trespass had been committed the complainant's party had no right to pursue and seize them. The petitioners were, therefore, entitled to exercise their right of private defence, when the complainant's party were passing through their fields in their pursuit of the bullocks. In support of this contention the learned counsel relies upon the judgment in *Bhagwant Rao* v. *Champat Rao* (*A. I. R.* 1925. *Nagpur* 50) but the facts of that case are wholly different. There, the person, upon whose land trespass had been committed took no notice of it at the time of the trespass, but went to the cattle shed of the owner of the cattle afterwards with the intention of taking them from there to the cattle pound. On these facts it was held that a person upon whose land trespass had been committed, had no right to go to the cattle-shed of another person and to take away the cattle from there on the plea that they had trespassed upon his land and had done damage to him. In the case before me notice of trespass was taken at once, and the mere fact that the cattle had left the land before they could be seized did not, in my opinion, deprive the complainant's party of the right of seizure conferred upon them by S. 10, Cattle Trespass Act.

It is, however, unnecessary to pronounce any final opinion on the question, because I am quite clear that no right of private defence has been established on the facts of the present case. As pointed out above Chanan Singh had not seized any cattle: he was a mere straggler and the prisoners had no justification for belabouring him with dangs.

Waryam and Ghulami, who actually committed the assault, have, therefore, been rightly convicted under S. 304, I. P. C. and the sentences imposed upon them cannot be held to be excessive. The other two prisoners, namely Saidu and Agra, no doubt abetted the assault, but as admitted by the learned Government Advocate it is doubtful whether they abetted the offence of culpable homicide. I accordingly give them the benefit of the doubt, and altering their conviction to one under S. 325, read with S. 109, I. P. C., I reduce the sentence in the case of each of these two prisoners to rigorous imprisonment for one year. The application for revision is accepted pro tanto and the order of the Sessions Judge modified accordingly.

A.L./R.K. *Order modified.*

A. I. R. 1928 Lahore 693

ZAFAR ALI, J.

Bir Singh and *another*—Defendants—Appellants.

v

Pirthi Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 1645 of 1927, Decided on 16th December 1927, from decree of Sub-Judge, Rohtak, D/- 31st March 1927.

Civil P. C., O. 1, *R.* 8—*Partition suit.*

Order 1, R. 8, applies to defendants in a partition suit : 17 *Cal.* 906 and 16 *Bom.* 608, *Dist.*

[P 694 C 1]

Shamair Chand and *Qabul Chand*—for Appellants.

G. C. Narang—for Respondents.

Judgment.—This was a suit for possession of 434 square yards of abadi and the plaintiffs' case was that this land formed part of a plot which was allotted to them and had been in their possession in accordance with the decree for partition that they had formerly obtained.

The defendants pleaded, inter alia, ignorance of that decree. In the partition suit the persons impleaded as defendants being no less than seventy-nine, the plaintiffs were allowed on their application under O. 1, R. 8, Civil P. C., to nominate three of the defendants to defend the action on behalf of all, but notice of this suit was given to all the defendants. Further, Mehnga Singh and Bir Singh who are defendants in the present case stated to the commissary in the partition suit that they had no objection to partition. They were, therefore, bound by the decree in that case.

Further, it is clear that the plaintiffs were already in possession of the plot that was allotted to them on partition and it was not, therefore, necessary for them to take out execution of the decree for partition to obtain possession of that plot. The small area now in dispute was

lying waste and it follows that it remained in possession of the plaintiffs till the defendants encroached upon it by erecting a wall around it. In view of these facts the Courts below have overruled the defendants' pleas.

In second appeal it is urged that O 1, R. 8, Civil P. C., does not apply to defendants in a partition suit because they cannot be said to have "the same interest in the suit." This contention is not supported by any authority and the paragraph at p. 383, Mulla's Civil P. C., under the head—"Different interests" is misleading and the rulings—referred to under it, i. e., *Kalikanta Surma* v. *Gouri Prosad Surma* (1) and *Sadu* v. *Ram* (2), do not lay down any such proposition. As a matter of fact, O. 1, R. 8, Civil P. C., is not referred to therein at all.

Counsel for the appellants concedes, that the finding that the defendants' possession was only recent, cannot be interfered with being a finding of fact. The appeal, therefore, fails and I dismiss it with costs.

N.K. *Appeal dismissed.*

(1) [1890) 17 Cal. 906.
(2) [1892] 16 Bom. 608.

A. I. R. 1928 Lahore 694

SHADI LAL, C. J.

Hari Singh—Petitioner.

v.

Jagta and *others*—Respondents.

Criminal Revn. Petn. No. 691 of 1928, Decided on 25th May 1928, reported by Dist. Mag., Hoshiarpur, on 26th March 1928.

Criminal P. C., S. 107—Proceeding under S. 107 cannot be regarded a complaint—Ss. 202 and 203 are not applicable.

Sections 202 and 203, Criminal P. C., are applicable only to complaints and a proceeding under S. 107 cannot be regarded a complaint within the meaning of Cl. (h), sub-S. (1), S. 4 of the Code. [P 694 C 2]

Mohsin Shah—for Respondents.

Facts.—Hari Singh, the petitioner, brought an application against Jagta and others under S. 107, Criminal P. C., before Bawa Sunder Singh, Magistrate, 1st Class. The Magistrate recorded the statement of Hari Singh, and then sent the case to the local Zaildar for report apparently under S. 202, Criminal P. C. On receipt of the Zaildar's report he held that there was no sufficient ground for proceeding under S. 107, and dismissed the application, which he referred to as a "complaint" under S. 203 of the Code. Hari Singh now applies for the revision of this order.

Grounds.—I do not think that the procedure prescribed for complaints by Ss. 202 and 203, Criminal P. C. can be held to apply to informations under S. 107 of the Code. Such informations are not apparently complaints within the meaning of Cl. (h), sub-S. (1), S. 4 of the Code, as though they may contain an incidental allegation that an offence has been committed, such an allegation does not form an essential part of them. The wording of S. 107 of the Code indicates that a Magistrate before whom an information is laid may either at once refuse to proceed or, if in his opinion there is sufficient ground for proceeding, may act "in the manner herein after provided", that is to say, in accordance with the provisions of Ch. 8 which includes S. 107. I do not think that it is open to the Magistrate to refer to a Zaildar or anyone else before deciding whether to proceed, and it would seem that if he is satisfied that there are grounds for proceeding he is bound to act under S. 112. My recollection is that in December last a judgment of the High Court was published in the press in which it was held that cases under S. 107 could not be dealt with under Ss. 202 and 203 of the Code. I have, however, been unable to find this judgment, and the only authority on the subject before me is *A. I. R.* 1928 *Lah.* 119 (2). The parties to the proceedings have been heard by me.

Order.—Sections 202 and 203, Criminal P. C., are applicable only to complaints and a proceeding under S. 107, Criminal P. C., cannot be regarded a complaint within the meaning of Cl. (h), sub-S. (1), S. 4 of the Code. The trial Magistrate could not, therefore, deal with the case under Ss. 202 and 203 of the Code.

I accordingly quash the proceedings of the trial Magistrate and direct him to try the case in accordance with law.

A.L./R.K. *Proceedings quashed.*

A. I. R. 1928 Lahore 695

TEK CHAND AND BHIDE, JJ.

Hakam Singh and *others*—Defendants—Appellants.

v.

Hazara Singh—Plaintiff—Respondent.

Second Appeal No. 2619 of 1923, Decided on 12th January 1928, from decree of Dist. Judge, Jullundur, D/- 14th August 1923.

(a) *Custom (Punjab)—Maintenance.*

Unmarried daughters are entitled to be maintained out of the estate of their father. [P 696 C 1]

(b) *Custom (Punjab) — Inheritance — Non-ancestral property—Daughters.*

Daughters are entitled to inherit non-ancestral property in preference to collaterals. [P 696 C 1]

(c) *Adverse Possession—Possession by female of property for maintenance is not adverse.*

The possession of a female who is allowed to hold property merely in lieu of her right of maintenance cannot be held to be adverse to the real heir : 102 *P. R.* 1907, *Foll.* [P 696 C 2]

M. Sleem and *H. D. Bhalla*—for Appellants.

Badri Das—for Respondent.

Judgment.—Malla Singh, Jat of the Jullundur District, made a gift of a portion of his property in favour of his four pichhlag sons (Hazara Singh, plaintiff, and his three brothers) by a registered deed dated 14th April 1893. Malla Singh was childless at the time. It was provided in the deed that if no son was subsequently born to him, the whole of his property would go to pichhlag sons. No provision was made in the deed for the contingency of the birth of any daughter.

As it happened, subsequent to the execution of the above-mentioned deed, two daughters were born to Malla Singh, but no son. Malla Singh died in January 1901, and then a dispute arose about succession to his property. When the mutation with respect to his land came up for disposal, the pichhlag sons as well as the collaterals claimed to be the heirs. The Revenue Officer, who decided the mutation was, however, of opinion that the unmarried daughters were entitled to hold possession in lieu of maintenance till death or marriage and mutation was accordingly sanctioned in their names. Neither the pichhlag sons nor the collaterals took any step to contest this decision of the Revenue Officer.

One of the daughters died subsequently and the other, Mt. Santi, was married in 1920. The land was thereafter mutated in favour of the defendants, who are collaterals of Malla Singh. Plaintiff Hazara Singh, the sole survivor, out of the four pichhlag sons of Malla Singh, then instituted the present suit on 23rd December 1921, for possession of the land, on the basis of the above-mentioned deed dated 14th April 1893. The defendants pleaded inter alia that the suit was barred by limitation, but this plea was overruled and the suit was decreed by the trial Court. The learned District Judge concurring with the findings of the trial Court dismissed the appeal.

The defendants have come up to this Court in second appeal and the sole contention put forward on their behalf is that the suit was clearly time barred and should have been dismissed. The learned counsel for both the parties were agreed before us that Art. 140, Sch. I, Limitation Act, is applicable to the case. According to this article, the period of limitation would run from the time the "estate falls into possession." There is no doubt that according to the terms of the deed, the pichhlags were entitled to succeed on the death of Malla Singh. The lower Courts have, however, found that the daughters were allowed to succeed in lieu of their right to maintenance, by an agreement between the pichhlag sons and the collaterals and hence held the suit to be within time. The finding does not appear to be supported by the evidence on the record. Both the pichhlag sons and the collaterals claimed the land at the time of mutation and it was the Revenue Officer who of his own accord seems to have mutated the land in favour of the daughters. It is true that neither the pichhlag sons nor the collaterals attempted to challenge the Revenue Officer's decision, but in the absence of any other evidence this fact alone cannot be held to establish any agreement on the point between the parties to the suit.

It is, however, pointed out on behalf of the plaintiff-respondent that it was specifically asserted in the plaint that the unmarried daughters held possession of the land in lieu of maintenance with the permission and consent of the plaintiff and that this allegation was not denied by the defendants in the jawab

dawa. It is, therefore, contended that the possession of the unmarried daughters being permissive, plaintiff's cause of action only arose when the defendants took possession of the land after the marriage of Mt. Santi in 1920. This contention appears to us to be well founded. On a strict construction of the pleadings, there is no doubt that it must be held to have been admitted by defendants that the unmarried daughters held possession of the property with the permission of the pichhlag sons in lieu of maintenance. There are, however, other circumstances also which point to the same conclusion. The pichhlag sons had a strong claim to Malla Singh's property under the deed of 1893, which they had asserted at the time of mutation and it cannot be expected that they would have abandoned the claim without even a contest, if they had not been willing to allow the unmarried daughters to remain in possession in lieu of their right of maintenance or had looked upon the claim of the daughters as "adverse."

There is no doubt that according to the general custom in this Province, unmarried daughters are entitled to be maintained out of the estate of their father and although there was no specific provision in the will for the maintenance of the daughters, the pichhlags probably thought that their claim to maintenance could not be defeated by the will. They may have been readily induced to accept this position owing to a feeling of gratitude towards Malla Singh, who had treated them so generously. Secondly, it is significant that Mt. Santi quietly gave up possession of the property on her marriage in 1920 The land left by Malla Singh has been held to be "non-ancestral" and this finding has not been challenged before us in arguments. According to general custom daughters are entitled to inherit non-ancestral property in perference to collaterals. If, therefore, the contest was merely between the daughters and the collaterals the former might have been expected to claim the property of Malla Singh. The fact that she surrendered possession quietly on her marriage suggests that she was conscious that her possession till then had been only permissive and that she had no claim to the land in the face of the deed in plaintiff's favour.

The possession of a female who is allowed to hold property merely in lieu of her right of maintenance cannot be held to be "adverse" to the real heir. It was held in *Bura Mal* v *Narain Das* (1) in somewhat similar circumstances that the widow of a pre-deceased son, who held land in lieu of her right of maintenance did not hold it adversely to the real heir and that limitation did not run till after the death of the widow.

In view of the pleadings of the parties as well as the other circumstances alluded to above we hold that possession of the unmarried daughters in this case was permissive and not adverse to the plaintiff and that plaintiff's suit was, therefore, within time.

We dismiss the appeal with costs.

D.R./R.K. *Appeal dismissed.*

(1) [1907] 102 P. R. 1907=78 P. W. R. 1907.

A. I. R. 1928 Lahore 696

ADDISON, J.

David Johnston—Surety—Appellant.

v.

Dwarka Pershad—Lachmi Das—Decree-holder—Respondent.

Misc. Second Appeal No. 417 of 1927, Decided on 8th February 1928, from order of Addl. Dist. Judge, Lahore, D/- 15th December 1926.

Civil P. C., S. 145—Surety undertaking to produce judgment-debter on a certain date—Court closed on the day—Surety is not bound to produce him on any other date unless called upon to do so.

Suretyships must be construed strictly. A surety cannot be held liable beyond the extent to which he has contracted. [P 698 C 1]

A judgment-debtor was arrested. A bond was executed by a surety to produce him on a fixed date and in default to pay the decretal amount. Court was closed on the fixed date, when the surety was present with judgment-debtor. No notice was served on the surety to produe the judgment-debtor on any or other date and the judgment-debtor and the surety were absent on the next hearing fixed. Proceedings were taken out against surety.

Held: that the surety was not liable: *A. I. R.* 1925 *All.* 5; *A. I. R.* 1928 *Lah.* 20 ; and 15 *P.W. R.* 1919 ; *Rel. on.* [P 698 C 1]

Ram Lal Anand—for Appellant.

Shamair Chand—for Respondent.

Judgment *—The respondent in this second appeal in execution of his decree against one C. P. Gupta applied for the

* [Letters Patent Appeal No. 92 of 1928 preferred against this judgment was dismissed on 11th May 1928.]

arrest of his judgment-debtor. The appellant in this second appeal, when the judgment-debtor was arrested, stood surety for him on 8th May 1926. The next date of hearing had already been fixed and was 23rd June 1926. This date had also been given in the warrant. The bond provided that he would produce the judgment-debtor on the date fixed, i. e., the 23rd June 1926, and in case of default that the surety would be liable to pay the decretal amount. The 23rd June 1926 later was declared to be a holiday and the Subordinate Judge did not sit on that day. His Reader was present and noted that the counsel for the decree-holder attended and that the case was adjourned to the 1st July On 1st July the decree-holder applied to execute his decree against the surety and the 15th July was fixed for the surety's attendance to show cause against this application. The surety appeared on that date and pleaded that he had produced the judgment-debtor in the Court compound on 23rd June 1926. No evidence was taken and on 18th August 1926, the Subordinate Judge held that the surety was not liable as his agreement was to only produce the judgment-debtor on 23rd June which he could not do as it was a holiday. He further held that S. 4, Limitation Act, and S. 10, General Clauses Act, did not apply and that it was not the duty of the surety to produce him on the next day the Court sat, that is, on 24th June 1926.

On appeal the learned Additional District Judge has written a somewhat confused judgment. He first held that in his opinion the surety was bound to produce the judgment-debtor on the day of the reopening of the Court, that is, the next day. His argument in connexion with this finding is based on the analogy of S. 4, Lim. Act and S. 10, General Clauses Act. He then went on to hold that there was no evidence on the record that the surety produced the judgment-debtor in Court on 23rd June 1926, and that his case might have been different, had he done so. In the last part of his judgment he came to the finding that there was a duty resting on the surety to produce the judgment-debtor in Court on the next day of hearing, which I presume would be the 1st July 1926, though the Additional District Judge has not stated what it was. Consequently he accepted the appeal and held that the surety was not discharged. Against this decision this second appeal has been preferred.

There is an affidavit before me of the surety to the effect that he did bring the judgment-debtor to the Court of the Subordinate Judge on 23rd June 1926, but that he then found that the Court was closed. It has frequently been held that a security bond must be strictly interpreted. It was conceded before me that the sole undertaking of the surety was to produce the judgment-debtor on 23rd June 1926, which turned out to be a holiday. Further it was conceded that the surety could not produce him on that day for the reason that it was a holiday Now, no notice was ever given to the surety to produce the judgment-debtor on any other date. He was only called upon to show cause why he himself should not be held liable for the decree. In these circumstances it follows that he is certainly not liable for the decree. He could not produce the judgment-debtor on the date fixed for the reason already given and was never called upon to produce him on any other date. That is sufficient to dispose of this appeal which must be accepted with costs throughout.

I might mention that the judgment-debtor was being criminally prosecuted by the surety. The criminal case against the judgment-debtor had been temporarily stayed, but it was revived and the judgment-debtor was arrested in that case at the instance of the surety on 26th July 1926. He was convicted on 1st November 1926, and has since been in jail. It is obvious that the decree-holder did not desire the presence of the judgment-debtor for these reasons and that was why he tried to make the surety liable for the decree. The learned counsel who appeared on behalf of the respondent asked me to allow him now to call upon the surety to produce the judgment-debtor, but I am not prepared to do so in the circumstances described as he did not then desire the judgment-debtor when it was possible to produce him.

In *A. I. R.* 1928 *Lahore* 20 it was held that where a surety undertook to produce an accused person before a Magistrate on a particular date and the Magistrate did not sit on that date, the surety was not liable to produce him on any other date. It is true that case is not on all fours

with the present case as the day fixed was not a holiday. At the same time it is analogous to the present case as the Court was not sitting. To a similar effect is another decision of this Court reported in *Thakur Das* v. *Sham Das* (1). In *A. I. R.* 1925 *All.* 5 the sureties bound themselves to produce in Court the judgment-debtor on the day the appeal then pending was dismissed and in case of failure to pay the decretal amount. It was held that it was impossible to know beforehand on what date the appeal would be finally disposed of by the High Court and that decree-holders since then took no steps to call upon the sureties to produce the judgment-debtor in Court. In that case the vakil for the decree-holder was asked whether he wanted the judgment-debtor to be brought into Court and said that he did not want him as he had become insolvent. This case bears some analogy to the present case except that the decree-holder was not specially asked whether he wanted the surety to produce the judgment-debtor in Court. It is obvious, however, for the reasons already given, that he did not want him as the judgment-debtor was a man of straw. It follows, therefore, that the decree-holder cannot be now allowed to call upon the surety to produce the judgment-debtor in Court.

Lastly, I am of opinion that suretyships must be construed strictly and that a surety cannot be held liable beyond the extent to which he has contracted. This means that, as for no fault of his own the surety could not produce the judgment-debtor in Court on 23rd June 1926, he cannot be called upon to produce him on any other date. For this reason also the appeal succeeds.

In the result the appeal is accepted with costs throughout. The order of the Additional District Judge is set aside and the order of the Subordinate Judge, Second Class, restored.

A.L./R.K. *Appeal accepted.*

(1) [1919] 15 P. W. R. 1919=49 I. C. 438.

A. I. R. 1928 Lahore 698

ZAFAR ALI, J.

Secretary of State—Defendant — Appellant.

v.

Hakim Singh and *another* — Plaintiff and Defendant—Respondents.

Second Appeal No. 1873 of 1927, Decided on 22nd December 1927, from decree of Dist. Judge, Amritsar, D/- 1st June 1927.

Registration Act, S. 60 (2) — *A party who registers and executes a document should prove that a recital made therein is incorrect.*

A party who executes and registers a document should prove that a recital made therein is incorrect. What a party himself admits to be true may reasonably be presumed to be so, and until the presumption is rebutted the fact admitted must be taken to be established : 29 *All.* 184 (*P. C.*), *Foll.* [P 698 C 2]

Abdul Rashid—for Appellant.

Judgment.—Nobody appears in this Court on behalf of the respondents.

The plaintiff had by a registered deed gifted certain houses to his sons but his case was that the gift was inoperative and invalid and had never been acted upon because possession had never been delivered to the donees. But he produced no evidence whatsoever in support of this plea and the trial Court dismissed his suit for a declaration that the houses belonged to him. On appeal the learned District Judge decreed his suit finding that the gift was invalid because it was not followed by delivery of possession. But in the deed itself it was recited that possession had been delivered to the donees. A party who executed and registered a document should prove that a recital made therein was incorrect. In *Chandra Kunwar* v. *Narpat Singh* (1) their Lordships of the Judicial Committee held that " what a party himself admits to be true may reasonably be presumed to be so " and until the presumption was rebutted the fact admitted must be taken to be established. In that case also there was an admission in a document. As in the present case the admission in question made in a regstered deed was not shown to be incorrect, it must be taken to be correct and the plaintiff's suit must fail. I, therefore, accept the appeal, set aside the order of the lower appellate Court and restore

(1) [1907] 29 All. 184=4 A. L. J. 102=9 Bom. L. R. 267 (P. C.).

that of the trial Court. The plaintiff shall pay the defendant's costs throughout.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 699

SHADI LAL, C. J., AND BROADWAY, J.

Fateh Muhammad-Din Muhammad—Judgment-debtor—Appellant.

v.

Chuhar Mal-Mohan Singh — Decree-holder—Respondent.

Letters Patent Appeal No. 74 of 1926, Decided on 24th April 1928, from judgment of Campbell, J., D/- 10th February 1926, in Civil Appeal No. 2875 of 1925.

Civil P. C., O. 21, R. 69—Court sale—Acceptance of decree-holder's bid — Refusal by him to deposit the usual 25 per cent of the price—Attempt by auctioneer to continue sale but finally closing it to continue it on a further date if so ordered by Court—Sale is not postponed.

Where at a Court sale the auctioneer accepted the decree-holder's bid and then called upon him to deposit the usual 25 per cent., but on the decree-holder's refusal to make this payment the auctioneer made an attempt to continue the sale, but owing to the state of the weather and other circumstances he obtained no further bids and at the request of the parties closed the auction telling them that should the Court order it the sale would be continued on a future date.

Held : that there was no actual postponement or adjournment of the sale as contemplated by R. 69, O. 21, by the auctioneer, and therefore it could not be contended that there was no sale which could be confirmed.

(P 700 C 2)

Durga Das and *Mohammed Monier*—for Appellant.

Moti Sagar and *Jagan Nath Aggarwal*—for Respondents.

Broadway, J.—The firm of Seth Chuhar Mal-Rai Sahib Mohan Singh of Amritsar obtained a decree against the firm of Fateh Mohammad-Din Muhammad also of Amritsar for Rs. 25,518 odd and in execution of that decree attached certain property which under orders of the Court was brought to sale on 3rd August 1925. The decree-holder had obtained permission to bid at the sale and offered a sum of Rs. 20,000, which being the highest bid was accepted by the auctioneer.

When the decree-holder was called upon to pay the customary 25 per cent. deposit he refused to do so saying that his decree exceeded the amount of his bid. The auctioneer thereupon acting under O. 21, R. 84 (1), Civil P. C., proceeded to try to resell the property. It was then about 5 p m. and heavy rain had begun to fall with the result that there was no further bidding and the auctioneer at the instance of the decree-holder and the judgment-debtor closed the auction.

On 6th August 1925, the auctioneer reported the circumstances to the Court, at the same time saying that he had announced that if the Court ordered it the auction would again be held on the morning of 7th August 1925.

On 10th October 1925, the Court confirmed the sale holding that as the decree-holder was himself the purchaser it was not necessary for him to deposit the 25 per cent and adjourned the case to 26th October 1925.

On that date the judgment-debtor filed certain objections purporting to be under S. 47, O. 21, R. 90, Civil P. C. The Court dismissed the objections holding that the sale had already been confirmed and refusing to entertain the judgment-debtor's application after such confirmation, more particularly since he, as a judgment-debtor, had exhausted every possible method of delaying execution of the decree.

Against this order the judgment-debtor preferred an appeal to this Court which was dismissed by Campbell, J., as incompetent.

The judgment-debtor has now preferred this appeal under Cl. 10, Letters Patent, and we have heard Mr. Durga Das in support of it, while Mr. Moti Sagar has addressed us on behalf of the decree-holder respondent.

The only point for determination is whether the appeal against the order of 26th October 1925 was competent. Mr. Durga Das admitted that the majority of the objections contained in his application of 26th October 1925 fell within the purview of O. 21, R. 90, Civil P. C., and inasmuch as the application was barred by time those objections could not be entertained. He urged, however, that in the said objections it was definitely alleged that inasmuch as the auctioneer had under O. 21, R. 69, Civil P. C., postponed the sale on 3rd August 1925, there was no sale.

which could be confirmed, and, therefore, the sale should be regarded as a nullity or void, and the question gone into under S. 47, Civil P. C. He also urged that the failure on the part of the decree-holder to deposit the 25 per cent of his bid was an illegality not covered by O. 21, R. 90, Civil P. C., and therefore, falling within the purview of S. 47 of the Code.

The second contention is concluded by *Parja Mal Chandi Mal* v. *Mul Chand Murari Lal* (1). On the first point reliance was placed in the main on *Rajagopala Ayyar* v. *Ramanuja Chariar* (2) which to some extent supports Mr. Durga Das. It is not, however, necessary to discuss that authority as the mere fact that in the application S. 47 was mentioned does not necessarily mean that the objection falls within it: see *Matiur Rasul* v. *Abdul Said* (3).

Before the question whether a sale was void because of its postponement can be considered, it has to be seen whether the factum of the alleged postponement has been made out. In the present case all that Mr. Durga Das could say was that the report of the auctioneer dated 6th August 1925 establishes his contention that there was a postponement of the sale, but a reference to that report does not bear out his contention. It shows rather that the auctioneer had accepted the decree-holder's bid of Rs. 20,000 and had then called upon him to deposit the usual 25 per cent. On the decree-holder's refusal to make this payment the auctioneer made an attempt to continue the sale, but owing to the state of the weather and other circumstances he obtained no further bids and at the request of the appellant and the respondent closed the auction telling them that should the Court order it the sale would be continued on 7th August 1925. As I read this report there was no actual postponement or adjournment of the sale as contemplated by R. 69, O. 21, by the auctioneer. All he did was to report the facts to the Court for such orders as might be necessary.

Seeing that the amount of the decree-holder's bid was less than his decree by over Rs. 4,000, the Court very properly exercised the discretion given to it by R. 84 (2), O. 21 and dispensed with the deposit. There was thus no postponement of the auction and the sale was not void on that account. In these circumstances I think the Court was right in dismissing the application and the learned Judge in Chambers in dismissing the appeal.

I would, therefore, dismiss this appeal with costs.

Shadi Lal, C. J.—I concur.

S.J. *Appeal dismissed.*

(1) A. I. R. 1925 Lah. 624=6 Lah. 250.
(2) A. I. R. 1924 Mad. 431=47 Mad. 288 (F.B.).
(3) A. I. R. 1926 Cal. 109.

A. I. R. 1928 Lahore 700

TEK CHAND, J.

Imam Bakhsh—Plaintiff—Appellant.

v.

Mt. Amiran and *others*—Defendants—Respondents.

Second Appeal No. 1330 of 1927, Decided on 22nd November 1927, from decree of Dist. Judge, Mianwali, D/- 15th March 1927.

Restitution of conjugal rights—Gross failure by husband to perform obligations imposed by marriage contract — Decree for restitution should not be granted.

The grant of a decree for restitution of conjugal rights is discretionary with the Courts and though ordinarily such a decree will be refused only if the husband has been guilty of legal cruelty towards his wife, he may disentitle himself to this relief by his gross failure to perform the obligations which the marriage contract had imposed on him for the benefit of the wife : 11 *M. I. A.* 551 ; 148 *P. L. R.* 1916 ; and *A. I. R.* 1924 *Lah.* 188, *Ref.* [P 701 C 1]

Shambu Lal Puri—for Appellant.

S. R. Laul—for Respondents.

Judgment.—The suit, which has given rise to this second appeal, was instituted by Imam Bakhsh, plaintiff-appellant, for restitution of conjugal rights against Mt. Amiran, defendant 1, whom he claimed as his wife. The parents of Mt. Amiran and some other relations were also impleaded and an injunction was asked for against them directing them not to prevent Mt. Amiran from going over to the plaintiff.

The suit was decreed ex parte by the trial Court but was dismissed by the learned District Judge on appeal by the defendants.

A second appeal has been preferred by Imam Bakhsh and it is argued on his behalf that the learned District Judge having found that defendant 1 was validly

married to the plaintiff has dismissed the suit for restitution of conjugal rights on legally inadequate grounds. The facts found are, however, as follows :

(a) That Mt. Amiran was married to the plaintiff about ten years before the suit, the marriage having been arranged by her father with a view to procure a bride for his son in exchange for her.

(b) That since the marriage the girl has been living with her parents, no effort having been made by the plaintiff to bring her to his house.

(c) That though Mt. Amiran attained puberty three years ago, the marriage has not been yet consummated.

(d) That about the time Mt. Amiran attained puberty the plaintiff married another woman with whom he has since been living and from whom he has got a daughter.

(e) During all this period the plaintiff has absolutely neglected Mt. Amiran,

Mr. Shambhu Lal Puri has argued that these facts are insufficient to justify refusal to the plaintiff of relief by way of restitution of conjugal rights and that the learned District Judge should have decreed the suit. He has cited before me a number of rulings each of which was, however, decided on its peculiar facts. It is well settled that the grant of a decree for restitution of conjugal rights is discretionary with the Courts and though ordinarily such a decree will be refused only if the husband has been guilty of legal cruelty towards his wife, he may disentitle himself to this relief by his gross failure to perform the obligations which the marriage contract had imposed on him for the benefit of the wife : see *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1), *Ziada* v. *Jowai* (2) and the recent decision of this Court in *Nawab Bibi* v. *Allah Ditta* (3).

Having regard to the facts as found above and all the circumstances of the case I am of opinion that the learned District Judge exercised a sound discretion in dismissing the plaintiff's suit. The appeal fails and is dismissed with costs.

S.J. *Appeal dismissed.*

(1) [1866] 11 M I. A. 551=8 W. R. 3=2 Suther 259=2 Sar. 259 (P. C.).
(2) [1916] 46 P. R. 1916=148 P. L. R. 1916=34 I. C 538=131 P. W. R. 1916.
(3) A. I. R. 1924 Lah. 188.

A. I. R. 1928 Lahore 701

HARRISON AND DALIP SINGH, JJ.

Mohamed Farid-Mohamed Shafi—Petitioners.

v.

Commissioner of Income-tax, Punjab—Respondent.

Miscellaneous Petn. No. 451 of 1927, Decided on 21st February 1928.

Income-tax Act, S. 66—Application for reference rejected—Notice subsequently erroneously issued under S. 29 instead of under S. 45—Fresh application for reference to re-agitate previous unsuccessful points was not entertained.

Acting under S. 33 the Commissioner assessed the petitioner to an additional sum. On the Commissioner refusing to refer the case to the High Court, an application was made to the High Court to take action, which was rejected. A notice of demand was then issued as headed under S. 29, and the assessment was described under Ss. 23 and 33, while in fact it ought to have been headed as under S. 45. Petitioner paid the money and then applied to the Commissioner to refer not only the legality of the demand, but also all the other points which he had unsuccessfully attempted to agitate before and contended that as S. 29 was wrongly invoked and quoted, he was entitled to agitate all the points contended on the previous unsuccessful application.

Held : that the other points could not be agitated as no special jurisdiction had been created by the error in quoting S. 29. [P 702 C 1]

J. C. Sethi—for Petitioners.

Jagan Nath Aggarwal—for Commissioner, Income-tax.

Dalip Singh, J.—Acting under S. 33, Income-tax Act, the Commissioner assessed the present petitioner to an additional sum of Rs. 6,000 odd. The petitioner presented an application under S. 66 (1) asking to have certain points of law, which he alleged arose, referred to the High Court. On the Commissioner declining to take action an application was made to this Court which was rejected by a Division Bench, an order being passed to the effect that whatever power the Presidency High Courts might have of compelling a reference under S. 66 (1), this High Court had no such power and as the action taken by the Commissioner was taken under S. 33, no relief could be given. After this decision had been announced a notice of demand was issued by the Income-tax Officer to the petitioner for the recovery of the amount so assessed. This was described and headed as under S. 29 and the assessment was described as falling under Ss. 23 and 33, the

decision having been under S. 33. On receiving this demand the petitioner paid the money and then applied to the Commissioner to refer not only the question of the legality of the demand but also all the other points, which he had unsuccessfully attempted to agitate before. The Commissioner gave a finding that S. 29 did not apply and had wrongly been referred to by the Income-tax Officer. He pointed out that action should have been taken under Ch. 6, and referred to S. 45. He then offered to return the deposit as he had decided the only point involved in favour of the petitioner.

The petitioner has now come to this Court again and contends that because S. 29 was wrongly invoked and wrongly quoted by the Income-tax Officer, the door is somehow opened, which was formerly closed, and he is entitled to agitate all the points contended on the previous unsuccessful application, and this because the error committed by the Income-tax Officer in some curious way creates a new and special jurisdiction under S. 66 (2) to deal with points which normally could only reach this Court if referred under S. 66 (1), inasmuch as they arise out of an order passed by the Commissioner under S. 33.

We are of opinion that the decision of the Commissioner was right and that S. 29 was wrongly used. As we agree with him, there is no question of our granting leave to refer the question on which we do agree. We are of opinion that the other points cannot be agitated now any more than they could be agitated before and that no special jurisdiction has been created by the error of the Income-tax Officer in quoting S. 29.

We, therefore, dismiss the application. No order as to costs, as Rs. 100 have been deposited and not repaid.

A.L./R.K. *Application dismissed.*

A. I. R. 1928 Lahore 702

ADDISON, J.

Thaman Singh — Defendant—Appellant.

v.

Bachna and *others* — Plaintiffs and Defendant—Respondents.

Second Appeal No. 1924 of 1927, Decided on 12th January 1928, from decree of Dist. Judge, Ludhiana, D/- 12th May 1927.

Custom (Punjab)—Debt incurred by an agriculturist as surety is not a necessity.

An alienation of ancestral property by an agriculturist for a debt incurred as surety is invalid according to custom as such a debt is not a necessity : 112 *P. W. R.* 1906, *Foll.* : *A. I. R.* 1922 *Lah.* 299, *Dist.* [P 702 C 2]

Lal Chand Mehra—for Appellant.

L. Rai for *N. C. Mehra*—for Respdts.

Judgment.—Sucha Singh was surety for certain debts due by another person. The creditor sued on one of the bonds and obtained a decree for Rs. 600. Thereafter Sucha Singh mortgaged two houses with the creditors for Rs. 1,000. The consideration was the sum of Rs. 600 for which a decree had been obtained and another sum of Rs. 400 due on two bonds in which Sucha Singh was surety also. The creditor was the same in the case of all the bonds and he was also the decree-holder and the mortgagee. The sons of Sucha Singh brought the present suit for a declaration that the alienation by mortgage should be held not to affect their reversionary rights after the death of their father as the money was not advanced for necessity. Consideration was held to be proved but both the Courts below have concurred in holding that there was no necessity. The plaintiffs, therefore, obtained the decree they asked for and the mortgagee has come here in second appeal.

It is quite clear that this appeal must be dismissed. It was held in *Hemraj* v. *Ganda Singh* (1) that an alienation of ancestral property by an agriculturist for a debt incurred as surety is invalid according to custom as such a debt is not a necessity. It, therefore, follows that there was no necessty for the sum of Rs. 400 due on the two bonds as to which no decree was obtained. The mortgagee as he was himself the creditor knew that Sucha Singh was only a surety. Further, the fact that a decree was obtained for Rs. 600 on one of the bonds does not help the mortgagee. In that case, too, he was the creditor and also the decree-holder and he knew that the bond and the decree were against Sucha Singh as surety. This case, therefore, has no analogy of any kind with *Ran Singh* v. *Rullia* (2).

The decision of the Courts below was correct and I dismiss this appeal with costs

N.K. *Appeal dismissed.*

(1) [1906] 112 P. W. R. 1906.
(2) A. I. R. 1922 Lah. 299=3 Lah. 139.

A. I. R. 1928 Lahore 703

SHADI LAL, C. J., AND JOHNSTONE, J.

Sultan—Plaintiff—Appellant.

v.

Mt. Sharfan and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 2690 of 1925, Decided on 5th May 1928, from decree of Sr. Sub-Judge, Lyallpur, D/- 20th October 1923.

Custom (Punjab)—Among Awans of Kardar (Jhelum District) daughters inherit self-acquired property in preference to collaterals.

Among Awans of village Khardar of the District of Jhelum a daughter is entitled to succeed to the self-acquired property of her father in preference to collaterals : 115 *P. R.* 1892, *Doubted* and *Dist.* [P 703 C 1,2]

Shamair Chand and *Qabul Chand*—for Appellant.

Badri Das and *Mehr Chand Wadhera*—for Respondents.

Shadi Lal, C. J.—On 22nd November 1922, Mt. Sharfan, the widow of one Sharaf Khan, an Awan of the village Khardar in the District of Jhelum, gifted to her daughter, Mt. Bhag Bhari, a plot of land which she had inherited from her deceased husband. The plaintiffs, who are the brothers and nephews of Sharaf Khan, have brought the present action to impeach the alienation, and the question debated before us is whether the daughter or the collaterals are entitled to succeed to the estate which was admittedly the self-acquired property of Sharaf Khan.

The plaintiffs place their reliance upon an entry in the Riwaj-i-am of the district, which lays down that an unmarried daughter, in the absence of male lineal descendants, succeeds to the property of her father only until marriage; and that no distinction is made, in the matter of inheritance, between self-acquired and ancestral property of the father or between moveable and immovable property. As laid down by their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1) an entry in the Riwaj-i-am raises a presumption in favour of the custom recorded therein, and the onus lies upon the daughter to rebut that presumption. It is, however, clear that the general custom of the province favours the succession of the daughter to the acquired property of her father in preference to collaterals, vide Rattigan's Digest of Customary Law, para. 23, sub-para. (2); and that the custom invoked by the plaintiffs must be treated as an exception to the general rule. It is to be observed that the Code of Tribal Custom prepared by Mr. Talbot at the last settlement of the district does not mention any instances in support of the exclusion of the daughter from the self-acquired property of her father and the declaration that a married daughter cannot inherit even the self-acquired moveable property of her father verges on an absurdity. Indeed, Mr. Talbot himself in his preface points out that the Code must not in all cases, be regarded as a correct record of the customs actually existing, and that the more intelligent tribesmen who usually act as spokesmen on an occasion of this kind sometimes allow their opinion as to what customs are expedient to override their knowledge of the customs as they really are.

The considerations set out above leave no doubt that the onus placed upon the daughter by the entry in the Riwaj-i-am is a light one, and does not require much evidence to repel it. Now the evidence produced on behalf of the defendants shows that, in at least four instances, daughters inherited the self-acquired property of their fathers in preference to collaterals. The witness Abdulla deposes that the property of Mt. Chhati's husband was inherited by her daughter Mt. Suban in the presence of the cousins of the deceased husband. The village to which Mt. Chhati belonged is situate at a distance of less than five miles from the village of the parties. The second instance is mentioned by the witness Ashraf Khan, who states that the estate of Sahib went to his daughter Mt. Milkhan to the exclusion of his male collaterals. The third instance is proved by an entry in the mutation register which shows that Mt. Bhag Bhari gifted the estate of her deceased husband to her daughters In the same way one Mt. Bakht Bano gifted the land inherited by her from her husband to her daughters, and no person objected to this gift.

The learned counsel for the defendants has invited our attention to two other instances, namely, the succession of Mirza's daughter and of Khadim's daughters, but it does not appear that in either of these cases there was any col-

(1) A. I. R. 1916 P. C. 129 = 44 Cal. 749=44 I. A. 89 (P. C.).

lateral who could dispute the claim of the daughters.

As against the instances relied upon by the defendants, we have only one real instance proved by the plaintiffs in which, according to the witness Captain Nawab Khan, the self-acquired property of Muhammad Khan was taken by his brother without any contest by his daughters. The area of the land is not, however, given, and it appears that the property was acquired by the deceased jointly with his brothers.

Mr. Shamair Chand for the plaintiffs has also relied upon the judgment in *Mt. Sharfan* v. *Kammu* (2), in which a Division Bench of the Punjab Chief Court held that no custom was proved entitling a daughter and a daughter's son to exclude a brother and nephews from succession to acquired immovable property. It is, however, clear that parties to the case, though Awans by tribe, were Jhiwars (water-carriers) by occupation, and that they lived in the town of Rawalpindi. The property, which was the bone of contention, was a water-mill and not agricultural land. Moreover, this judgment was adversely commented upon in *Wazir* v. *Mt. Maryan* (3).

Upon an examination of the entire material before us I have reached the conclusion that the presumption arising from the entry in the Riwaj-i-am has been sufficiently rebutted, and that the plaintiffs are not entitled to succeed to the self-acquired property of Sharaf Khan. I accordingly confirm the judgment of the Subordinate Judge and dismiss the appeal with costs.

Johnstone, J.—I concur.

A.L./R.K. *Appeal dismissed.*

(2) [1892] 115 P. R. 1892.
(3) [1917] 84 P. R. 1917 = 3 P. L. R. 1918 = 42 I. C. 358 = 151 P. W. R. 1917.

A. I. R. 1928 Lahore 704

DALIP SINGH, J.

Daulat Ram and *others* — Plaintiffs—Appellants.

v.

Ballu—Defendant—Respondent.

Second Appeal No. 1505 of 1927, Decided on 5th November 1927, from decree of Sr. Sub-J. Ludhiana, D/- 31st March 1927.

(a) Limitation Act, Art. 142—Suit for possession alleging possession and dispossession by the defendant—Plaintiff must prove his possession within 12 years.

Where plaintiff sues for possession alleging possession and dispossession by the defendant, he must prove that he had possession within 12 years and it is not for the defendant to prove his adverse possession for more than 12 years : 41 *All.* 669 and *A. I. R.* 1926 *Lah.* 13, *Dist.* [P 704 C 2]

(b) Practice — High Court is not debarred from looking at unprinted documents.

It is open to the High Court to refuse to look at documents that have not been so printed, but that Court is not debarred from looking at such documents: *A. I. R.* 1916 *P. C.* 27, *Dist.* [P 705 C 1]

(c) Civil P. C., S. 100—Non-compliance with O. 13 not complained at the earliest opportunity—Such plea cannot be raised in second appeal.

If the parties have not made the non-compliance of O. 13 by the Court a ground of complaint at the earlist opportunity, they should not be allowed to raise such points in a second appeal thereafter. [P 705 C 2]

Dev Raj Sawhney—for Appellants.
Mohammad Amin Khan—for Respdt.

Judgment.— The plaintiffs in this case sued for possession of a house shown red in the plan annexed to the plaint. They alleged possession and dispossession by the defendant. On appeal the learned Senior Subordinate Judge held that the plaintiffs on their own evidence had not been able to prove that they had ever been in possession of the house. He further accepted the defendant's evidence that the defendant had been in possession for a long time—more than twelve years—and he, therefore, dismissed the suit as time barred. The plaintiffs appeal and their learned counsel has endeavoured to argue that the defendant should have proved adverse possession and the plaintiffs should not have been called upon to prove their possession within 12 years. *Jai Chand* v. *Girwar Singh* (1) and *Ismail* v. *Ibrahim* (2) have been cited in support, but those were suits on title without allegation of possession and dispossession. This contention of counsel for the appellant is, therefore, incorrect.

Counsel has next contended that the documents produced by the defendant and in fact most of the documents produced by either side have not been duly exhibited and has cited *Secretary of State* v. *Sarla Devi* (3) and *Sadik Husain Khan*

(1) [1919] 41 All. 669 = 52 I. C. 366 = 17 A. L. J. 814.
(2) A. I. R. 1926 Lah. 13.
(3) A. I. R. 1924 Lah. 548 = 5 Lah. 227.

v. *Hashim Ali Khan* (4), a Privy Council ruling, as laying down that in such a case there must be a re-trial. The Privy Council, in my opinion, do not lay down anything of the kind. Their Lordships merely stated that in future to avoid the great difficulty which arises before their Lordships in determining what documents were or were not on the record they would not for purposes of appeal before them look at any documents that had not been duly exhibited. It is to be observed that their Lordships stated that they would not, not that they could not, look at these documents. It is obvious that before their Lordships of the Privy Council there must be considerable difficulty in determining what documents had been produced and what not. Those considerations would not necessarily apply in every case in this country. In *Secretary of State for India* v. *Sarla DeviChaudhrani* (3) no doubt it was stated by a Division Bench that they would in that case have ordered a re-trial as the documents had not been duly exhibited. But that decision was obiter because counsel on both sides agreed to allow the documents which had been put in to be taken as evidence.

I do not, therefore, think that that is binding on me. To make my meaning clearer I would refer to the rules of this Court by which documents on which either side wished to rely on a first appeal have to be printed. It is open to the Court to refuse to look at documents that have not been so printed, but I have never heard it contended that the Court is debarred from looking at such documents. Of course, the Court should always consider before looking at such documents whether the other side was being prejudiced in any way by this fact, but I know of no ruling that the Court could not, if it wished to, refer to documents which had not been printed. In any event this point was not raised before the lower appellate Court by either side and I do not consider that it is open to any party who had not raised this point to raise it for the first time in a second appeal merely in order to have a decision, counter to himself, set aside on that ground. When all is said and done it is impossible for any party to compel the Court to observe the provisions of O. 13, and if the parties have not made the non-compliance of the Court a ground of complaint at the earliest opportunity I do not think they should be allowed to raise such points in a second appeal thereafter.

Counsel for the appellants has further wished me to refer to a record of execution proceedings. There is nothing to show that these execution proceedings were ever produced or brought on the record of the present case. I, therefore, decline to look at them. The appeal, therefore, fails and is dismissed. In view of all the circumstances of the case I do not think that any order for costs is necessary.

N.K. *Appeal dismissed.*

(4) A. I. R. 1916 P. C. 27=38 All. 627=43 I. A. 212 (P. C.).

A. I. R. 1928 Lahore 705

JAI LAL, J.

Jhanda—Defendant—Appellant.

v.

Ditt and *another*—Plaintiff and Vendor—Respondents.

Misc. Second Appeal No. 1566 of 1927, Decided on 16th February 1928, from order of Dist. Judge, Sialkot, D/- 14th March 1927.

Limitation Act, Art. 10—*Pre-emption suit—Actual possession of property sold given to vendee—Art.* 10 *applies and limitation starts from date of possession.*

A suit for pre-emption is governed by Art. 10 where the sale is of a specified plot whether in actual possession of the vendor or in joint possession of the vendor and others, and actual possession of the property sold is given to the vendee, and the starting point for limitation is the date of possession. The determining factor in such cases is the factum of actual physical possession and not the nature of the whole property of which the plot sold is a part.

[P 706 C 1]

Rozdon for *Muhammad Shah Nawaz*—for Appellant.

S. C. Chatterjee—for Respondents.

Judgment.*—This is a second appeal in a suit for pre-emption which was dismissed by the trial Court as barred by time but which was remanded to it for trial on the merits by the appellate Court on the ground that it was not barred by time. The sale took place on the 3rd February 1925 on which date a report was made by the parties to the patwari stating that out of a big holding which

*[L. P. Appeal preferred against this judgment was dismissed on 8th March 1928.]

was joint between the vendor and others, the vendor had sold 11 marlas of a specific plot to the vendee and had actually given possession thereof to him and that he had erected walls around the plot so purchased by him. The sale was expressly for the purpose of construction by the vendee of a cattle-shed on the plot sold. The District Judge has found on evidence produced at the trial that actual possession of the plot sold was given to the vendee but he holds that :

as the sale was of a share of a joint khata the property sold was incapable of physical possession according to rulings,

and therefore he has declined to apply Art. 10, Sch. 1, Lim. Act.

In my opinion the District Judge has misunderstood the law on the subject. If the sale is of a share of a joint khata as distinguished from a specified plot out of a joint khata then the property sold would not be capable of actual physical possession and therefore Art. 10, Lim. Act, would not govern a pre-emption suit in such a case But where the sale is of a specified plot whether in actual possession of the vendor or in joint possession of himself and others, and actual possession of the property sold is given to the vendee then it is Art. 10, Lim. Act, that applies and the starting point for limitation is the date of possession. The determining factor in such cases is the factum of actual physical possession and not the nature of the whole property of which the plot sold is a part.

I hold that, on the finding of fact arrived at by the District Judge, the suit was clearly barred by time and consequently accepting this appeal I dismiss the plaintiff's suit with costs throughout.

A.L./R.K. *Appeal accepted.*

A. I. R. 1928 Lahore 706

TEK CHAND AND JOHNSTONE, JJ.

Sohan Singh and *others*—Plaintiffs—Appellants.

v.

Kabla Singh and *others*—Defendants—Respondents.

Second Appeal No. 2616 of 1923, Decided on 28th May 1928, from decree of Dist. Judge, Sheikhupura and Lyallpur, D/- 2nd August 1923.

(a) *Custom (Punjab)—Marriage between a Jat male and a Mazhabi female is valid.*

A marriage between a Jat male and a Mazhabi female is valid, whether performed according to the Anand or the ordinary Hindu ceremonies : 99 *P. R.* 1913, *Foll.* ; 73 *P. R.* 1897 ; 50 *P. R.* 1900 ; 15 *P. L. R.* 1907; and 79 *P. R.* 1910; *Ref.* [P 707 C 2]

(b) *Hindu Law—Marriage inter se between different sub-divisions of Sudra caste are valid.*

Marriage inter se between different sub-divisions of Sudra caste are valid and must be recognized as such : 13 *M. I. A.* 141 and 14 *M. I. A.* 346, *Foll.* [P 708 C 2]

Mehr Chand Mahajan and *Anant Ram*—for Appellants.

Mukand Lal Puri and *Jagan Nath*—for Respondents.

Tek Chand, J.—The land in dispute was owned by one Khushal Singh, a Sikh Virk Jat of Mauza Sawanke in the Khankah Dogaran Tahsil of Sheikhupura District. Khushal Singh died in 1918 and on his death mutation was effected in the names of defendants 1 and 2, Kabula Singh and Tilok Singh, minors, who described as his sons, under the guardianship of their mother Mt. Isher Kaur.

Three years later Khushal Singh's collaterals sued for a declaration that they were the owners in possession of the land left by him and that defendants 1 and 2 "had nothing to do with it." It was alleged that Mt. Isher Kaur, the mother of defendants 1 and 2, belonged to the Mazhabi caste and was not in fact, nor could she be in law, married to Khushal Singh and that defendants 1 and 2 being his illegitimate children were not entitled to succeed to his property.

The defendant admitted that Mt. Isher Kaur was of the Mazhabi caste but pleaded that she was the lawfully wedded wife of Khushal Singh, that they were his legitimate sons and that Khushal Singh and the brotherhood had throughout recognized them as such.

Both the Courts below have concurrently found that Khushal Singh was married to Mt. Isher Kaur in the Anand form and this finding has not been challenged before us. As to the validity of the marriage, the Subordinate Judge held on the evidence that marriages between Jats and Mazhabi women were valid according to the custom prevailing in the locality, and further, that they were not prohibited by Hindu law, to which resort must be had, if no well-established custom be held to have been established. On appeal the learned District Judge, Sardar Sewa Ram Singh, did not choose to rest his decision on actual proof of

custom, but, following *Dalip Kaur* v. *Fatti* (1), held the marriage to be legal under the Sikh law of marriage, as well as under Hindu law, according to which intermarriages between Jats and Mazhabis are lawful both being subdivision of the Sudra caste. On these findings the suit has been dismissed and the plaintiffs have preferred a second appeal to this Court.

The only question which has been agitated before us relates to the validity of the marriage of Khushal Singh with Mt. Isher Kaur. As stated above the marriage was performed according to the Anand ceremony, which is now one of the recognized forms of marriage among the Sikhs. According to the Sikh tradition Anand marriage was first introduced by the third Guru, and his immediate successor Guru Ram Das composed the four Lawans given in the Suhi Rag of the Granth Sahib, which are recited at the ceremony, and which will be found translated in Macauliffe's Sikh Religion, Vol. II, pp. 334 and 335, and Hari Kishen Kaul's Census Report (Punjab), 1911, part 1, p. 277. At one time doubts were entertained about the legality of marriages performed in this form, but the matter was set at rest by the enactment of the Anand Marriage Act 7, 1909, S. 2 of which provides that all marriages which may be or may have been duly solemnized according to the Sikh marriage ceremony called Anand shall, and shall be deemed to have been, with effect from the date of the solemnization of each, respectively, good and valid in law.

The learned counsel for the appellants, however, contends that the Anand marriage Act is a permissive legislation. which merely authorizes a change in the ritual observed at the marriage ceremony, and does not deal with the qualifications of the spouses, which continue to be regulated by the personal law of the parties or the rules of custom (if any) prevailing among them. His argument is that all that the Act did was to dispense with the necessity of performing the ceremonies prescribed in the Shastras like circumambulations round the sacred fire and the chanting of Sanskrit texts, and to substitute therefor the prakriman round the Granth Sahib and recitation of verses from it, and that the Act being silent about marriages between persons of different castes cannot be said to have legalized inter caste marriages, even though performed according to the Anand ritual. As at present advised, I am not prepared to accept this argument as sound, but I do not wish to express a definite opinion, so far as intermarriages between persons belonging to the higher castes are concerned. At the trial the enquiry was not directed towards that aspect of the matter nor is it necessary for the purposes of this case to give a decision on it. The parties to the marriage, the legality of which is under consideration, were a Jat male and a Mazhabi female and I have no doubt that marriages between them are valid, whether performed according to the Anand or the ordinary Hindu ceremonies.

It is well known that Jats, especially Sikh Jats, hold very liberal views on questions relating to marriage and even at the height of the Brahmanical supremacy they did not show much inclination to be bound by the caste iron rules laid down in the later Hindu Smritis, interdicting marriage outside the caste, and prescribing elaborate ritual for the performance of the marriage ceremony. Among them remarriage of widows has all along existed commonly, and chadar andazi, in which the ceremonial has been reduced to the very minimum, is one of the recognized forms of marriage. Indeed the Riwaj-i-ams of the districts [e.g, Ludhiana (1834-1835) p. 46, and Kaithal, p. 4] and the records of cases decided judicially are full of instances in which mere cohabitation as man and wife for a long period without any strict matrimonial ceremony, has been considered sufficient to validate the marriage It will perhaps be no exaggeration to say that nowhere has the doctrine of factum valet been more liberally applied to marriage than in the Punjab, and here, in no tribe so freely as among the Jats. In this connexion reference may inter alia be made to the following decision in which marriage between Jats and females of other castes have been held to be valid: *Chandra Singh* v. *Mela* (2), Jat with a Jhiwar Nai or Kalal woman; *Sahib Ditta* v. *Bela* (3), Jat with a Brahman woman, *Ranjit Singh* v. *Isa* (4), Khatri Kuka Singh with a Jat woman;

(1) [1913] 99 P. R. 1913=100 P. L. R. 1913=18 I. C. 930=41 P. W. R. 1913.

(2) [1897] 78 P. R. 1897.
(3) [1900] 50 P. R. 1900.
(4) [1907] 15 P. L. R. 1907.

Mt. As Kaur v. *Sawan Singh* (5), Jat with woman of the Koli (Chamar) caste and *Mt. Dalip Kaur* v. *Mt Fatti* (1), Jat Sikh with an Arain woman converted to Sikhism.

Incidentally it may be mentioned that the last two rulings are of particular importance as affording a complete answer to the argument of the appellants' counsel, that howsoever lax Jats might be in their notions of marriage, a union of a Sikh Jat with a woman of one of the so-called "impure" castes, even if performed in the Anand form, will not be valid. In the first of these cases the woman belonged to one of the Chamar tribes, and in the latter she was a born Mahomedan, who had been converted to Sikhism. Other cases bearing on the point are *Sodhi Kartar Singh* v. *Sher Singh* (6) and *Lachhman Singh* v. *Partap Singh* (7). It should also be noted that such marriages are not mere recent innovations, but seem to have been recognized as valid long before the British occupation: See, for example Macauliffe's Sikh Religion, Vol. V, p. 249, where an account is given of a number of Mahomedan women having been converted to Sikhism by Banda Sahib and married to Sikh soldiers (mostly Jats) by the ceremony of Anand.

I am also in complete agreement with the learned District Judge that the marriage in question would be valid under Hindu law, as administered by the British Indian Courts. As pointed out by Mayne in his Treatise on Hindu Law, (edn. 9, p. 106) the prohibition against marriages between persons of different castes is of comparatively modern origin. It was not in force in ancient times, as then caste was not regulated by birth, but, according to some Orientalists, was determined by the personal qualities of each individual, and according to others it was an "ethnological distinction." Bannerji's Hindu Law of Marriage and Stridhana, (edn. 2, p. 71). Gradually the caste system in its present form grew up, but for centuries inter-caste marriages were allowed. Among the earlier Sutra writers the validity of such marriages was undisputed (Mayne, p. 107) and later on the marriage of a male of a higher caste with a woman of lower caste (Anuloma) but not the reverse (Pratiloma) was recognized (see Ganpathi Iyer's Hindu Law, Vol. 1, p. 454, and Golap Chandra Sarkar's Hindu Law, edn. 6, p. 146, where numerous quotations are given from lawgivers like Yajnawalkya, Manu, Budhayana, Gautama, Vasishta, Narda, Brihaspati and the Mitakshara permitting such marriage). It was only in the time of Apastamba that the rule was made more rigid and marriages outside the caste were prohibited. But even then the prohibition was applicable to the three regenerate or the Dwija castes and did not apply to the Sudras (Ganpathi Iyer's Hindu Law, p. 458, S. 632); Gour's Hindu Code, edn. 2, p. 271, Ss. 483, 486) and Mulla's Hindu Law, edn. 4, p. 421, S. 531).

But whatever conflict might have existed among the mediaeval Sanskrit writers on the subject, it may be taken as settled law, at any rate so far as British India is concerned, that marriages inter se between different sub-divisions of Sudra caste are valid and must be recognized as such. The matter has been put beyond all controversy by the decisions of their Lordships of the Privy Council in two cases from Madras reported as *Inderun Valungypooly* v. *Ramasawmy Pandia* (8) and *Rammani Ammal* v. *Kulanthai Natchear* (9). The rules laid down in these rulings have since been applied to Sudras in other provinces as well. See *Upoma Kuchain* v. *Bholaram Dhubi* (10), *Garish Chandra* v. *Mahomed Shajed Chowdhury* (11), *Biswanath Das Ghose* v. *Sarashibala Dasi* (12), *Fakiraguda* v. *Gangi* (13), *Mahantava Irappa* v. *Gangavi* (14), *Har Prasad* v. *Kewal* (15), *Mt Dalip Kaur* v. *Mt. Fatti* (1) cf. *Haria* v. *Kanhya* (16) and *Rajani Nath* v. *Nitai Chandra De* (17).

The learned counsel for the appellants, while conceding that the statement of the law enunciated above could not be

(5) [1910] 79 P. R. 1910=97 P. L. R. 1910=7 I. C. 1009=115 P. W. R. 1910.
(6) [1895] 50 P. R. 1895.
(7) A. I. R. 1921 Lah. 251.
(8) [1869] 13 M. I. A. 141=12 W. R. 41=2 Suther. 267=2 Sar. 493 (P. C.).
(9) [1870] 14 M. I. A. 346=17 W. R. 1 (P. C.)
(10) [1888] 15 Cal. 708.
(11) [1921] 25 C. W. N. 634.
(12) A. I. R. 1921 Cal. 48=48 Cal. 926.
(13) [1898] 22 Bom. 277.
(14) [1909] 33 Bom. 693=3 I. C. 962=11 Bom. L. R. 822.
(15) A. I. R. 1925 All. 26=47 All. 169.
(16) [1908] 72 P. R. 1908=64 P. L. R. 1908=47 P. W. R. 1908.
(17) A. I. R. 1921 Cal. 820=48 Cal. 643 (F.B.)

challenged, contended as a last resort that the rule could not be extended to intermarriages of males of the "pure" Sudra caste like the Jat with women of the "unclean classes," touch with whom was pollution. He has, however, been unable to cite any authority in support of his contention. In Gour's Hindu Code at p. 199, S. 294 (4) the untouchable classes, including Chamars, Pariahs, and Mehtrars are described as Sudras and in the leading case of *Muthusami Mudaliar* v. *Musilamani* (18) it was held by Sankaran Nair, J. (Abdur Rahim, J., concurring) that for the purposes of the rule aforesaid, all Hindus other than those belonging to three regenerate classes were to be treated as Sudras, marriage between different sub-sections of whom were valid. In that particular case one of the parties was a Christian who had before marriage been converted to Hinduism. She was classed as a Sudra and her marriage with a male of the Kaikolar caste was held to be legal under Hindu law. As regards the Mazhabis it is interesting to note that

many of them have the same gots as those of the Jats and in their customs, too, at wedding etc., they conform to a great extent to those prevalent among the Jats: Rose's Glossary of Tribes and Castes in the Punjab, Vol. 3, p. 76.

I am of opinion, that the marriage between Khushal Singh and Mt. Isher Kaur was valid and defendants 1 and 2 being his legitimate sons have lawfully succeeded to his property.

The appeal fails and is dismissed with costs.

Johnstone, J.—I concur.

A.L./R.K. *Appeal dismissed.*

(18) [1910] 33 Mad. 342=5 I. C. 42=20 M. L. J. 49.

A. I. R. 1928 Lahore 709

DALIP SINGH, J.

Shimbu Dayal and *others*—Plaintiffs—Appellants.

v.

Gajju Mal and *another*—Defendants—Respondents.

Second Appeal No. 1400 of 1927, Decided on 17th December 1927, from decree of Dist. Judge, Delhi, D/- 9th March 1927.

Easements Acts, S. 27—Right of way—Claimant cannot claim more than that his right of easement should not be curtailed in any way.

An easement like a right of way over a tenement is a right running with the land and is not a personal right. Whether it is the owner or a trespasser who is in possession, the person who claims the right of way cannot claim more than that his right of easement should not be curtailed in any way. [P 710 C 1, 2]

(b) *Highway—Blind alley—Court may presume that the ownership vests in the owners of the adjacent house—That presumption is an inference of fact.*

In the case of a blind alley the Court may presume that the ownership vests in the owners of the adjacent houses, but that presumption is not a presumption of law but an inference of fact: *A. I. R.* 1925 *Bom.* 27, *Cons.* [P 710 C 1]

Kishan Dayal—for Appellant.

Dev Raj Sawhney for *Jagan Nath Aggarwal*—for Respondents.

Judgment. *—The plaintiffs in this case sued for a permanent injunction directing defendant 1 to remove the almirah and the wooden takht which he had placed in a certain galli and restraining him from using the land of the galli in future in any way so as to obstruct the rights of the plaintiffs in the galli. The plaintiffs claimed to be joint owners of the land of the galli and also claimed rights of easement and user therein. They alleged that their rights of way in this passage had been obstructed by the erection of this takht and the almirah. The defendants pleaded that they were the owners of the galli and that the plaintiffs had only a right of way and that the almirah and the takht had been lying there for more than 35 years and that the plaintiffs' right of way was not obstructed and the suit was barred by limitation.

The trial Court held that the plaintiffs had not proved their joint ownership, that the defendants had failed to prove their exclusive ownership, that the land in question was a street which the plaintiffs had a right to use, that the obstruction made the enjoyment of the easement more difficult and that the obstruction had been caused only few months before the suit and granted, therefore, a decree for permanent injunction as prayed.

On appeal the learned District Judge agreed that the plaintiffs had not proved their joint title. He held that the takht had been there since 1896 and that the plaintiffs' right of way had in no way been interfered with and he thereupon dismissed the suit with costs in both Courts.

* [Letters Patent Appeal preferred against this judgment was dismissed on 22nd March 1928.]

The plaintiffs have appealed and the first point urged by their counsel is that both the Courts are wrong in holding that the plaintiffs had failed to prove the joint ownership. His ground is that in the case of a blind alley there is a presumption of law that the ownership vests in the owners of the adjacent houses and he cites *Secy. of State* v. *Lakshmishankar Govindram* (1), a Division Bench ruling of the Bombay High Court, in support of his proposition. The word "presumption" is sometimes used to describe what is really an inference of fact and not a presumption of law in the true sense, and I think the word "presumption" in this particular ruling is used in the former sense. No doubt. ornarily speaking, if the Court drew this inference of fact in the case of a blind alley it would be a proper inference to draw. But in this particular case evidently the matter was not presented in this light to the District Judge and I cannot say that his finding which is a finding of fact is wrong. In this particular case further there is the fact that plaintiffs never claimed either in 1895 or in 1916 or at any time prior to this suit any right of joint ownership. I therefore repel the contention of the appellants.

The second point raised by them is that the trial Court held that the defendants were not exclusive owners of this property and they say that their admission that the defendants were joint owners along with themselves must be taken as a whole or should not be considered at all. There is force in this contention, and as the District Judge gave no finding as to whether the defendants were or were not owners for the purpose of this appeal, I will assume that the defendants also are trespassers on this land. Nevertheless, I see no force in the further ground that counsel raises on this assumption, namely, that whereas the owner of a servient tenement can use the property in any way he likes as long as he does not curtail the plaintiffs' right of easement, this principle does not apply to the case of a trespasser. An easement like a right of way over a tenement is a right running with the land and is not a personal right. It seems to me, therefore, that whether it is the owner or a trespasser who is in possession the person who claims the right of way cannot claim more than that his right of easement should not be curtailed in any way. It is a finding of fact by the learned District Judge that the plaintiffs' right has not been so curtailed in any way, and, therefore, there is no force in this ground either.

I therefore dismiss the appeal with costs.

N.K. *Appeal dismissed.*

(1) A. I. R. 1925 Bom. 27.

A. I. R. 1928 Lahore 710

BHIDE, J.

Ram Mal—Defendant—Appellant.

v.

Upendra Datt and *another*—Plaintiffs and Defendant—Respondents.

Second Appeal No. 3014 of 1927, Decided on 14th April 1928, from decree of Dist. Judge, Jullundur, D/- 15th August 1927.

(a) *Civil P. C., S. 11—Withdrawal of suit does not operate as res judicata.*

The basic principle of res judicata is that there should have been a final adjudication on merits. The case of withdrawal is analogous to a dismissal in default and as there is no decision on merits there is no res judicata : 177 *P. R.* 1888, *Rel., on* : 1 *Mad.* 84 ; 12 *Cal.* 563 ; 10 *Mad.* 272 ; *A. I. R.* 1923 *All.* 613 ; and 29 *C. L. J.* 11, *Dist.* [P 712 C 1]

(b) *Civil P. C., O. 23, R. 1—Second suit filed during the pendency of first suit—First suit subsequently withdrawn—O. 23, R. 1, is no bar to second suit.*

A second suit will not be barred in the case of withdrawal of a previous suit unless the conditions of O. 23, R. 1, are fully satisfied : 39 *Mad.* 987, *Foll.*

A brought a suit against *B* and *C*, claiming that a certain property was his private property. During the pendency of the suit, *A* brought another suit for injunction directing *B* to close certain doors in the property of the first suit. Subsequently the first suit was withdrawn. It was contended that the second suit was barred under O. 23, R. 1.

Held : that the suit did not come within the provisions of O. 23, R. 1. [P 712 C 2]

Badri Das—for Appellant.

Nawal Kishore—for Respondents.

Judgment.—Civil Appeals Nos. 3014, 3015 and 3016 of 1927, arise out of three out of four suits relating to a dispute between two persons named Rama Mal and Upendra Datt who own properties separated by a cul-de-sac in Jullundur city.

Upon the application of Upendra Datt, the Municipal Committee, Jullundur, proposed to declare the cul-de-sac a thorough-

fare, upon which Ram Mal instituted a suit on 22nd May 1926 against Upendra Datt and the Committee for an injunction to prevent them from interfering with the use of the cul-de-sac, which he claimed as his private property.

On 14th July 1926, Upendra Datt brought a suit against Rama Mal, for an injunction to restrain him from building a wall in the cul-de-sac so as to close his (Upendra Datt's) ventilators and water-spouts.

On 12th October 1926, Rama Mal instituted a suit against Upendra Datt for an injunction directing him to close the door which he had opened in his house, on to the cul-de-sac.

On 19th October 1926, Upendra Datt filed another suit against Rama Mal for a permanent injunction to restrain him from obstructing his right of way through the cul-de-sac by building a kucha bandi.

In the first suit instituted by Rama Mal, on 22nd May 1926, against Upendra Datt and the Municipal Committee, Ram Mal stated in Court on 20th December 1926 that he did not wish to proceed with the suit as the Municipal Committee had admitted his rights in the cul-de-sac. The suit was therefore dismissed.

It was contended in the remaining suits that as the question of the ownership of the cul-de-sac was in issue in the first suit and the suit had been dismissed the issue must be deemed to have been decided against Rama Mal and the matter had become res judicata. The contention was, however, not accepted by both the Courts below. On merits the Courts found that the cul-de-sac, was the property of Rama Mal. As a result of this finding, Upendra Datt's suit with respect to kucha bandi (instituted on 19th October 1926) has been dismissed and Rama Mal has been granted an injunction restraining Upendra Datt from using his door for passing on to the cul-de-sac. As regards the suit of Upendra Datt with respect to the waterspout and the ventilators, the trial Court found that Upendra Datt's right of easement regarding these had been already established in a suit of the year 1915, but held that the right had not been interfered with in any way. Upendra Datt had claimed that he was entitled to discharge not only rain-water but also dirty water from latrines, etc, through the water-spout. The trial Court held that the claim had not been substantiated and that Upendra Datt was only entitled to discharge rain-water through the waterspout. As, however, no interference with the right of easement has been proved, the suit of Upendra Datt in connexion with the water spout and ventilators was dismissed. On appeal the learned District Judge was of opinion that there was no justification for the right of easement in connexion with the waterspout, being restricted to rain-water as held by the trial Court. He accepted the appeal and granted Upendra Datt a decree for an injunction against Rama Mal, restraining the latter from constructing his wall so as to obstruct the ventilators and the waterspouts.

From the above decrees second appeals have been filed in all the suits excepting the one instituted on 22nd May 1926, which was withdrawn by Rama Mal. There are thus two appeals by Upendra Datt and one by Rama Mal.

In the appeals filed by Upendra Datt, the main contentions put forward by the learned counsel were :

(1) That the issue as to ownership of the cul-de-sac must be deemed to have been found against Rama Mal, in asmuch as the first suit which involved that issue was dismissed and the finding operated as res judicata for the purposes of the other suits.

(2) Secondly, that the finding on merits, viz., that the cul-de-sac was the private property of Rama Mal was incorrect and could be challenged in second appeal as the learned Judge had failed to take all the material evidence into consideration and had misconstrued a certain document.

As regards the first point relianace was placed on *Rama Rao* v. *Surya Rao* (1), *Kartik Chandra* v *Shridhar Mandal* (2), *Venkatachalam* v. *Mahalakshmamma* (3) and *Kedar Nath Singh* v. *Sheoshankar* (4) which were cited before the learned District Judge and also on *Danesh Mulla* v. *Dhananjoy Biswas* (5). The learned District Judge has distinguished the rulings cited be-

(1) [1876] 1 Mad. 84.
(2) [1886] 12 Cal. 563.
(3) [1887] 10 Mad. 272.
(4) A. I. R. 1923 All. 613=45 All. 515.
(5) [1917] 29 C. L. J. 11=40 I. C. 403.

fore him from the present case merely on the ground that in those cases the subsequent suits were filed after the dismissal of the first suit, while in the present instance the other suits were pending at the time of the dismissal of the first suit. But I do not think this distinction is of any consequence. For, according to Expl. 1, S. 11, Civil P. C., it would appear that the expression "former suit" denotes a suit, which has been decided prior to the suit in question whether or not it was instituted prior thereto. But the rulings seem to me to be distinguishable on another ground, viz., that the plaintiff Rama Mal in the present instance withdrew the first suit and did not seek adjudication on merits.

The basic principle of res judicata is that there should have been a final adjudication on merits. But when a plaintiff withdraws his suit, there is no necessity for any finding on the issues arising in it and the suit is dismissed without any findings being recorded. In none of the rulings cited before the learned District Judge did the plaintiff withdraw his suit. If a party goes to trial on issues, but fails to produce evidence in respect of the same and his suit is consequently dismissed, the dismissal may no doubt operate as res judicata, but the case of withdrawal obviously stands on a different footing The case of withdrawal is analogous to a dismissal in default. In the latter case also there is no decision on merits and consequently no res judicata: see *Chand Kour* v. *Partab Singh* (6). It was urged that the plaintiff only stated that his claim had been admitted by the Committee and not by Upendra Datt; but the fact remains that even as against Upendra Datt he did not go to trial on the issues on merits, but merely abandoned the suit. The Code has attached a definite consequence to a withdrawal or abandonment of a claim of this kind and that consequence is that the plaintiff is debarred from instituting a fresh suit with respect to the same subject-matter, except in those cases where the suit is withdrawn with the permission of the Court to institute a fresh suit. as laid down in R. 1, O. 23, Civil P. C. In the present instance no such permission was obtained, but the plaintiff had already instituted another suit against Upendra Datt with respect to the cul-de-sac, when the first suit was withdrawn and hence the provisions of that rule cannot apply. It will appear from *P. Surja Reddi* v. *Subba Reddi* (7) that a second suit will not be barred in the case of withdrawal of a previous suit unless the conditions of O. 23, R. 1, Civil P. C., are fully satisfied. The ruling *Danesh Mulla* v. *Dhananjoy Biswas* (5) seems to be somewhat in favour of the contention of the learned counsel, but no reasons have been given in support of the view, that the principle of res judicata applies even in the case of a withdrawal or abandonment of a claim. The facts of that case are also distinguishable in certain respects for the plaintiff therein had apparently definitely stated in the former case that he did not at all claim the property to which the subsequent suit related. I therefore agree with the Courts below that the dismissal of the first suit in the circumstances stated above did not operate as res judicata.

The second point urged on behalf of Upendra Datt involves a finding of fact. It was urged that the learned District Judge has not taken into consideration some material evidence. Reference has been made in this connexion to the oral evidence of Bulanda and Ramzan Ali who have stated that the cul-de-sac was at one time paved by the Committee. As against this evidence there is the definite fact that the Municipal Committee itself does not claim the cul-de-sac as its property (vide evidence of P. W. 1): The learned District Judge refers to the existence of a drain in the cul-de-sac and I am not satisfied that he has failed to take into consideration any material evidence. I also do not think that he has misconstrued any documentary evidence. The learned counsel for the appellant has referred in this connexion to a mortgage-deed executed by Rama Mal with respect to some of his house property in which the cul-de-sac is described as Kucha and shown as one of the boundaries of the property mortgaged. But the learned District Judge has considered this point and held that the cul-de-sac was shown as a boundary because it was not included in the property mortgaged. This was a

(6) [1888] 16 Cal. 98=15 I. A. 156=177 P. R. 1888=5 Sar. 243 (P. C.).

(7) [1916] 39 Mad. 987=31 M. L. J. 48=4 M. L. W. 1=35 I. C. 185=(1916) 2 M. W. N. 1 (F.B.).

possible construction of the terms of the document and I do not see that the construction involves any error of law. I must, therefore, hold that there is no ground for interference with the findings of fact or merits.

As a result of the above findings, the two appeals of Upendra Datt (Nos. 3015 and 3016) must fail. As regards the appeal of Rama Mal (No. 3014) the learned District Judge does not appear to have given any good reasons for reversing the decree of the trial Court. The trial Court found that the plaintiff had not been obstructed in the exercise of his right of easement.

This finding of fact was not disturbed by the learned District Judge and must be taken as final. The mere fact that a wall was being constructed would not entitle Upendra Datt to an injunction. He had moreover already obtained a decree in respect of such right of easement relating to the waterspout and ventilators as he possessed and he could execute the decree, if the right were interfered with. It was unnecessary in the circumstances to go into the question whether Upendra Datt was entitled to discharge only rain-water or foul water also.

It seems to me that the decree of the trial Court dismissing the suit was correct. I dismiss Civil Appeals Nos. 3015 and 3016 with costs. I accept Civil Appeal No. 3014 and dismiss plaintiff's suit with costs throughout.

A.L./R.K. *Appeal accepted.*

A. I. R. 1928 Lahore 713 (1)

TEK CHAND, J.

Lajpat Rai—Surety—Appellant.

v.

Daulat Ram Bhana Mal and *another*—Judgment-debtor and Decree-holder—Respondents.

Misc. Second Appeal No. 1670 of 1927, Decided on 21st December 1927, from order of Senior Sub-Judge, Jullundur, D/- 10th March 1927.

(a) Punjab Courts Act, S. 42 (2)—No second appeal lies from a decision in execution proceedings of a suit which is of a small cause nature and which is valued below Rs. 500.

No second appeal lies under S. 42 from a decision in the execution proceedings which relate to a decree passed in a suit the value of which is below Rs. 500 and which is of a small cause nature. [P 713 C 2]

(b) Civil P. C., S. 115—Revision.

Misconstruction of a document (even if established) is not sufficient ground for interference in revision. [P 713 C 2]

Badri Das—for Appellant.

Shiv. Charan Das—for Respondents.

Judgment. — A money decree for Rs. 486-7-6 was obtained by the firm Hamir Chand-Hari Chand against one Doulat Ram. The decree-holder applied for execution by arrest of the judgment-debtor. The judgment-debtor was brought under arrest on 3rd May 1926, but was released on Lajpat Rai appellant, executing a surety bond. Later on the decree-holder applied for recovery of the decretal amount from the surety Lajpat Rai, but he denied liability on the ground that under the terms of the surety bond his liability had not yet arisen. The trial Court found against him and held that he was liable. This order was upheld on appeal.

A second appeal has been preferred by the surety but this appeal is clearly incompetent. The execution proceedings in which the surety bond had been executed related to a decree passed in a suit the value of which was below Rs. 500. The suit was of a small cause nature and in such a case no second appeal lies under S. 42 (2), Punjab Courts Act.

Mr. Badri Das has asked to treat the memorandum of appeal as one for revision and has urged that the lower Courts have misinterpreted the surety bond. There is no doubt that the bond is not very happily worded, but misconstruction of a document (even if established) is not a sufficient ground for interference on the revision side.

Accordingly I hold that no appeal lies and there is no ground for interference on revision. The appeal is dismissed with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 713 (2)

JAI LAL, J.

Jagat Singh—Defendant—Petitioner.

v.

Mahan Bir Singh—Plaintiff—Respondent.

Civil Revn. Petn. No. 347 of 1928, Decided on 30th April 1928, from order of Addl. Judge, Kangra, D/- 26-5-1927.

(a) Pensions Act, S. 6—Application for declaration to be a sharer in jagir to Collector—

Collector declining to interfere and directing the applicant to civil Court—Civil suit filed without certificate—Order by the Court for its production within a fixed time—Its production within the period was held to be a sufficient compliance with the provisions of the section.

A applied to the Collector for declaring him to be a jagirdar jointly with *B*. Collector declined to entertain the application and directed him to civil Court. *A* then instituted a suit against *B* for a declaration that he was a jagirdar jointly with *B* and that *B* was not entitled to recover land revenue from him. He also claimed an injunction that *B* should not recover the land revenue on *A*'s land alleging that Collector's direction was tantamount to a certificate under S. 6. It was contended that the civil Court had no jurisdiction to entertain the suit without the Collector's certificate. *A* was given time to produce certificate of the Collector, which was duly produced and placed on record :

Held : that it was a sufficient compliance under S. 6 as the certificate was produced within time fixed by the Court. [P 715 C 2]

(*b*) *Punjab Land Revenue Act, S.* 158, *Cls.* (8, 13 *and* 14)—*S.* 158 *does not oust jurisdiction for settling rights of persons among themselves.*

Clauses 8, 13 and 14, S. 158, are intended to oust the jurisdiction of the civil Court to determine disputes between the Government and the owner connected with the assessment and recovery of land revenue. They do not prevent disputes between persons to whom such land revenue may have been assigned and others who dispute the right of such persons to the exclusive enjoyment of such rights. [P 716 C 1]

Mehr Chand Mahajan—for Petitioner.
Faqir Chand—for Respondent.

Judgment.—The plaintiff-respondent instituted a suit in the Court of the Subordinate Judge at Kangra against Jagat Singh, appellant, on the allegation that a certain jagir was granted to the common ancestor of the parties for the benefit of the family and that the defendant was the nominal holder thereof, the plaintiff being a share-holder in such jagir, that the share of the plaintiff was represented by the land revenue assessed on the land in his possession which by an agreement he was entitled to retain in satisfaction of his share in the jagir instead of paying it to the appellant. It is to be noted that the jagir takes the form of the land revenue assessed on certain land, including the plaintiff's land. The relief claimed was a declaration that the plaintiff was a jagirdar jointly with the defendant and that the latter was not entitled for that reason to recover the land revenue from him ; secondly an injunction to the defendant not to recover land revenue assessed on the plaintiff's land from him for the reasons already mentioned and, thirdly, for return of Rs. 14-7-3 recovered by the lambardar as land revenue on the plaintiff's land and presumably paid to the defendant.

An objection was taken on behalf of the defendant that the suit was not cognizable by the civil Court and was given effect to.

On appeal, however, by the plaintiff the Senior Subordinate Judge of Kangra at Dharamsala has held that the suit was cognizable by the Subordinate Judge and has remanded the case for trial and decision on the merits to the Subordinate Judge of Kangra, subject to the production by the plaintiff within one month of a certificate from the Collector of Kangra under the provisions of S. 6, Pensions Act, 1871. This is an appeal by the defendant against the order remanding the case.

A preliminary objection is taken on behalf of the plaintiff-respondent that an appeal from the order in question does not lie to this Court. Mr. Mehr Chand for the appellant concedes that his objection has force and prays that, having regard to the fact that the question before me is one of jurisdiction, the memorandum of appeal may be treated as a petition for the revision of the order of the Senior Subordinate Judge and the case heard accordingly.

To this also objection is taken by the respondent's counsel, who relying on *Bhoji Lal Trikam Lal* v. *Amar Nath Lajpat Rai* (1), *Chhubu Mian* v. *Harcharan Das* (2), *Arur Singh* v. *Bua Dutta* (3) and *Dawlat Ram* v. *Asa Ram* (4), contends that no revision lies from such an order as it is really an interlocutory order. The petitioner's counsel, however, relies upon *Dalipa* v. *Barkat Ali* (5) which follows the judgment of a Full Bench of the Madras High Court reported as *V. Atchayya* v. *Venkata Seetharama* (6).

It is to be observed that *Bhoji Lal Trikam Lal* v. *Amar Nath Lajpat Rai* (1)

(1) 2 L. C. 135=A. I. R. 1926 Lah. 47.
(2) [1912] 119 P. R. 1912=101 P. L. R. 1913 =18 I. C. 529=48 P. W. R. 1913.
(3) [1911] 4 P. R. 1911=45 P. L. R. 1911 9 I. C. 674=26 P. W. R. 1911.
(4) [1886] 46 P. R. 1886.
(5) A. I. R. 1923 Lah. 412=76 I. C. 1010.
(6) [1916] 39 Mad 195=18 I. C. 555=24 M. L. J. 112 (F.B.).

Dalipa v. *Barkat Ali* (5) are by the same learned Judge of this Court, but apparently there is conflict between the two. 2 *Lah.* case is the later judgment but 76 *I. C.* is based on a judgment of the Full Bench of the Madras High Court. On the other hand the later view receives some support from some judgments, already referred to, of the Chief Court of the Punjab. It becomes, therefore, rather difficult to decide which of the cases cited should be followed. I do not however, propose to discuss the matter any further because in my opinion the petition even if admitted must fail on its merits.

Now, it is to be remembered that, by virtue of S. 9, Civil P. C., a civil Court has jurisdiction to adjudicate upon all disputes of a civil nature, unless its jurisdiction is barred by any provision of law statutory or otherwise. It is, therefore, for the defendant to establish that the jurisdiction of the Subordinate Judge in this case was barred as admittedly the dispute in this case is of a civil nature. Reliance was placed by the defendant in the Courts below on the provisions of Ss. 4, 5 and 6, Pensions Act, 1871. S. 4 runs as follows :

> Except as hereinafter provided, no civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government * * *.

Section 5 provides that

> any person having a claim relating to any such pension or grant may refer such claim inter alia to the Collector of the district, and such Collector shall dispose of such claim in accordance with such rules as the chief revenue authority may prescribe in this behalf.

Section 6 lays down that

> a civil Court shall take cognizance of any such claim on receiving a certificate from such Collector, but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly.

It seems that originally the plaintiff applied for relief to the Collector, but that officer declined to entertain his petition and recorded an order that. if so advised, the petitioner could seek his remedy in the civil Court. It was contended in the Courts below that this order of the Collector was tantamount to the grant of a certificate under S. 6. This contention, however, was held not to be sound and in my opinion with justification, but the learned Senior Subordinate Judge granted the plaintiff a month's time to produce the Collector's certificate.

I am informed that such a certificate has now been produced and placed on the record. This, in my opinion, is a sufficient compliance with the provisions of S. 6, Pensions Act, 1871. The suit is distinctly of the nature contemplated by Ss. 4 and 5 of the Act, and it does not involve any order or decree by which the liability of the Government to pay any pension or grant will be affected directly or indirectly, the dispute being between the jagirdar and the plaintiff who claims to be entitled to be paid a share thereof by the defendant. It was a sufficient compliance with law that the certificate was produced within the time fixed by the Court.

The petitioner's counsel did not urge before me that the cognizance of the suit by the Subordinate Judge under the circumstances mentioned above was barred by the provisions of the Pensions Act, 1871. His contention, however, was that, under S. 158, Punjab Land Revenue Act, the suit was excepted from the jurisdiction of the civil Courts. The clauses of that section relied upon were (viii), (xiii) and (xiv). Cl. (viii) provides that

> a civil Court shall not exercise jurisdiction over a claim of any person to be liable for an assessment of land revenue or of any other revenue assessed under the Act.

The present suit is not of the nature contemplated by this clause. The plaintiff does not claim to be liable for an assessment of land revenue. On the other hand he merely admits that he has been assessed to and is liable to pay the land revenue to the Government and claims that the land revenue assessed though assigned to the defendant is repayable by him to the plaintiff and, therefore, in order to save the trouble of collection and its repayment to the plaintiff, an arrangement had been made between the parties whereby the plaintiff is entitled to retain it in lieu of his share of the jagir.

The same remarks apply to Cl. (xiii) which ousts the jurisdiction of the civil Courts with regard to any claim to hold any land free of revenue. Here again the plaintiff does not claim that he is entitled to hold free of revenue the land in his possession.

Clause (xiv) relates to

> any claim connected with, or arising out of

the collection by the Government, or the enforcement by the Government, of any process for the recovery of land revenue.

Now, here again the plaintiff's claim does not involve an attack on the right of the Government to collect the revenue from him, because so far as the collection of the revenue by the Government is concerned he does not object to it.

The clauses of S. 158, Punjab Land Revenue Act relied upon by the petitioner, therefore, have no application to the present suit. It seems to me that these clauses are really intended to oust the jurisdiction of the civil Courts to determine disputes between the Government and the owner connected with the assessment and recovery of the land revenue. They do not prevent disputes between persons to whom such land revenue may have been assigned and others who dispute the right of such persons to the exclusive enjoyment of such rights. To such cases the provisions of the Pensions Act, 1871, apply and those provisions have been complied with in this case.

I dismiss this petition with costs.

A.L./R.K. *Petition dismissed.*

A. I. R. 1928 Lahore 716

ZAFAR ALI, J.

Mt. Lachhmi—Defendant—Appellant.

v.

Nanak Chand—Plaintiff—Respondent.

Misc. First Appeal No. 1564 of 1927, Decided on 30th November 1927, from order of Sr. Sub-Judge, Ferozepore, D/- 12th May 1927.

(a) *Guardians and Wards Act* (8 *of* 1890), *S. 7—Proceedings should not be summary and Court should not appoint a person as guardian who does not live within its jurisdiction—Personal law of the minor should also be considered.*

Proceedings under the Guardians and Wards Act should not be summary, but a proper enquiry should be made and the Court should give an opportunity to the parties to produce evidence and show which of them is better entitled and qualified to act as guardian of the minors. Further it should be determined which of them is better entitled under the personal law of the parties: *A. I. R.* 1925 *Lah.* 567 and *A. I. R.* 1925 *Nag.* 233, *Foll.* [P 716 C 2]

(b) *Guardians and Wards Act* (8 *of* 1890), *S.* 9 *—Applicant must be within Court's jurisdiction.*

An applicant for guardianship should reside within the jurisdiction of the Court to which he makes the application: 36 *All.* 280, *Foll.* [P 716 C 2]

J. N. Bhandari—for Appellant.

Shiv Chand Das—for Respondent.

Judgment.—The two minor boys in this case were orphans, and their stepmother Mt. Lachhmi made an application to be appointed guardian of their persons and property. The property is situated in the Ferozepore District where the application was made. The minors live with the husband of a sister at Kasur. He opposed the application of the stepmother and applied himself to be appointed guardian of the persons and property of the minors. The Senior Subordinate Judge of Ferozepore accepted his application and rejected that of the stepmother.

She appeals, and her counsel contends that the proceedings of the Court below were irregular, inasmuch as the order was made without an enquiry and further because a person who did not live within the jurisdiction of the Court could not have been appointed the guardian. There can be no manner of doubt that the proceedings were summary and that no proper enquiry was made. The Court should have given an opportunity to the parties to produce evidence and show which of them was better entitled and qualified to act as guardian of the minors. Further it should have been determined which of them was better entitled under the personal law of the parties. In *Askhar Ali* v. *Amina Begam* (1) a Division Bench of the Allahabad High Court held that the Guardians and Wards Act, 1890, contemplates that an applicant for guardianship should reside within the jurisdiction of the Court to which he makes the application. In *Yusaf Ali Mamoonji* v. *Alibhoy* (2) and *Sheoshankar* v. *Khupchand* (3) it was held that proceedings under the Guardians and Wards Act were not summary. With these observations I accept the appeal, set aside the order of the Court below and remand the case for a fresh enquiry and decision in accordance with law.

S.J. *Appeal accepted.*

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(1) [1914] 36 All. 280=24 I. C. 59=12 A. L. J 392.

(2) A. I. R. 1925 Lah. 567.

(3) A. I. R. 1925 Nag. 233.

A. I. R. 1928 Lahore 717 (1)

ZAFAR ALI, J.

Partab Singh and *another*—Plaintiffs—Appellants.

v.

Surjan Singh and *others*—Defendants—Respondents.

Second Appeal No. 2153 of 1927, Decided on 21st December 1927, from decree of Dist. Judge, Hoshiarpur, D/- 22nd June 1927.

Easements Act, S. 7—Owner of land on lower level cannot prevent water flowing over his land in natural course from higher level.

An owner of land on a lower level to which surface water from adjacent land on a higher level naturally flows is not entitled to so deal with his land as to obstruct the flow of water from the higher land: *A. I. R.* 1926 *Mad.* 449 (*F.B.*), *Foll.* [P 717 C 1, 2]

Faqir Chand—for Appellants.

H. D. Bhalla—for Respondents.

Judgment.—The plaintiffs' case was that the surplus rain-water used to drain away from their fields through the adjoining fields of the defendants, which were on a lower level, but that the defendants had recently by constructing a dam at the common boundary obstructed the flow of water through their land with the result that the water accumulated in their (plaintiffs') fields and caused damage thereto. They prayed for an injunction directing the defendants to remove the dam and restraining them from obstructing the flow of water in future.

The trial Court decreed the suit, but on appeal the learned District Judge dismissed it on the authority of *Mahamahopadyaya Rungachariar* v. *Municipal Council of Kumbakonam* (1) where it was held that

the right of the owner of higher land that the water naturally rising in, or falling on, such land, shall be allowed by the owner of adjacent lower land to run naturally thereto is not a right in the nature of an easement and is subject to the right of the owner of such lower land to build thereon.

But *Mahamahopadyaya Rungachariar* v. *Municipal Council of Kumbakonam* (1) was expressly overruled by a Full Bench of the Madras High Court in *Hussain Sahib* v. *P. Subbayya* (2). The general proposition of law laid down in that case is stated thus:

An owner of land on a lower level to which surface water from adjacent land on a higher level naturally flows is not entitled to deal with his land so as to obstruct the flow of water from the higher land.

Mr. Bhalla, who appears for the defendants-respondents, contends that in the present case no obstruction has been proved, nor is it proved that the defendants' fields are on a lower level. This contention is not well founded. The commissary, who made a local enquiry in accordance with the order of the trial Court, found that the defendants had raised the boundary ridge so high that it obstructed the flow of water from the plaintiffs' fields into theirs. This boundary ridge should, therefore, be removed so that the water may flow on to the defendants' fields as before.

I, therefore, accept the appeal, set aside the order of the lower appellate Court and restore that of the trial Court, granting the plaintiffs the relief that they seek. The defendants will pay the plaintiffs' costs throughout.

A.L./R.K. *Appeal accepted.*

(1) [1906] 29 Mad. 589=16 M. L. J. 582.

(2) A. I. R. 1926 Mad. 449=49 Mad. 441 (F.B.)

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* A. I. R. 1928 Lahore 717 (2)

JAI LAL, J.

Bagga Singh and *others*—Plaintiffs—Appellants.

v.

Tirath Ram and *another*—Defendants—Respondents.

Second Appeal No. 2746 of 1927, Decided on 29th February 1928, from decree of Dist. Judge, Ferozepore, D/- 18th July 1927.

* *Civil P.C., S 92—Suit against alleged trustees after sanction—Plea that a third person was the real trustee—Collector's sanction to join the third party as defendant is necessary.*

P obtained sanction of the Collector under S. 92, Civil P. C. and sued *A* and *B*, the alleged trustees. A plea was raised that *M* was the real trustee and he was added as a defendant to the suit at the Court's instance, but without the sanction of the Collector.

Held: that the sanction of the Collector was necessary to maintain the suit against *M*: *A. I. R.* 1926 *Mad.* 970, *Foll.* [P 718 C 2]

J. N. Bhandari—for Appellants.

M. L. Puri—for Respondents.

Judgment.—The appellant, after obtaining sanction of the Collector under S. 92, Civil P. C., instituted a suit against two men, defendants 1 and 2, who were alleged to be the trustees of a

Gurdawara and against whom certain allegations of mismanagement were made. The prayer was to remove the defendants and for the appointment of new trustees in their place. The defendants pleaded that they were not the real trustees of the Gurdawara but were acting on behalf of another person Mahant Thakar Das. The trial Court thereupon directed that Mahant Thakar Das be added as a defendant. This having been done an objection was raised on behalf of Mahant Thakar Das that the suit could not proceed as against him without the sanction of the Collector. Thereupon the trial Court giving effect to this objection rejected the plaint. This order of the trial Court was affirmed on appeal by the District Judge. Consequently the plaintiff has presented this second appeal.

It is contended on his behalf that, as a matter of fact, no sanction was necessary, considering that the new defendant was added under the orders of the trial Court and not at the request of the plaintiff, and reference is made to *Parmeshwaram Manpu* v. *Narayanan Nambudri* (1), *Vithilingam* v. *Ramalingam Pillai* (2), *Bachal Shaw* v. *Jama Shaw* (3), *Kuber Singh* v. *Baohu Ram* (4) and finally to *Abdul Rahman* v. *Kassu-um-Ebrahim* (5). Some of these cases do not appear to have any bearing on the present case. In some of them it has been laid down that if a defendant has been added under the orders of the Court the suit does not in every case fail in the absence of the sanction of the Collector under S. 92, Civil P. C., to file or institute the suit against such defendant, but the principle has been recognized that if the addition of the defendant alters or enlarges the scope of the suit instituted by the plaintiff then it cannot proceed without such sanction. In this connexion the counsel for the respondent cited *A. I. R.* 1926 *Mad.* 970, a case in which the facts were similar to the present case. There also the suit originally had been instituted against persons who alleged that they were not trustees, but that another person was the trustee and thereupon the latter was added as a defendant. An objection was then taken by him that the suit could not proceed against him without sanction under S 92. The trial Court gave effect to this objection and dismissed the suit after ariving at the conclusion that the original defendants were not the trustees, but that the added defendant was and that no breach of trust on the part of the latter had been alleged. A Division Bench of the Madras High Court on second appeal held that under the circumstances mentioned above the suit has been rightly dismissed as the original defendants were found not to be the trustees and no sanction of the Advocate-General had been obtained to file a suit against the added defendant, the real trustee, and no breach of trust had been alleged as against him.

The following extract from the judgment of the learned Judges sums up their view on the legal point involved in this case.

> The very object of insisting upon the sanction of the Collector or of the Advocate-General being obtained as a preliminary to a suit under S. 92 is to secure that suits are not brought against trustees unless there is a prima facie case against them of breach of trust or unless circumstances exist which necessitate the Court's interference in the administration of the trust. The object of this section will be defeated if it is left open to a plaintiff to get sanction against a person who is not the trustee and then use it afterwards against the real trustee. The personality of the trustee and the way in which he is dealing with the trust are matters of material consideration in granting sanction for a suit.

Agreeing with this view I hold that sanction of the Collector was necessary in this case in order to enable the plaintiff to maintain the suit against Mahant Thakar Das.

It is, however, to be observed that it has not been determined in this case whether or not the original defendants 1 and 2 are the trustees of the Gurdwara or whether Mahant Thakar Das is the trustee; the trial Court, merely, on the objection of the original defendants has ordered that the latter should be impleaded as a defendant. The plaintiff's counsel asserts before me that the allegation of the original defendants that they are not the trustees is false, and states that he is prepared to abide by the plaint originally filed by him in case it is held that the suit is not competent against the added defendant without the sanction of the Collector. I consider that there is

(1) [1916] 40 Mad. 110=31 M. L. J. 279=3 M. L. W. 305=34 I. C. 384=(1916) 1 M. W. N. 402.
(2) [1917] 6 M. L. W. 9=38 I. C. 133=(1917) M. W. N. 550.
(3) A. I. R. 1923 Sind 35=16 S. L. R. 221.
(4) A. I. R. 1925 Oudh 128.
(5) [1912] 36 Bom. 168=11 I. C. 726=13 Bom. L. R. 583.

force in this contention of the appellant, as the suit cannot proceed against the added defendant without sanction and, as the plaintiff is not willing under the circumstances to retain him as a defendant in the case, I consider that he should be struck off from the list of the defendants and the suit should proceed against the original defendants. If the plaintiff is unable to establish his allegation that they are the trustees of the Gurdwara he will have to bear the consequences that must naturally flow from his failure in this respect.

I accept this appeal, set aside the order of the Courts below rejecting the plaint and direct that the name of Mahant Thakar Das be struck off from the list of the defendants and the suit proceed against the original defendants with due regard to the observations made above. Under the circumstances I leave the parties to bear their own costs in the Court of the District Judge and in this Court.

A.L./R.K. *Appeal accepted.*

A. I. R. 1928 Lahore 719

ADDISON, J.

Kundan Lal—Plaintiff—Appellant.

v.

Gauri Mal—Defendant—Respondent.

Second Appeal No. 1741 of 1927, Decided on 25th January 1928, from decree of Dist. Judge, Ambala, D/- 18th May 1927.

(a) *Injunction—Defendant bona fide preventing plaintiff from building a wall—Plaintiff suing after three years for injunction and damages—Injunction was granted but damages were refused.*

Plaintiff waited for three years after the defendant bona fide prevented him from building a wall, and then sued for a permanent injunction that the defendant should not prevent him from building a wall and for damages owing to the defendant's act in preventing the building of the wall three years before the suit. Injunction was granted but damages were refused.

Held : that the damages were rightly refused on the ground of plaintiff's laches [P 719 C 2]

(b) *Civil P. C., O. 21, R. 35 (2)—Symbolical joint possession stops adverse possession from running against the decree-holder.*

The giving of joint possession is merely a symbolical transaction under O. 21, R. 35 (2), but it stops adverse possession from running against the decree-holder. [P 719 C 2]

Bakhshi Sain Das—for Appellant.

Mahesh Das—for Respondent.

Judgment.—Kundan Lal sued Gauri Lal (1) for a permanent injunction that the defendant should not prevent the plaintiff from building a wall *G E* ; (2) for joint possession of a half share in an alcove beneath a stair case *A C* ; (3) for Rs. 300 as compensation or damages owing to the defendant's act in preventing the building of the wall *G E*, three years before suit ; (4) for Rs. 20, the value of a plank and rafter alleged to have been removed by the defendant and to be joint property of the parties : and (5) for Rs. 18 being the rent for three years of a chabutra in front of the staircase *A C*. The lower Courts granted the plaintiff a permanent injunction restraining the defendant from preventing him building the wall *G E* ; in other respects the suit was dismissed. Against this decision the plaintiff has preferred this second appeal.

Only two other reliefs were claimed before me by the learned counsel for the plaintiff the rest being given up. The first was that as an injunction had been granted to the plaintiffs in connexion with the wall *G E*, he should also have been awarded damages for the defendant's act in preventing him from building that wall. Both the Courts below refused to allow any damages on account of the laches of the plaintiff who waited for three years after the defendant bona fide prevented him building the wall before he instituted the suit. I think these are weighty reasons for refusing damages and I refuse to grant them.

The next relief claimed was that a decree should have been granted for joint possession of a half-share in the alcove below the staircase *A C*. There was a previous suit between the parties and it was held in it that the staircase *A C* and the alcove beneath it was the joint property of the parties and the plaintiff was in that suit given a decree for joint possession of this property though it was specifically laid down in the decree that the property should remain impartible. In the present suit the defendant denied that the alcove below the staircase was joint. It is clear that the plaintiff got joint possession under the previous decree. The giving of this joint possession is merely a symbolical transaction as laid down in O. 21, R. 35 (2), Civil P. C., but it stops adverse possession from running against the plaintiff. As the defendant has in this suit denied that the plaintiff is entitled to a share in this alcove the plaintiff is again entitled to a decree for

joint possession as regards this alcove against the defendant. This appeal must be accepted to that extent and a decree for joint possession given to the plaintiff of this alcove in which he holds a half share. This portion of the decree will be executed under O. 21, R. 35 (2), Civil P. C., that is, symbolical possession only will be given. The alcove forms part of the defendant's shop and approach to it is only possible through the defendant's shop so that the decree granted amounts to very little.

As the plaintiff-appellant has failed to the extent of half his suit or more, the parties will bear their own costs throughout.

N.K. *Appeal partly accepted.*

A. I. R. 1928 Lahore 720

BHIDE, J.

Ishar Das and *others*—Plaintiffs—Appellants.

v.

Bulaqi Das and *another*—Defendants—Respondents.

Second Appeal No. 1744 of 1927, Decided on 3rd April 1928, from decree of Addl. Dist. Judge, Delhi, D/- 31st January 1927.

(*a*) *Civil P. C., S. 100 — Finding of permanent tenancy depending on inferences of fact —Finding can be challenged.*

The finding that a particular tenancy is permanent one, in so far as it depends upon inferences from facts proved can be challenged in second appeal, but the findings of fact from which the inferences are drawn cannot be disturbed without adequate grounds falling within the scope of S. 100 : *A. I. R.* 1927 *P. C.* 102, *Rel. on.* [P 720 C 2]

(*b*) *Landlord and Tenant — Permanent tenancy—Test to determine permanancy laid down.*

The defendants claimed that they were permanent tenants and not liable to ejectment. It was found that (i) the origin of the tenancy was unknown ; (ii) there were permanent pakka buildings on the land which were built long before the present suit to the knowledge of the landlords ; (iii) the rent had been nominal (six annas per mensem) and uniform and (iv) the tenancy had been transferred on more than one occasion without any objection on the part of the landlords.

Held : that the interference of permanent tenancy was correct : *A. I. R.* 1925 *Cal.* 309, *Foll.*; 27 *Cal.* 570 ; 21 *All.* 493; 16 *Cal.* 223; and *A. I. R.* 1923 *Cal.* 632; *Dist.* ; *A. I. R.* 1919 *P. C.* 11 ; *A. I. R.* 1924 *Cal.* 465 ; *A. I. R.* 1923 *All.* 486; and 28 *Cal.* 733; *Rel. on.* [P 721 C 1, 2]

Moti Sagar—for Appellants.

Shamair Chand and *Qabul Chand*—for Respondents.

Judgment.—Plaintiffs sued in this case for ejectment of the defendants from a site about 200 square yards in area situated in Delhi city, on the allegation that the defendants were their tenants and had refused to pay rent. The defendants denied that the plaintiffs were the owners of the land and also pleaded adverse possession for over 12 years. In the alternative they claimed that they were permanent tenants and not liable to ejectment. Both the Courts below have found the defendants to be permanent tenants and decreed the claim only with respect to the arrears of rent. The plaintiffs have come up in second appeal and the sole contention put forward on their behalf is that the facts found are insufficient to establish permanent tenancy.

The learned Additional District Judge following *Abdul Hakim Khan* v. *Ilahi Bakhsh Shah* (1) has relied on the following facts in support of his finding :

(1) The origin of the tenancy is unknown ; (2) there were permanent pakka buildings on the land which were built long before the present suit, to the knowledge of the landlords ; (3) the rent has been nominal (six annas ser mensem) and uniform ; (4) the tenancy has been transferred on more than one occasion without any objection on the part of the landlords.

The finding of the lower appellate Court in respect of the permanent tenancy, in so far as it depends upon inferences from facts proved can be challenged in second appeal, vide *Dhanna Mal* v. *Moti Sagar* (2), but the findings of fact from which the inferences are drawn cannot be disturbed without adequate grounds falling within the scope of S. 100, Civil P. C. It has been argued on behalf of the appellants that the findings of fact in the present instance cannot be sustained in certain respects as they are not supported by any evidence and it is therefore necessary to clear the ground by examining these findings at the outset.

The first of the findings referred to above, viz., that the origin of the tenancy is not known has not been challenged. The second finding was questioned but there is evidence on the record, which goes to show that certain pucca structures have existed on the site for some 40 or 50

(1) A.I.R. 1925 Cal. 309=52 Cal. 43.
(2) A.I.R. 1927 P.C. 102=8 Lah. 573=54 I.A. 178 (P.C.).

years. Defendants' witnesses have deposed that the materials of the structures are 40 or 50 years old and the evidence has been believed. The learned Judge of the trial Court also inspected the spot and found the materials to be old. The third finding of the Court below that the rent has been uniform has been challenged on the ground that there is no evidence to show that the rent has been six annas all along. But the deeds of transfer relied on by the appellants themselves show that even in the years 1910-13 the rent was six annas per mensem. This raises a strong presumption that the rent has been uniform. If a different rent has been ever charged any time, the fact should have been within the knowledge of the plaintiffs and they could have easily produced evidence in rebuttal. But no such evidence has been produced. The last finding relied upon by the learned Additional District Judge is that the tenancy has been transferred more than once without any objection by the landlords. As regards this finding it was urged that there is no evidence on the record to show that the transfers were consented to or acquiesced in by the landlords by acceptance of rent etc. But although there is no such direct evidence, the fact remains that several transfers have taken place and the landlords have not objected. The landlords and their predecessors apparently belonged to Delhi and it is a reasonable presumption in the circumstances of the case that the pucca buildings as well as the transfers must have come to their knowledge.

I see, therefore, no good ground for interference with the above findings of fact and the only question that requires consideration is whether an inference of permanent tenancy is supported by those findings. The ruling *Abdul Hakim Khan* v. *Elahi Bakhsh Shah* (1), contains a review of a number of previous decisions of High Courts and the Privy Council and according to the test laid down the above findings of fact would appear to be sufficient to justify the learned Additional District Judge's conclusion. The learned counsel for the appellants has invited my attention to *Ismail Khan* v. *Jaigun Bibi* (3), *Beni Ram* v. *Kundan Lal* (4), *Secy. of State* v. *Luchmeswar* (5) and *A. I. R.* 1923 *Cal.* 682.

In *Beni Ram* v. *Kundan Lal* (4) the origin of the tenancy was known. The land had been leased for the term of the settlement only and there was nothing to prevent the landlords from evicting the tenants thereafter. It was held that the mere fact that the tenant had erected buildings on the land without any objection from the landlords could not in such circumstances estop the latter from ejecting the tenant. In the present case the origin of the tenancy is unknown and there is nothing to indicate that the tenancy was for a definite period only.

In *Secy. of State* v. *Luchmeswar Singh* (5) again the origin of the tenancy was known and it was held that mere long possession or a uniform rate of rent could not in the circumstances support any inference as to permanency of tenure.

In *Ismail Khan* v. *Jaigun Bibi* (3), the tenancy had been created by a kabuliyat which on the face of it contained nothing to imply permanency in the tenure created. It was held under the circumstances that a tenant in order to resist ejectment successfully on the ground that he had been allowed to erect permanent buildings must show that he was acting under an honest belief that he had a permanent right in the land and that the landlord knowing that he (the tenant) was acting under such belief stood by and allowed him to go on with the construction of the buildings.

In *A. I. R.* 1923 *Cal.* 682, it was only laid down that mere length of possession (about 40 years in that case) and uniform payment of rent were not sufficient to raise any presumption as regards permanency of tenure. The land had apparently not been let for residential purposes; there were no pucca buildings and no instances of transfers or succession.

It will thus be seen that the rulings cited are easily distinguishable from the present case. In the present case the inference as to permanency of tenure is based upon the cumulative effect of different factors. The absence of any evidence as to the origin of tenancy—evidence which a landlord seeking to evict a tenant is expected to produce in the ordinary course—is a very important factor in this case and strengthens the inference to

(3) [1900] 27 Cal. 570=4 C.W.N. 210.
(4) [1899] 21 All. 496=26 I.A. 58 (P.C.).
(5) [1889] 16 Cal. 223=16 I.A. 6=5 Sar. 275 (P.C.).

be drawn from the other facts. No explanation is forthcoming as to why the landlords failed to object to the construction of the buildings or the transfers of the tenancy. There is some evidence indicating uniformity of rent and the landlords have not been able to show that there was any change in the rent. The value of the building materials is not great, but that is not very material cf. *A. I. R.* 1924 *Cal.* 465. Besides the buildings were probably of a substantial value from the standpoint of the tenants, who were apparently poor men. Taking all these facts into consideration the conclusion of the lower appellate Court seems to be amply justified in the light of the principles laid down in *Abdul Hakim Khan* v. *Elahi Bakhsh Shah* (1). The conclusion would also appear to be supported by the decisions in *Caspersz* v. *Kader Nath* (6), which was quoted with approval in *Afzal-un-nissa* v. *Abdul Karim* (7), *A. I. R.* 1924 *Cal.* 465 and *Nabin Chandra* v. *Bandi* (8), which have been cited on behalf of the respondents, and where an inference as to permanency of tenure was based on similar evidence. I dismiss the appeal with costs.

A.L./R.K. *Appeal dismissed.*

(6) [1901] 28 Cal. 738=5 C.W.N. 858.
(7) A.I.R. 1919 P.C. 11=47 Cal. 1=46 I.A. 131 (P.C.).
(8) A.I.R. 1923 All. 486.

A. I. R. 1928 Lahore 722

BROADWAY AND AGHA HAIDAR, JJ.

D. Johnstone—Defendant—Appellant.

v.

Mt. Jan Bibi and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 1293 of 1927, Decided on 29th May 1928, from decree of Addl. Dist. Judge, Lahore, D/- 22nd April 1927.

(a) *Promissory note—Pro-note signed by one partner alone but headed by the partnership name—Form of document showing the liability of that partner—Other partner was held not liable.*

A pro-note was headed "The Lahore Cotton Baling Press" and signed by one *G* alone. A suit was brought against *G* and *H* alleging that *H* was the partner and thus liable.

Held: that the form of the document showed that *H* was not liable: *A. I. R.* 1918 *P.C.* 146, *Relied on.* [P 724 C 1]

(b) *Civil P. C., S.* 100—*Correctness of conclusions drawn from a finding of fact is a question of law.*

Where correctness of the conclusions drawn from a finding of fact is questioned, it involves a question of law and as such a second appeal is maintainable. [P 723 C 2]

Ram Lal Anand—for Appellant.

Jai Gopal Sethi—for Respondents.

Broadway, J.—This second appeal has arisen in the following circumstances:

On 27th June 1923 one C. P. Gupta executed a pro-note in favour of Mrs. Aziz Dutta of the Punjab Ice Company, Lahore, for Rs. 4,000. The pro-note was later endorsed by Mrs. Aziz Dutta in favour of her sister Jan Bibi on 9th July 1923, and on 8th May 1925 Jan Bibi instituted this suit for the recovery of Rs. 4,880 being the principal and interest due on the above pro-note. The suit was instituted against the executant of the pro-note, Mr. C. P. Gupta, and Mr. D. Johnston, it being alleged that these two defendants were partners, and that Mr. Gupta had signed the pro-note on behalf of the said partnership. The partnership was denied by Mr. Johnston and it was also pleaded that the pro-note itself was not executed on behalf of the partnership but by Mr. Gupta on his own account. The trial Court held that Mr. Gupta had signed this document on his own account and not on behalf of any partnership. He found that as a matter of fact Mr. Johnston and Mr. Gupta were partners in a concern known as the Lahore Cotton Baling Press. The plaintiff, Mt. Jan Bibi, as the holder in due course of this negotiable instrument was granted a decree for the amount claimed against Mr Gupta alone. Not satisfied with this decree the plaintiff preferred an appeal to the District Court, asking that the decree should be granted against Mr. Johnston as well. The Additional District Judge on 22nd April 1927 accepted the appeal and made Mr. Johnston liable under the decree. Against this decree Mr. Johnston has preferred this second appeal which has been argued on his behalf at considerable length by Mr. Ram Lal Anand, and we have heard Mr. Jaigopal Sethi at equal length on behalf of Mt. Jan Bibi

Mr. Sethi raised a preliminary objection to the effect that no question of law was involved. After being heard for some time, however, he was constrained to admit that there was a question of

law involved and we thereupon proceeded to hear the case.

Now, it seems to me that two questions of law emerge from the matters agitated at the Bar. First, whether the conclusions arrived at on the findings of fact by the Additional District Judge are correct and ; secondly, whether the inferences which have been drawn by the learned Additional District Judge with regard to the presumptions to be raised on account of the non-production of certain account books were warranted. The second matter is of minor importance and does not really go to the root of the case. I think it only necessary here to say that in my judgment the learned Additional District Judge was wrong in drawing the inferences that he did. It appears that Mr. Johnston and his clerk Nanak Chand had been summoned as witnesses by the plaintiff together with certain documents including the account books in question. It was pointed out on behalf of Mr. Johnston that the documents and the account books called for were not in his possession, being as a matter of fact exhibits in certain other cases that were pending in other Courts. The plaintiff apparently took no further steps to obtain these documents and finally gave up both Mr. Johnston and Nanak Chand. Later Mr. Johnston and Nanak Chand went into the witness-box as witnesses for Mr. Johnston himself. In these circumstances I consider that no presumption could legally have been drawn either as to the contents of those documents or against Mr. Johnston from their non-production.

The real point, however, is whether the learned Additional District Judge is right in concluding that Mr. Johnston is liable on the pro-note. The major portion of the arguments addressed to us has been directed to the question of the liability of one partner for the action of another partner, either in a partnership under the Contract Act or in the case of a partnership under the Hindu Law. It seems to me, however, that the question is really concluded by the decision of their Lordships of the Privy Council in *Sadasuk Janki Dass* v. *Kishan Pershad* (1). As stated by their Lordships of the Judicial Committee in that judgment at p. 667 :

> The real point for decision is whether the hundis have been so drawn that in form they bind the Maharaja. If they have, it will then become necessary to determine whether in fact Mohan Lal had authority for the purpose. If they have not, this question of agency does not, and cannot arise in the present suit.

As in that case so in the one before us, the first and the real point for decision is whether this pro-note has been so drawn that in form it binds Mr. Johnston as a partner of the Lahore Cotton Baling Press. Now, the learned Additional District Judge has found the following facts which we are unable to interfere with : He has found that (1) the pro-note is not written on any printed form ; (2) it is all typed and signed by Gupta by his own hand (3) ; at the top of the pro-note it is written : " The Lahore Cotton Baling Press. Lahore, dated 27th June 1923 ;" (4) the third line is Rs. 4,000 ; (5) below the fourth line commences " on demand I promise to pay ;" (6) it is signed " C. P. Gupta ;" and (7) no further designation of the executant is given below his signatures. On these findings he proceeds to say :

> The pro-note on the whole clearly shows that it was executed by Gupta in his managing capacity of the Lahore Cotton Baling Press, otherwise there was absolutely no necessity for him to insert the name of the press at the top of the pro-note.

He then goes on further to say :

> If the words " The Lahore Cotton Baling Press " had been inserted just below the signatures of Gupta, then surely there would have been no reason for the respondent to assert that it was not executed on behalf of the press. To my mind the pro-note is perfectly clear as having been executed on behalf of the press. Mr. Gupta has adopted this commercial form of a pro-note, as is evidenced by putting the figure " Rs. 4,000 in the third line at one corner."

Now, it is only necessary to point out here that, as was held by their Lordships of the Judicial Committee in *Ram Gopal* v. *Shams Khatun* (2), a Court of second appeal is entitled to examine the conclusions arrived at by the first Court of appeal on the facts found. It becomes, therefore, necessary to examine the document which is in the following terms :

> The Lahore Cotton Baling Press.
>
> Lahore, dated 27th June 1923.
>
> Rs. 4,000.
>
> On demand I promise to pay to Mrs. Aziz Dutta, of the Punjab Ice Company, Lahore, or order the sum of rupees four thousand only for value received with interest at the rate of rupee one per cent per month from this date to the date of payment in full.
>
> C. P. Gupta.

(1) 46 Cal. 663=A. I. R. 1919 P. C. 140=46 I. A. 93 (P. C.).

(2) [1893] 20 Cal. 93=19 I. A. 228 (P. C.).

As pointed out, it is headed "The Lahore Cotton Baling Press," immediately below which come "Lahore, dated 27th June 1923." As noted by the learned Additional District Judge, had Mr. Gupta placed the words "The Lahore Cotton Baling Press" immediately below his signature there would have been only one conclusion to come to. I am unable to agree with the learned Additional District Judge that the fact that this piece of paper is headed : "The Lahore Cotton Baling Press" necessarily raises an inference that Mr. Gupta was acting on behalf of that press. An examination of the document leads me to the conclusion that the heading was given by Mr. Gupta merely as his address. In *Sadasuk Janki Das* v. *Krishan Pershad* (1) the hundi in question is to be found given in extenso in the judgment delivered by Lord Buckmaster. It will be seen that the hundi was headed "By order of Sirkar, may his happiness increase," and the executant of that hundi, Mohan Lal, signed giving his designation as "Acting Superintendent of the Private Treasury of his Excellency Sir Maharaja, the Prime Minister of H. H. the Nizam." It was held there by their Lordships of the Judicial Committee that that was not sufficient to make it primarily appear that the Maharaja was responsible for the hundi in the suit brought on the document.

Similarly, it seems to me that it is not necessary to go into the question whether Mr. Johnston and Mr. Gupta were partners, or whether the money had been repaid as Mr Gupta alleged, or whether Mr. Gupta had the power as a partner to sign on behalf of the partnership and thus bind Mr. Johnston. for it seems to me that on the authority of their Lordships of the Judicial Commitee those questions can only be gone into when the form of the document shows that Mr. Johnston is bound by it. Whether Mr. Gupta had other dealings with Mrs. Aziz Dutta is entirely immaterial as also is the question whether he was carrying on any other dealing on his own account. The document, as it stands, does not attract the liability of Mr. Johnston on the face of it and in my judgment Mr. Gupta and Mr. Gupta alone is liable under this document.

I would, therefore, accept this appeal, set aside the order of the learned Additional District Judge and restore the decree passed by the trial Court. The appellant will get his costs throughout.

Agha Haidar, J.—I agree.

A.L./R.K. *Appeal accepted.*

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* A. I. R. 1928 Lahore 724

SHADI LAL, C. J., AND COLDSTREAM, J.

Sullah—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 239 of 1928, Decided on 11th May 1928, from order of Sess. Judge, Shahpur, D/- 3rd February 1928.

(a) Criminal Trial — Identification marks told to the witness before identifying the accused—Subsequent identification cannot be considered.

Where an accused has been admitted to have been identified by a witness after being told the identification marks of the accused by the police before he was required to identify him in jail, such an identification cannot be considered in proving the guilt of the accused.

[P 725 C 2]

* *(b) Criminal P. C., S. 164—Incomplete challan put by police to avoid S. 164—Magistrate examining accused under S. 342—Accused subsequently withdrawing his admission—His confession was excluded—Criminal P.C., S. 342.*

A was charged of murder. Before police investigation had been concluded, an incomplete challan was placed before the committing Magistrate who, after recording the evidence of some witnesses, examined the prisoner under S. 342, wherein *A* admitted his participation in assault. But when he was again examined he denied having committed the murder and attributed his previous statement to a promise of pardon by the police and also to the ill-treatment by the investigation officer. It was found that the incomplete challan was produced with the object of avoiding mandatory provisions of S. 164.

Held: that an attempt by the police to get over the mandatory provisions of S. 164 must be deprecated and such a confession must be excluded from consideration. [P 726 C 1]

Mukand Lal Puri—for Appellant.

Des Raj Sawhney—for the Crown.

Shadi Lal, C. J.—The appellant Sullah, an Abir of Chak No. 452 in the District of Jhang, has been found guilty of the murder of one Salehon, an Ahir of the same Chak: and has been sentenced, under S. 302, I, P. C., to suffer the penalty of death.

The story for the prosecution is briefly to the following effect:

The deceased's cousin Luqman, was suspected of having contracted a liaison

with Mt. Bakhan, the wife of the prisoner Sullah. This illicit intimacy was resented not only by the husband but also by his cousin Mudai. On the morning of 21st October 1927, Mudai and Sullah were working in their fields when they saw Luqman going to Jhang. They then decided to take their revenge on Luqman when he returned from Jhang, and they accordingly concealed themselves behind some bushes. In the afternoon Luqman was seen coming back from Jhang, riding a mare, with his cousin Salehon sitting behind him. Thereupon, Sullah and Mudai emerged from their place of concealment and attacked Luqman and Salehon. Luqman received a blow with a dang on his forehead but he galloped off and managed to make good his escape. His cousin Salehon, however, fell down and was done to death by the prisoner and Mudai. Luqman, after reaching his village, proceeded to the police station at Mochiwala, three miles away, and lodged a report in which he charged six persons with having participated in the assault and declared that they were all armed with dangs.

It is to be observed that the evidence given by Luqman in Court materially differs from the story related by him at the police station, and we do not think that his testimony can be accepted at its face value. Mudai, who was one of the assailants, has turned King's evidence and appeared as a witness for the prosecution. In his statement before the Committing Magistrate he implicated his cousin Sullah but resiled from that statement before the Sessions Judge and explained that the version given by him to the Magistrate was the result of tutoring received by him from the Deputy Superintendent of Police.

On the morning of 24th October 1927 the prisoner conducted the investigating party to his cotton field from which he recovered a dang and a hatchet. The hatchet was, on serological examination, found to be stained with human blood. There is also the evidence of a boy, Ghulam Muhammad, aged 13, to the effect that on the evening of 21st October 1927, he had seen two persons washing the hatchet at a water pool close to the scene of the occurrence; and, on 26th October 1927, when a parade in the jail was held, he identified the prisoner and the approver out of a group of 15 or 16 persons as the men whom he had seen washing the hatchet on the evening in question. The witness, however, admitted in his statement before the Committing Magistrate that the police had told him the identification marks of both the persons before he was required to identify them in jail. In view of this admission the evidence of the boy does not deserve any serious consideration.

Our attention has also been invited to the evidence of the head constable Nur Muhammad, who claims to be an expert tracker. He visited the scene of the occurrence on 22nd October 1927, and observed the footprints of three persons. He admits that he did not cover these footprints, and yet, on the following day, when he saw the tracks of seven persons, including the prisoner and the approver who had been asked to walk in his absence, he declared that the footprints of the approver and the accused tallied with those found on the spot. Upon the record as it stands, we are unable to test the veracity of this witness; and it would be unsafe to accept this *ipse dixit* without corroboration that the tracks found on the spot were those of the prisoner and his cousin Mudai.

Lastly, we have the confessional statement made by the prisoner before the Committing Magistrate. It appears, that on 27th October 1927, when the police investigation had not yet concluded, an incomplete chalan was placed before the Magistrate, and after recording the evidence of three witnesses, namely, the boy, Ghulam Muhammad, Sardar Bakhsh (who deposed to the recovery of the hatchet from the prisoner's field, and the approver Mudai, the Magistrate examined the prisoner under S. 342, Criminal P. C. In that statement the accused admitted his participation in the assault, but when he was examined again by the Committing Magistrate on 17th December 1927, he denied having committed the murder and in his written statement filed two days afterwards he attributted his first statement to a promise of pardon made by the police and also to the ill-treatment to which he was subjected by the investigating officer. The police produced the incomplete chalan evidently with the object of getting the confession recorded by the Committing Magistrate, and thereby avoiding the mandatory provi-

sions of S. 164 Criminal P C., relating to the recording of a confession by a Magistrate. As the police had not completed their investigation, they should have adopted the straightforward course of producing the accused before a Magistrate and asked him to record the confession under S. 164 after observing the precautions prescribed by that section. Sub-S. (3), S. 164 lays down in clear terms that a Magistrate shall, before recording a confession, explain to the person making it, that he is not bound to make a confession, and that if he does so it may be used as evidence against him; and that no Magistrate shall record any such confession unless upon questioning the person making it, he has reason to believe that it was made voluntarily. Now, if these precautions had been observed, the prisoner might have explained to the Magistrate that he was making the confession, not voluntarily, but under the pressure of the police or in pursuance of a promise of pardon made by them. We must deprecate this attempt made by the police to get over the mandatory provisions of the law contained in S. 164, Criminal P. C., and we exclude the alleged confession from consideration.

Coming now to the remaining material on the record, we find that the approver has retracted the statement made by him before the Committing Magistrate and that his evidence before the Sessions Judge does not, in any way, implicate the prisoner. As regards the evidence of Luqman, it is sufficient to say that it differs in material particulars from the report which he dictated at the police station shortly after the murder and also from the story related by the approver before the Magistrate. It is true that the prisoner produced from his field a hatchet, on which human blood was found by the Imperial Serologist; but this discovery, coupled with the unsatisfactory evidence of Luqman, cannot be regarded as a certain foundation which can support the conviction for murder.

We may have a moral conviction that Sullah participated in the fatal assault on Salehon, but moral conviction can never be a substitute for legal proof. The evidence produced against the prisoner appears to be tainted, and cannot sustain the conviction.

Upon an examination of the entire material before us I have reached the conclusion that the guilt has not been brought home to the accused. I would accordingly accept the appeal, and setting aside the conviction and the sentence, direct that he be released forthwith.

Coldstream, J.—I concur.

A.L./R.K. *Conviction set-aside.*

A. I. R. 1928 Lahore 726

TEK CHAND AND BHIDE, JJ.

Budhu Ram—Plaintiff—Appellant.

v.

Uttam Chand and *others*—Defendants—Respondents.

First Appeals Nos. 2255 and 867 of 1923, Decided on 23rd January 1928, from decree of Dist. Judge, Dera Ghazi Khan, D/- 4th June 1923.

(a) *Pre-emption—Sale or mortgage—Real intention of the parties when entering into the transaction is the criterion—Intention has to be determined on all the available material including the terms of the document.*

The criterion, for deciding the question whether a certain mortgage was a sale, is the real intention of the parties when entering into the transaction, and it has to be determined on all the available material including the terms of the document itself ; 100 *P. R.* 1898 (*F.B.*), *Rel. on.* [P 727 C 1]

A mortgagor who mortgaged his land admitted that the transaction was in reality a sale. The terms of the mortgage-deed were so onerous as to render the redemption impossible. But it was also found that there was no necessity to disguise the transaction as a mortgage for defeating the right of pre-emption of a third proprietor because the mortgagees were themselves the proprietors in the village.

Held : that the mortgage was not a sale in spite of the admission of the mortgagor to the contrary : 78 *P. R.* 1904, *Rel. on*

(b) *Evidence Act, S.* 18—*Admission.*

The admission, if gratuitous, can be withdrawn at any time and therefore such a confession, though against the interest of the party making it, is of little value : 78 *P. R.* 1904, *Rel. on.* [P 728 C 1]

A. N. Chona and *A. R. Khosla*—for Appellant.

G. C. Narang and *G. R. Khanna*—for Respondents.

Bhide, J.—This was a suit for pre-emption with respect to a mortgage of 183 kanals 13 marlas of land for Rs. 6,400 executed by defendant 1 in favour of defendants 2, 3 and 4 on the allegation that the transaction was in reality a sale and had been disguised as a mortgage merely to defeat the right of pre-emptor.

The learned District Judge who tried the suit found that the plaintiff had failed to establish his allegation and dismissed the suit. The plaintiff has appealed.

The sole point in appeal is whether the transaction in dispute was in reality a sale. The criterion for deciding the question is, as laid down in *Zafaryab Khan* v. *Fatteh Ram* (1), the real intention of the parties when entering into the transaction, and has to be determined on all the available material including the terms of the document itself. The onus lay heavily on the plaintiff to establish beyond reasonable doubt that the parties did intend permanent transfer at the time when the transaction was entered into.

The learned counsel for the appellant relied mainly on : (a) the terms of the mortgage-deed which he alleged to be so onerous as to render redemption virtually impossible; (b) the evidence of the mortgagor himself to the effect that the transaction was in reality a sale; and (c) the evidence relating to the market price of the land which was alleged to be much less than the amount for which the land was mortgaged.

As regards the first contention stress was laid on the following terms in the mortgage-deed, namely, No. (1). The mortgage was to be for twelve "pur abad" years, the term "pur abad" being defined as a year in which at least two-thirds of the land was cultivated (2). The mortgagees had the right to get the land partitioned (3). The mortgagees were entitled to take from it loppings, etc., of the trees and cut wood for agricultural implements (4). The mortgagees had the right to construct a cattle shed and also to construct a new well and realize the costs from the mortgagor at the time of redemption (5). Out of the mortgage debt Rs. 2,400 were to carry interest at annas 15 per cent per mensem.

As regards No. 1, it was pointed out (vide Ex. P. 5) that during the years from 1916 to 1923 the land was cultivated to the extent of two-thirds of the area only in one year. But the mortgage itself was effected in 1920 and it is obvious that the mortgagees cannot be held responsible for want of adequate cultivation during the years prior to the mortgage which may have been due to a variety of causes including scarcity of rain-fall to which the learned District Judge has referred. The present suit for pre-emption was instituted within a year after the mortgage and hence the mortgagees may have been apathetic about cultivation thereafter. I do not, therefore, think that any reasonable inference can be drawn from this evidence either as to the state of normal cultivation or as to the intention of the parties. It was argued that it was possible for the mortgagees to render redemption practically impossible merely by cultivating less than two-thirds of the mortgaged area, but if the mortgagees deliberately abused this condition, in this manner the Courts would probably not hesitate to treat it as a mere "clog" on the equity of redemption.

The right to get the land partitioned seems to be of little significance and will not affect in any way the mortgagor's title. The right to enjoy fruit or cut trees for agricultural implements or even the right to construct cattle shed which has been given to the mortgagees does not appear to be of a very unusual character. As regards the right to sink a well, it was urged that wells are very expensive in the Dera Ghazi Khan District and the cost of a new well which will have to be eventually paid by the mortgagor would practically render redemption impossible. There appears to be no evidence on the record about the cost of constructing a new well in the Dera Ghazi Khan District, but, if it is really prohibitive it is unlikely that the mortgagees will incur the expense. It seems to me that all these conditions may well have been agreed to merely to secure to the mortgagees full benefit from the mortgaged land during the period of the mortgage and they do not afford any strong indication as to the intention of the parties. Lastly, the condition as regards the interest to be paid on Rs. 2,400 also cannot be considered to be particularly onerous. Out of the mortgage debt Rs. 4,000 were to be paid to prior mortgagees and interest was paid only on the extra sum of Rs. 2,400 paid to the mortgagor. The learned District Judge has pointed out that the rate of 15 annas per cent. per mensem which was fixed in this case was a little less than the normal rate prevailing in the case of loans to Hindu agriculturists in the Dera Ghazi Khan District.

It seems to me that the conditions of the mortgage-deed, even if they be con-

(1) [1898] 100 P. R. 1898 (F.B.).

sidered to be onerous in some respects, are not so unreasonable as to justify an inference that the parties contemplated a permanent transfer and intended to render redemption impossible. On the contrary the mortgage-deed makes not only the mortgaged property but also the person and other property of the mortgagor liable for the mortgage debt and this condition certainly appears to be a strong indication that the parties did not contemplate at the time that the mortgagor was severing his connexion with the mortgaged land for good, or was putting an end to his liability for the mortgage debt for ever.

The evidence of the mortgagor to the effect that the transaction was in reality a sale, though not excluded by the provisions of S. 92, Evidence Act, does not appear to me to be reliable in this case. The learned District Judge has pointed out that the mortgagor's evidence, which was taken on interrogatories, could not be secured till the plaintiff himself went to Jammu where the mortgagor was living. The mortgagor appears to have given his evidence under the influence of the plaintiff as he has gone to the length of admitting even plaintiff's allegation in the plaint that he, i. e., the mortgagor, was a debauchee and a man of bad character. The mortgagor stated that a verbal agreement as to the sale transaction was made in the presence of three persons named Lalu, Bala and Daulat Ram. It seems unlikely that if the parties were discussing a fraudulent transaction they would have done so in the presence of strangers. Out of the witnesses named only Lalu, who is a relation of the plaintiff, has supported him, while Daulat Ram, who was produced as a witness by the defendant denied his presence. It was argued that the mortgagor's admission being against his own interest should be given great weight; but as pointed out in *Muhammad Umar* v. *Kirpal Singh* (2), the admission being gratuitous could be withdrawn at any time. It is possible that the mortgagor, thinking that the terms of the mortgage were more onerous than he realized at first, was induced to support the plaintiff's case. The plaintiff's position was that the mortgagor sold his land because he had to leave his village on account of his having incurred the displeasure of the baradari owing to his abduction of a Brahman widow. But it appears from the mortgagor's own evidence that he has still valuable *virt* land and house property in his village and his sons are living there.

The evidence as to the market price of the land is of little value. No documentary evidence in the shape of title-deeds was produced. In the abstract of sales prepared by the village patwari for the years 1915-20, no details as to the classification of land or its situation are given. The witnesses produced have made widely divergent statements as to the price of the land without giving any definite reasons. No conclusion as to the market price of the land could be based on such evidence. Moreover, plaintiff's contention was that the land was worth only about Rs. 80 per bigha. According to this rate the market price of the land in suit would be about Rs. 3,660. But the land was admittedly mortgaged in favour of other persons for Rs. 4,000 before the transaction now in dispute. Plaintiff's allegations as to the market price of the land then seem obviously unreliable.

The learned counsel for the appellant has cited *Parma Nand* v. *Airapat Ram* (3) and *Anwar Hasan* v. *Umatul Karim* (4) as authorities in his favour; but these rulings appear to be clearly distinguishable from the present case. In *Parma Nand* v. *Airapat Ram* (3) there was independent documentary evidence in the shape of a bahi entry to show the real nature of the transaction. In *Anwar Hasan* v. *Umatul Karim* (4) there were a number of circumstances which do not exist in the present case. The property had, for example, been already offered for sale in that case. The mortgagor was 80 or 90 years of age and yet the term of mortgage was fixed at 32 years. The mortgagee was given the right to erect new buildings on a site situated in a town, while the mortgagor had not even the right to look into the mortgagee's expenditure on the buildings.

The facts of the present case appear to be analogous in several respects to those in *Muhammad Umar* v. *Kirpal Singh* (2) in which, in spite of the mortgagor's admission that the transaction was a sale and the terms of the mortgage-deed which were somewhat onerous, it was held that

(2) [1904] 78 P. R. 1904.

(3) [1899] 20 P. R. 1899.

(4) [1906] 145 P. R. 1906=109 P. L. R. 1907.

the transaction was not a sale. In the present case there is the further important fact that the parties had really no necessity for "disguising" the transaction as a mortgage. The plaintiff has based his right of pre-emption merely on the fact that he is a proprietor in the village; but two of the mortgagees are also admittedly proprietors in the village and if the object was merely to defeat plaintiff's right of pre-emption this could easily have been achieved by executing a sale in favour of these persons only.

I would accordingly uphold the finding of the learned District Judge and dismiss the appeal with costs.

Tek Chand, J.—I agree.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 729

HARRISON AND DALIP SINGH, JJ.

In the matter of Rattan Chand-Duni Chand.

Civil Reference No. 34 of 1927, Decided on 21st February 1928, made by Offg. Commissioner, Income-tax, Lahore, D/- 18th October 1927.

Income-tax Act, S. 23 (4)—*Return made by signing of a prescribed form with all various columns left blank and the word "blank" written against the item of "total," is no return under S.* 23 (4).

A return made by the signing of a prescribed form without any date with all the various columns left blank and the word "blank" written against the item "total" accompanied by a covering letter in which it was explained that the assessee carried on no business in the place, is no return for the purposes of assessment under S. 23 (4). [P 729 C 2]

Mehr Chand Mahajan—for Appellant.

Jagan Nath Aygarwal—for Income-tax Commissioner.

Judgment.—The question referred to by the Income-tax Commissioner, is as follows:

Whether a "return" such as was made in this case, namely, the signing of a prescribed from without any date with all the various columns left blank and the word "blank" written against the item "total," accompanied by a covering letter in which it was explained that the firm in question carried on no business in Amritsar, is "no return" for the purposes of assessment under S. 23 (4).

Section 22 (1) says that the principal officer of every company shall prepare a return, in the prescribed form, which is sent to him by the income-tax authorities, and verified in the prescribed manner, of the total income of the company during the previous year.

Counsel contends that, in the first place, the word "blank" must be read as having a totally different meaning from that to be found in the dictionary, that it means "nil," that the absence of the date is wholly immaterial as it is the business of the Income-tax Department to look up the registers and other papers and find out the year referred to in the notices and fill up the lacunae, that the signature on the form together with the verification somehow supplied the missing details and made the form no longer a blank form, but one sufficiently filled up to be a "return." The word "blank" is explained in the Oxford Dictionary as, not written or printed on (of paper); (of document) with space left for signature or details.

Blankness is the negation of any entry and how that which is blank can be said to constitute a "return" containing all or any necessary facts, figures and details, appears to us impossible to understand. In our opinion this form was what it said it was, a blank form, and the writing of the word "blank" merely emphasized and drew a attention to the fact that nothing had been shown in any column and that the verification was meaningless as verifying nothing at all. But counsel urges, the covering letter must be read with this blank form and, if the necessary figures are to be found in that covering letter, it may be said that the necessary return has been made in the prescribed form, the information there called for having been supplied. Even if this view were accepted we find that the covering letter does not supply the information, let alone supplying it in the prescribed form. It merely challenges the rights of the Income-tax Officer to call for a return at all and does not say that the addressee had no income during the year in question, or even that he had no assessable income. Even if we read the two together, therefore, as counsel would have us do, we find that there had been no return in the prescribed form and that the action taken by the income-tax officer was quite correct.

We answer the question accordingly and hold that there has been no return. No order as to costs. Rs. 100 have already been deposited by the unsuccessful petitioner and have not been returned.

N.K. *Reference answered.*

A. I. R. 1928 Lahore 730

JAI LAL, J.

Ladha Ram—Plaintiff—Appellant.

v.

Rallaram and *others*—Defendants—Respondents.

Second Appeal No. 2386 of 1927, Decided on 22nd March 1928, from decree of Dist. Judge, Gujranwala, D/- 11th May 1927.

(a) *Arbitration—Suit not maintainable as to subject-matter of arbitration—No decree can be passed on the award.*

If a Court is not initially competent to entertain a suit in respect of the dispute which is the subject-matter of the reference to arbitration, it cannot pass a decree on an award made as a result of such reference by the parties whether before the suit was instituted or during its pendency. In the latter case the Court is incompetent to refer the matter to arbitration. [P 730 C 2]

(b) *Civil P. C., Sch. 2, R. 16 (2)—Court having no jurisdiction—Appeal lies.*

The rule prohibiting an appeal against a decree based on and in accordance with an award does not apply to a case where the objection is to the inherent jurisdiction of the Court to entertain the suit. [P 730 C 2 P 731 C 1]

(c) *Civil P. C., S. 9—Rights of Acharajs inter se can be adjudicated upon and enforced by civil Courts.*

A Court cannot control the selection of an acharaj by the jajman and if it transpires that that the jajman has chosen a particular acharaj to the exclusion of another, the Court will not give any decree so as to affect such a selection; but as between the acharajs themselves in the absence of an express selection by the jajmans to whom it may be immaterial whether the brit is received by one or the other, the rights of the acharajs inter se can be adjudicated upon and enforced by the civil Courts: 96 *P. R.* 1911, *Expl.* [P 731 C 2]

Mehr Chand—for Appellant.

Nand Lal—for Respondent 1.

Judgment.—The appellant instituted a suit against the defendants, his brother and first cousins, for a declaration of his right to realize the usual brit from the jajmans and an injunction against the defendants restraining them from interfering with such right. The parties are acharajs and it was alleged by the plaintiffs that the right to recover the birt in suit really belonged to one Shankar Nath who had mortgaged it to the plaintiff, but that the defendants were illegally interfering and were realizing the brit themselves. The plea of the defendants was that the mortgage by Shankar Nath was not to the plaintiff in his individual capacity but as representative of the joint Hindu family to which the plaintiff and the defendants were the members. On these respective allegations the parties went to trial. The dispute, however, was referred to arbitration and the award of the arbitrator being in favour of the plaintiff, objections were taken by the defendants to the validity thereof on the ground of alleged enmity of the arbitrator with the defendants and also on the ground that the dispute between the parties was not cognizable by the civil Court. The trial Court repelled these objections and decreed the suit. The District Judge, however, on appeal dismissed it on the ground that the right to recover birt from the jajmans was not "property" as that term is defined in law and that therefore the suit was not cognizable by the civil Courts. The plaintiff has consequently presented this second appeal.

The first ground urged on behalf of the appellant is that the dispute having been referred to arbitrator and the award made on such reference by the arbitrator the only ground which could be raised against the validity of the award was some illegality apparent on the face thereof or misconduct on the part of the arbitrator. In reply, counsel for the respondents cited 80 *P. R.* 1909 in support of his contention that this ground has no force. In that case an application had been made to file an award and the first Court had ordered that same be filed, and had passed a decree thereon. On appeal, however, it was found that the award was not in existence at the date of the presentation of the application to file it. The application was therefore dismissed. The facts of the reported case are distinguishable from the present case, still I am inclined to hold that if the Court is not initially competent to entertain a suit in respect of the dispute which is the subject-matter of the reference to arbitration, it cannot pass a decree on an award made as a result of such reference by the parties whether before the suit was instituted or during its pendency. In the latter case the Court is incompetent to refer the matter to arbitration.

Another objection taken by the appellant's counsel was that the decree of the trial Court being in accordance with the award no appeal lay with the District Judge. In my opinion the rule prohibiting an appeal against a decree based on

and in accordance with an award does not apply to a case like the present where the objection is to the inherent jurisdiction of the Court to entertain the suit.

On the merits, however, the contention of the appellant is that the suit was cognizable by the civil Courts and it was in the first instance fought by the parties on that assumption. It is no doubt true that the latest view of the Chief Court of the Punjab is that a claim to realize brit from the jajmans is not property as that term is understood in legal parlance and therefore that a suit to establish such a right is not entertainable by the civil Courts. Reference in this connexion may be made to *Gurdas* v. *Bhag* (1) In that case it was held that the relationship between a jajman and an acharaj is purely of a voluntary nature and that a decree declaring the right of an acharaj to receive brit from a particular jajman to the exclusion of certain other acharajs and for an injunction against the latter restraining them from receiving such brit would practically amount to controlling the right of the jajman to select his own acharaj which the Court is not entitled to do and therefore that a decree in such a case would be practically valueless, the evasion of which would be the easiest task, and consequently that no such decree could be given by the civil Courts but the following remark made by the learned Judge at p. 342 of the report would show that they considered that under certain circumstances the plaintiff may be granted a decree:

> Apparently defendants admitted that the suit would lie for an injunction restraining them from visiting the houses of jajmans during specified days of the month. It certainly would, if defendants had covenanted with plaintiffs not to visit jajmans during those days, but in the absence of any, such agreement (and I believe none such was pleaded) I consider that the objections urged to the grant of a declaratory decree are equally fatal to the grant of an injunction. Before an injunction can be granted under S. 54, Specific Relief Act, the plaintiff's case must disclose a breach, whether actual or threatened, by the defendant of some present legal right vested in the plaintiff. But plaintiffs have no legal right to brit vested in them and therefore they cannot claim an injunction to restrain a threatened breach of that right.

Now, it will be observed that the learned Judges hold that if there is an agreement or an arrangement between the acharajs to visit certain jajmans on certain specified days (which implies a right to recover brit from the latter), that is to say, an agreement or arrangement that one family to receive brit from a particular jajman and the rest from others, then an injunction may be granted to restrain the parties from breaking such an agreement or arrangement. Ordinarily an arrangement of the nature mentioned above between the acharajs is based on actual contract or on custom and I am unable to see why a Court should not be able to enforce the right of one acharaj against the other when it is based on custom if it can enforce it in the case of an agreement. I quite agree that a Court cannot control the selection of an acharaj by the jajman and if it transpires that the jajman has chosen a particular acharaj to the exclusion of another, the Court will not give any decree so as to affect such a selection; but as between the acharajs themselves, in the absence of an express selection by the jajmans to whom it may be immaterial whether the brit is received by one or by the other there is no reason why the rights of the acharajs inter se could not be adjudicated upon and enforced by the civil Courts.

Some judgments of the Bombay High Court and of the Judicial Commissioner of Sind were cited by the appellant's counsel. They have, however, no application to the present case, because in Bombay and Sind it has been held that the right of the hereditary priests to receive certain customary dues is enforceable even against the jajmans and cannot ordinarily be annulled by the latter which view has never been followed in this Court and is opposed to the recognized practice as it prevails here.

Now in the present case there is no question of a choice having been made by the jajman, and it appears that from this point of view it is immaterial whether the plaintiff receives the brit or the defendants. The person who is really entitled to it is Shankar Nath whose right is not denied either by the plaintiff or the defendants and the contest between the parties is as to the character in which the plaintiff took mortgage from him. It, therefore, seems that by declaring the plaintiff's right and restraining the defendants from interfering therewith this Court will not in any way

(1) [1911] 96 P.R. 1911=216 P.L.R. 1911=11 I. C. 231=143 P. W. R. 1911.

control the choice of the jajman, but will merely decide the dispute between the parties. I consider that there can be no legal objection to the decree prayed for by the plaintiff in this case and if necessary a proviso can be incorporated therein that it would not in any way affect the right of the jajman to choose his acharaj, though he not being a party to this litigation would not under any circumstances be bound by the decision in it. I hold, therefore, that having regard to the nature of the present suit, the pleadings of the parties and the fact that they referred the dispute to arbitrator who decided in favour of the plaintiff, there was no legal objection to the grant of the decree to the plaintiff in this case.

I accept this appeal and setting aside the decree of the District Judge, restore the decree of the trial Court. The respondents will pay the costs of the appellant throughout.

A.L./R.K. *Appeal accepted.*

A. I. R. 1928 Lahore 732

ZAFAR ALI AND DALIP SINGH, JJ.

Gurdial Singh—Defendant — Appellant.

v,

Diwan Chand and others — Plaintiff and Defendants—Respondents.

First Appeal No. 959 of 1923, Decided on 26th April 1928, from preliminary decree of Sr. Sub-Judge, Amritsar, D/- 26th January 1923.

Civil P. C., O. 2, R. 2—First suit for recovery of rent purporting to be interest on a mortgage—Subsequent suit for principal and balance of interest is not barred.

A mortgaged his houses with *B*. He then executed a lease-deed of the mortgaged houses in favour of *B*. The rent was to be accounted for in the interest account of the mortgage. *B* sued *A* for the recovery of rent and later on for the principal and balance of interest.

Held : that the two transactions were separate and O. 2, R. 2 did not bar the subsequent suit : *A. I. R.* 1922 *P. C.* 412, *Dist.*

[P 733 C 2]

Jagan Nath Aggarwal and *Jiwan Lal Kapur*—for Appellant.

Sheo Narain and *Din Dayal Khanna*—for Respondents.

Dalip Singh, J.—In this case the plaintiff brought a suit for the recovery of principal and interest due on two registered mortgage-deeds dated 28th May 1907, and the 23rd June 1910 respectively, executed in favour of his grandfather and of himself. The rate of interest in both deeds was annas 10 per cent per mensem. The two houses Nos. 198 and 172, were hypothecated in the first deed for Rs. 2,800 and these two houses and a third house No. 185, were hypothecated in the second mortgage-deed for Rs. 1,700.

The trial Court struck three issues, but the only issue contested in the trial Court was whether O. 2, R. 2, Civil P. C., barred the claim, because the plaintiff had obtained a decree on a rent deed dated 23rd June 1910 and it was contended that the rent-deed was only a machinery for recovery of interest on the mortgages sued on. On 23rd June 1910 the defendant had executed a lease-deed in favour of the plaintiff for Rs. 28-2-0 rent per mensem for a period of 11 months for the three houses forming the subject of the two mortgages. It is admitted that this rent was exactly equal to the interest due on the two mortgages at the rate of annas 10 per mensem. This rent was agreed to be paid monthly and it also referred to the two mortgage-deeds. The mortgage-deed of 23rd June 1910 also referred to the fact that the mortgagee had been put in possession of the three mortgaged houses by means of deeds of rent, and it was stipulated that the rent should be accounted for in the interest account. It was further stipulated that if the mortgagor got deeds of rent executed by other tenants occupying the mortgaged houses in favour of the mortgagee, the mortgagor would receive credit for the rent that would be realized in the interest account and would be responsible for excess or deficiency. The term fixed for redemption was two years, with a clause allowing redemption in 1½ years under certain conditions. The following rulings were cited before the trial Court: *Gangaram* v. *Abdul Rahman* (1), *Kundan Mal* v. *Alla Dad Khan* (2) and *Natha Singh* v. *Chuni Lal* (3), on behalf of the defendant in support of the contention that O. 2, R. 2 barred the present suit. On behalf of the plaintiff the fol-

(1) [1907] 28 P. R. 1907=93 P. L. R. 1908.
(2) [1910] 19 P. R. 1910=167 P. L. R. 1910 =5 I. C. 821=36 P. W. R. 190.
(3) [1918] 69 P. R. 1918=117 P. L. R. 1918 =47 I. C. 364=112 P. W. R. 1918.

lowing rulings were cited before the trial Court, *Pindi Das* v. *Lal Chand* (4), *Duni* v. *Ali Mahomed* (5), *Parmeshri Das* v. *Fakiria* (6), and *Ralia Ram* v. *Amir Chand* (7).

Before us, in addition to the above, reliance has also been placed on *A. I. R.* 1926 *Lah.* 559 and our attention has also been drawn to *Mahomed Husain* v. *Abdul Ghafur Khan* (8) and to the Privy Council ruling reported as *Kishan Narain* v. *Pala Mal* (9) and *Sultan Singh* v. *Joti Sarup* (10) decided on 8th February 1928. The trial Court held, following *Ralia Ram* v. *Amir Chand* (7), that the lease and the mortgage-deed were not indivisible transactions and, therefore, O. 2, R. 2 did not bar the present suit. He accordingly gave the plaintiff a preliminary decree with costs for the sum claimed with future interest on Rs. 4,500 at annas 10 per cent per mensem from date of suit until realization, realizable on the decree being made absolute after four months time, from the mortgaged property by sale thereof and the balance, if any, from the person and other property of the mortgagor.

It is unnecessary for us to enter into any detailed discussion of these rulings. It was conceded by the learned counsel who appeared for the appellant that in all the rulings in which a suit for this nature has been held to be barred by O. 2, R. 2 it has been held that the lease and the mortgage form one transaction. In the present case it is obvious and it has not seriously been contested by counsel for the appellant that the lease and the mortgage-deeds cannot be said to form part of one transaction. Counsel, however, relies on an argument based on analogy and the contention is that the suit for rent should really be regarded as a suit for the interest due on the two mortgages. At that time the mortgagee could have sued for principal and for interest. The Privy Council ruling reported in *Kishan Narain* v. *Pala Mal* (9), does not apply because there was no independent obligation to pay interest and principal. He also somewhat faintly contended that the conduct of the respondent should be held to bring the case within the purview of O 2, R. 2. The last contention obviously has no force as a technical rule of procedure cannot be based on some intention to be deduced from the actions of the parties. We are of opinion that on the facts of this case it cannot be held that the claim for rent was really no more than a claim for interest on the mortgages in a disguised form. This being so, the fact remains that the transactions in form were separate and there has been nothing shown to us by which the defendant-appellant has discharged the onus which lay on him to show that in reality they were one and the same. We therefore dismiss the appeal with costs.

It has been conceded on both sides that the judgment of the trial Court is defective, in that it directs a decree to be passed not only for sale of the mortgaged property, but also for the balance, if any, from the person and other property of the mortgagor. This will be corrected in the decree drawn up by this Court.

A.L./R.K *Appeal dismissed.*

(4) [1916] 177 P. W. R. 1916=36 I. C. 209=102 P. L. R. 1916.
(5) [1912] 8 P. W. R. 1912=13 I. C. 857=144 P. L. R. 1912.
(6) [1920] 1 Lah. 457=59 I. C. 71=56 P. W. R. 1920=3 L. L. J. 22 (F. B.).
(7) A. I. R. 1923 Lah. 203=4 Lah. 52.
(8) A. I. R. 1922 Lah. 111=3 Lah. 1.
(9) A. I. R. 1922 P. C. 412=4 Lah. 32.
(10) A. I. R. 1928 Lah. 269.

A. I. R. 1928 Lahore 733

HARRISON, J.

Batna—Defendant—Appellant.

v.

Dewa Singh and *another*—Plaintiffs—Respondents.

Second Appeal No. 1820 of 1927 Decided on 13th January 1928, from decree of Dist. Judge, Hoshiarpur, D/- 1st March 1927.

(a) *Civil P. C., O. 3, R. 4 (as amended in 1926)—Principal authorizing agent to engage counsel in the suit—Counsel so engaged cannot represent the principal in appeal — Legal Practitioner.*

There is no doubt that a pleader appointed by a principal can conduct all proceedings in every and any Court; but where the principal has authorized his attorney to appoint a pleader in the suit the pleader appointed by him has no authority to represent the principal in the appellate Court. [P 734 C 1, 2]

(b) *Civil P. C., O. 3, R. 4 (3)—"Appeal."*

The word "appeal" in para. 3, R. 4, O. 3 is not confined to first appeal, but it covers all appeals. [P 734 C 2]

(c) Words—"Pervi," and "jawabdehi," do not include presentation of appeal.

The words "pervi" or prosecution, and "jawabdehi," or reply, do not cover and include the presentation of an appeal. [P 734 C 2]

N. C. Pandit—for Appellant.

Nanak Chand—for Respondents.

Judgment.—A preliminary objection is taken in this second appeal to the effect that Mr. N. C. Pandit was not duly authorized inasmuch as Ram Singh, the attorney of the appellant Batna, had no authority to appoint him. The power-of-attorney in favour of Ram Singh appoints him to act on behalf of his principal and to engage counsel in the suit, *Dewa Singh* v. *Batna*. In the exercise of the power so conferred he has appointed three different counsel in turn in the trial Court, the lower appellate Court and this Court. Counsel relies on *Mohammad Ali Khan* v. *Jasram* (1), and points out that the authority is silent on the subject of appeal and that, therefore, Ram Singh's power ended with the proceedings in the original Court. Mr. N. C. Pandit has quoted *Thiruvenkatasami Iyengar* v. *Pavadai Pillay* (2), which does not help us in any way. He has also relied on the amendment of the year 1926 of R. 4, O. 3. This rule deals with the appointment of a pleader and in para. 3 says that, inter alia, any appeal from any decree or order under suit shall be deemed to be proceedings in the suit. Mr. Nanak Chand would have me confine the word "appeal" to a first appeal, but the words used are very wide and appear to me to cover all appeals. The only question, therefore, is whether this amended rule extends Ram Singh's authority in any way, for it is clear, as laid down in *Mohammad Ali Khan* v. *Jasram* (1), that before this rule was amended Ram Singh's authority ended and, indeed, even a pleader's authority if appointed in the terms used in Ram Singh's power-of-attorney ended with the conclusion of the case in the original Court. There is no doubt that a pleader appointed by the principal could have conducted all proceedings in every and any Court, but unless the attorney's power is extended by this rule Ram Singh himself had no authority and, therefore, no pleader appointed by him had any authority in this Court and *Thiruvenkatasamy Iyengar* v. *Pavadai Pillay* (2) does not help. I think the word "pleader" must be read in its narrowest sense and it must be held that Ram Singh's authority ended with the original Court and the amended rule only applies to pleaders in the strict sense. Counsel would have me hold that the words "pervi" or prosecution and "jawabdehi" (or reply) cover and include presentation of an appeal. This is, I think, impossible, and holding as I do that the amendment of the Code has not extended the power of Ram Singh, I find that the appeal has not been duly presented and must, therefore, be dismissed with costs.

S.J. *Appeal dismissed.*

(1) [1914] 36 All. 46=23 I. C. 464=11 A. L. J. 1015.

(2) A. I. R. 1922 P. C. 225=44 Mad. 736=48 I. A. 534 (P. C.).

A. I. R. 1928 Lahore 734

DALIP SINGH, J.

Jaimal—Insolvent—Appellant.

v.

Chanan Mal-Chauth Mal — Respondents.

First Appeal No. 1941 of 1926, Decided on 7th January 1927, from order of Dist. Judge, Ferozepore, D/- 27th July 1926.

Punjab Land Alienation Act, S. 16—Property of an insolvent though not liable to sale is liable to attachment—Receiver can sell the property to an agriculturist—Provincial Insolvency Act, S. 28 (5).

Under S. 16, the property of an insolvent agriculturist is not liable to sale, but nothing is said about its being not liable to attachment and, therefore, his property does vest in the Receiver and the Receiver would be entitled to sell the property to an agriculturist. [P 735 C 1]

Lal Chand Mehra—for Appellant.

Fakir Chand—for Respondents.

Judgment. — The appellant in this case was declared an insolvent on the 11th November 1925. On the 3rd June 1926 the learned District Judge, acting in insolvency, ordered that the Receiver should sell the land which is in his possession to any agriculturist for the highest bid obtainable. On the 7th July 1926 the insolvent applied to the Court to recall this order on the ground that under S. 16, Punjab Alienation of Land Act, the Receiver could not sell the land of an agriculturist through this Court. On the 27th July 1926 the Court sanc-

tioned the sale, having previously rejected the petition of the 7th July 1926.

The insolvent has appealed. and the appeal was admitted by order of the Hon'ble Mr. Justice Broadway on the 16th August 1926. No order was passed on the application for leave to appeal under S. 75 (3), Provincial Insolvency Act. I presume, however, that by admitting the appeal the learned Judge impliedly granted leave. A preliminary objection is taken by counsel for the respondent that this appellant has not made the Receiver or the purchaser a party to this appeal, and, therefore, the appeal is not properly instituted. Counsel for the appellant wishes me to exercise my powers under O. 41, R. 20. Civil P. C., to make the Receiver a party. As regards the auction-purchaser he says that his client was unaware that the property had been sold. This is incorrect, because it is clear that the appellant was aware of the order of the 3rd June 1926 and he was present in Court when the order sanctioning the sale was passed on the 27th July 1926. I, therefore, consider that the preliminary objection has force, and I see no reason to exercise the powers given under O. 41, R. 20, Civil P. C. The appeal would, therefore, fail on this ground.

On the merits, however, I also think the appeal should fail because under S. 28 (5), Provincial Insolvency Act, the property of the insolvent which does not vest in the Receiver must be not liable to attachment and sale. Under S. 16, Punjab Land Alienation Act the property of an insolvent is not liable to sale. Nothing is said about it being not liable to attachment. Therefore, following the case of *Manji* v. *Girdhari Lal* (1), I hold that the property does vest in the Receiver. The Receiver, therefore, would be entitled to sell the property to an agriculturist and this is exactly what the Court ordered and this seems to have been done. I would, therefore, hold that the appeal fails on the merits also.

The appeal is, therefore, dismissed with costs.

N.K. *Appeal dismissed.*

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(1) A. I. R. 1921 Lah. 44=2 Lah. 78.

A. I. R. 1928 Lahore 735

TEK CHAND, J.

Shri Dwarka Dhishji and *others*—Plaintiffs—Appellants.

v.

Dewa Singh—Defendant—Respondent.

Second Appeal No. 1373 of 1927, Decided on 5th December 1927, from decree of Dist. Judge, Amritsar, D/- 1st March 1927.

Easements Act, S. 15—Light and air—Measure of, laid down—Closing of the only ventilator of a room, though occupied by servants was held a nuisance.

The owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or the business of the tenement according to the ordinary notions of mankind. The closing of the only ventilator of a room amounts to a nuisance whether the room is occupied by servants or others: 42 *Cal.* 46 (*P. C.*), *Rel. on.* [P 736 C 1]

Fakir Chand for *Jagan Nath Aggarwal*—for Appellants.

D C. Ralli—for Respondent.

Order.—The suit out of which this second appeal has arisen was instituted by the temple Shri Dwarka Dhish Ji of Amritsar through its trustees against one Dewa Singh for a perpetual injunction to the effect that the defendant be directed to remove the obstruction against the ventilator *C* and the door *D* caused by the defendant building against the plaintiff's wall. In the plaint it was claimed that the door and the ventilator in question had existed for more than 20 years and that the plaintiff acquired an easement of light and air through both and of passage through the door *D*. The suit was resisted by the defendant on various grounds it being alleged: firstly, that the wall in which the door and the ventilator existed did not belong exclusively to the plaintiff; secondly, that the alleged right of easement did not exist; and thirdly, that the defendant had built against the door and the ventilator with the consent of some of the trustees of the temple. The trial Court held that the wall was the exclusive property of the plaintiff, that the ventilator *C* and the door *D* existed for more than 20 years, that the plaintiff had acquired an easement of light and air in respect of both *C* and *D* and also an easement of psssage through the door *D* and that the defendant had failed to

prove that he had built with the consent of any of the trustees of the temple. The Court, however, refused to grant the injunction prayed for on the ground that the rooms in which the door and the ventilator opened were occupied by servants, "who had not a very high standard of living." He accordingly, granted a decree for Rs. 400 as damages for infringement of his rights.

Both parties appealed to the District Judge who upheld the findings of facts of the trial Court on all points but granted the injunction prayed for in respect of the obstruction to the ventilator. He held that no cause had been made out for the issue of an injunction relating to infringement of light and air through the door *D*, but that for this infringement damages were the proper relief which he assessed at Rs. 300.

Second appeals have been preferred by both the parties to this Court and the case has been fully argued by Mr. Ralli for the defendant and Mr. Fakir Chand for the plaintiff.

As regards the ventilator Mr. Ralli contends that though it has been found that there has been a deprivation of light and air, there is no finding that it amounts to a nuisance and that consequently the mandatory injunction should not have been issued. In support of his contention, he relies on the well-known case of *P. C. E. Paul* v. *William Robson* (1). But in my opinion this contention is devoid of all force. A look at the plan, Ex. H. P. 1, shows that besides this ventilator the room has no other means of access of light and air except a door which opens into another kothri and that if the ventilator is closed the room will become dark. The deprivation of light and air, therefore, clearly amounts to a nuisance. The rule laid down by Lord Davey in the well-known case of *Colls* v. *Home and Colonial Stores* (2), which was adopted by their Lordships of the Privy Council in the above-cited case is thus expressed:

> The . . . owner of the dominent tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind.

(1) A. I. R. 1914 P. C. 45=42 Cal. 46=41 I.A. 180 (P. C.).

(2) [1904] A. C. 179=53 W. R. 30=73 L. J. Ch. 484=20 T. L. R. 475=90 L. T. 687.

Applying this test the obstruction caused to the ventilator in question clearly amounts to a nuisance. Mr. Ralli has laid emphasis upon the fact that the room is used by servants, and this circumstance appears to have largely influenced the Subordinate Judge in refusing the injunction. Servants even in a country like India cannot be denied the right to receive free air and light through the ancient lights of rooms in which they live and a relief otherwise appropriate cannot be refused merely because the room is inhabited by persons of inferior status. I, therefore, uphold the order of the lower appellate Court with regard to the ventilator.

In respect of the door the plaintiff had in the plaint claimed an easement of passage as well as of light and air. Issue 3 covered both these easements and the Subordinate Judge had decided it in plaintiff's favour. The learned District Judge has, however, given no finding with regard to the easement of passage; and as to the easement of light and air he has given no finding whether the diminution of the quantity of light and air is of such a nature as to amount to a nuisance. The materials on the record are insufficient to enable this Court to definitely decide this point, nor are there any data on the record from which it may be ascertained whether the damages have been properly assessed. It is, therefore, necessary to remit the case to the learned District Judge under O. 41, R. 25, Civil P. C., for decision of issues 3 and 6 in respect of this door *D*. He should definitely find whether the plaintiff had or had not acquired an easement of passage through the door on the date the suit was instituted, and whether the infringement of the easement relating to light and air amounts to a nuisance. In order to determine the relief to be granted it should be ascertained when the building in front of the door was built and what is the nature and size of the building constructed by the defendant, which will have to be demolished in case the appropriate relief to be granted to the plaintiff is the grant of injunction. If the learned District Judge is of opinion that the proper relief is by way of damages, he should state the data on which he assesses the amount of damages. If the materials on the present record are found to be insufficient the case may, if neces-

sary, be remanded to the trial Court for fresh evidence being produced.

The remand is under O. 41, R. 25. The report will be submitted to this Court within three months.

A.L./R.K. *Case remanded.*

A. I. R. 1928 Lahore 737

BHIDE, J.

Johaga and *others* — Defendants — Appellants.

v.

Bir Chand and *others* — Plaintiffs — Respondents.

Second Appeal No. 3155 of 1927, Decided on 15th April 1928, from decree of Sr. Sub-J., Dharamsala, D/- 26th August 1927.

(a) *Civil P. C., O. 41, R. 4—Plaintiffs suing for possession of a strip of land, with a tree and for damages for removing bows of trees—Claim decreed—Defendants appealing—Defendant 1 dying during pendency—Appeal dismissed—Second appeal by defendants on behalf of all without defendant 1 being represented by legal representative—Remaining appellants excluding defendant 1 were held to have an independent right of appeal.*

Plaintiffs brought a suit for possession of a strip of land together with a tree and for damages for removing bows of the trees against defendants 1 to 6, alleging unlawful possession by defendants 1 to 3 in collusion with defendants 4 to 6. Their claim was decreed, and was affirmed on appeal by defendants. During pendency of this appeal, defendant 1 had died. Other defendants then preferred an appeal on behalf of all defendants except one who confessed judgment. Defendant 1 was not represented by any legal representative.

Held: that the remaining appellants exoluding defendant 1 had an independent right of appeal under these circumstances and so the appeal could proceed on their behalf alone: 45 *All.* 286 and 53 *I. C.* 548, *Dist.* [P 737 C 2]

(b) *Limitation Act, S. 5—Value of Court-fee incorrectly given in copy of judgment—Appellant consequently failing to pay proper Court-fee in time — Extension of time should be granted.*

Where the proper Court-fee was not paid within time owing to the fact that the value for purposes of Court-fee was not correctly given in the copy of the judgment appealed from.

Held: that an extension of time should be granted under the circumstances. [P 738 C 1]

(c) *Civil P. C., S. 100—Evidence.*

Decision which proceeds not on legal evidence but on mere conjectures can be attacked in second appeal. [P 738 C 1]

M. L. Puri and *S. L. Puri*—for Appellants.

Gullu Ram—for Respondents.

Judgment.—This second appeal arises out of a suit for possession of a strip of land together with a tree and for Rs. 5 as damages. The trial Court decreed the suit, and the decision was affirmed by the learned Senior Sub-Judge on appeal.

The present appeal was filed on behalf of all the defendants, but it appears that Johaga who is shown as an appellant, had really died during the pendency of the appeal before the learned Senior Sub-Judge. A preliminary objection is therefore taken on behalf of the respondents that the appeal is not competent. Reliance is placed on *Ambika Prasad* v. *Jhinak Singh* (1) and *Balaram Pal* v. *Kanasha Majhi* (2).

Those authorities lay down that when an appeal is filed by one person on behalf of others under O. 41, R. 4, Civil P. C., the latter must be joined as respondents In the present instance, however, the appeal was filed on behalf of all the defendants, except Loharu who confessed judgment. The only defect in the appeal was that Johaga had died during the pendency of the appeal before the learned Senior Sub-Judge as stated above and the appeal should have been on behalf of his legal respresentatives. This does not, however, appear to affect the appeal on behalf of the other appellants. According to the plaintiffs' allegations defendants 1 to 3 had taken unlawful possession of the site in collusion with defendants 4 to 6. The pleas of the defendants were that the site belonged to defendants 4 and 5 and that the tree belonged to defendant 6. Johaga, defendant 1, according to the defendants themselves only took the leaves of the tree. The decree for possession was passed against all the defendants, but it seems to me that the appellants exoluding Johaga had an independent right of appeal in the circumstances of the case. The cases cited by the learned counsel for the respondent can be distinguished inasmuch as the appellants therein had a joint cause of action. Even if the decree stands so far as Johaga's legal representatives are concerned, there seems to be no good reason why the suit against the other appellants should not be dismissed, if the decree passed against them is found to be unsustainable. Plaintiff cannot eject the appellants (excluding Johaga) unless he establishes his claim for possession as against them. I am of opinion

(1) A. I. R. 1923 All. 211=45 All. 286.
(2) [1919] 53 I. C. 548.

that the appeal can proceed as filed on behalf of the appellants with the exception of Johaga.

The next preliminary objection raised on behalf of the respondent was that the appeal was not properly stamped on the date on which it was instituted and as the Court-fee was not made up within limitation it should be held as time barred. It appears, however, that the mistake in respect of the Court-fee arose owing to the fact that the value for purposes of Court-fee was given as Rs. 15 instead of Rs. 25 in the copy of the judgment of the learned Senior Sub-Judge. In the circumstances I would allow the necessary extension of time under S. 5, Lim. Act.

A third objection raised on behalf of the respondent was that no second appeal was competent as decision of the learned Senior Sub-Judge was based purely on findings of fact. As regards this point it was argued on behalf of the appellants that the decision can be attacked in second appeal inasmuch as it proceeds not on legal evidence, but on mere conjectures. This contention appears to me to be well founded. The learned Senior Sub-Judge has himself remarked that the oral evidence produced in the case was practically useless. He has merely affirmed the decree of the trial Court on the grounds that the site in dispute was just behind another strip of land belonging to the plaintiff and that Loharu, one of the defendants (not included in the list of the appellants) had confessed judgment. Now it seems obvious that the mere fact that the site in dispute adjoined another strip of land belonging to plaintiff could not establish the plaintiff's claim. So also the admission by Loharu, who, according to the appellants, is colluding with the plaintiff, cannot be considered binding on the appellants in any way. It has not been urged that there is any other evidence which the learned Senior Sub-Judge has not taken into consideration and on which the decree could be upheld. In the circumstances I must accept this appeal and dismiss the plaintiff's suit as against the appellants excluding Johaga. In view of all the facts of the case I leave the parties to bear their own costs.

D.R./R.K. *Appeal partly accepted.*

A. I. R. 1928 Lahore 738

DALIP SINGH, J.

Tulsi Ram—Appellant.

v.

Mohamad Arif and *others* — Respondents.

Misc. First Appeal No 3209 of 1927, Decided on 24th January 1928, from order of Addl. Dist. Judge, Ferozepore, D/- 10th November 1927.

(a) *Provincial Insolvency Act* (1920), *S.* 2 (*e*). —"*Secured creditor*"—*Meaning.*

The mere fact that the receiver mentioned a certain person as secured creditor in a report submitted by him to the Court which was never approved by the Court either expressly or by implication, does not mean that the Court approved of the receiver's report that the person was a secured creditor. [P 739 C 2]

(b) *Provincial Insolvency Act* (1920), *S.* 28—*Award obtained by creditor during pendency of his application for adjudication, is a nullity.*

An award obtained by creditor, during the pendency of an insolvency application by the same creditor in respect of the same debt, without obtaining the leave of the Court, is a nullity and the creditor cannot claim to be a secured creditor on the basis of such award. [P. 739 C 2]

(c) *Provincial Insolvency Act* (1920), *S.* 28—*Charges created during pendency of application do not bind receiver.*

As the property of the insolvent, by virtue of the adjudication, vests in the receiver on the date of the petition, the condition of the property must also be taken from that date and charges whether created by decrees or otherwise after the date of the petition cannot be held binding against the receiver, though they may bind the insolvent himself. [P 740 C 1]

J. G. Sethi—for Appellant.

Brij Lal and *Niaz Muhammad*—for Respondents.

Judgment.—On 13th November 1922 Tulsi Ram and others applied for the insolvency of one Mohammad Araf. On 13th February 1923, Tulsi Ram and the insolvent referred the matter of their debt to arbitration. On 4th April 1923. an award was made and on 30th May 1923, the award was made a rule of Court and a decree was passed in terms of the award. By the award a charge was created on certain land of the defendant-insolvent. On 6th December 1923. Mohammad Araf was declared an insolvent. A receiver was appointed on that date and on 10th July 1925 the receiver submitted a report together with a schedule of various debts proved before him. There was no mention in the schedule that the debt of Tulsi Ram was a secured debt by virtue of the decree.

In the report, however, Tulsi Ram was mentioned as a secured creditor. On the same date the Court ordered objections to be filed within the time allowed by law and fixed the next date of hearing as 6th August 1925. Various objections by various persons were dealt with, but on 3rd June 1926, objections were taken by one Daulat Ram and one Mohammad Khan, creditors of the insolvent wherein they alleged that they had come to know that Tulsi Ram had been made a secured creditor by the receiver because wrong facts had been given to the receiver by Tulsi Ram and that the charge created by the decree was anyhow bad under the Land Alienation Act. On 3rd June 1926, the Court passed a brief order holding that Tulsi Ram should not be treated as a secured creditor. This order was set aside on 21st June 1927, by this Court on the ground that the judgment was unsatisfactory as it did not show on what grounds it proceeded. The case, was, therefore, sent back to the insolvency Court for decision.

The Court has now held that as this decree was obtained by Tulsi Ram after the presentation .of the application for insolvency the doctrine of lis pendens would, therefore, apply and the decree was of no avail as against the other creditors. It further held that under S. 28 the order of adjudication relates back to the date of presentation of the petition and, therefore, the creation of the security in favour of Tulsi Ram by the decree was invalid as against the receiver. It further held that there was no question of limitation arising in the case as an ordinary receiver has no power to declare any creditor to be a secured creditor, and in this case the receiver never actually declared Tulsi Ram to be a secured creditor, but only submitted a schedule for the approval of the Court and in the annexed report mentioned Tulsi Ram as a secured creditor, therefore, there was no adjudication on the point by the receiver. It further held that the Court had never approved of the schedule before it was objected to. He, therefore, refused the application of Tulsi Ram to be treated as a secured creditor.

In appeal it has been contended that the doctrine of lis pendens has no application, that until the order adjudicating Mohammad Araf an insolvent had actually been passed suits could proceed and decrees be obtained against him and that S. 28 had also no bearing on the question of the validity or otherwise of the decree and that the Court by its action had approved of the action of the receiver and, therefore must be taken to have approved of the report of the receiver mentioning Tulsi Ram as a secured creditor and further as no objection had been taken to it at any time until the present application, the present application was barred by limitation and the Court has wrongly held it to be within limitation.

In my opinion no question of limitation arises in the case because as pointed out by the Court the receiver had only power at best to submit a report to the Court as to whom he considered to be a secured creditor of the insolvent and he had no power to go into the question as to the nature of the debt at all. There is nothing to show that the Court had delegated this power to the receiver and where a Court takes extraordinary action of this nature it is incumbent to limit that action within the narrowest limits posssible. I, therefore, hold that at no time, did the Court approve of the report of the Receiver that Tulsi Ram was a secured creditor. It was not actually put into the schedule that he was a secured creditor and, therefore, the mere fact that the receiver mentioned this fact in a report which was never approved by the Court either expressly or by implication does not mean that the Court approved of the receiver's report that Tulsi Ram was a secured creditor.

The only question, therefore, that remains to be decided is whether Tulsi Ram as a matter of fact can be treated as a secured creditor. It seems clear to me that this award was obtained during the pendency of an insolvency application by Tulsi Ram himself. Now Tulsi Ram's locus standi to bring such application would rest on the fact that he was a creditor. He had not contended that there was any other debt due to him by the debtor. It, therefore, follows that the matter of his debt was itself before the Insolvency Court. I, therefore, consider that Tulsi Ram and the .insolvent could not ,refer the matter of this debt to arbitration without obtaining the leave of the Court and the award following on such a reference without leave of the Court was a nullity. No doubt if the insolvency Court had chosen to adopt this award it

might do so, but at no time has the insolvency Court ever adopted the award of Tulsi Ram as already explained. I, therefore, hold that Tulsi Ram was not a secured creditor on this short ground.

As regards S. 28 it is argued that as the property of the insolvent by virtue of the adjudication vests in the receiver on the date of the petition, the condition of the property must also be taken from that date and that charges whether created by decrees or otherwise after the date of the petition cannot be held binding against the receiver. It seems to me that there is force in this way of looking at the matter and I take it that this is what the learned District Judge meant. I, therefore, consider that on this ground also the charge created by the decree in favour of Tulsi Ram would not be valid as against the receiver though it might be valid as against the insolvent himself. For these reasons I dismiss the appeal.

D.D. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 740

TEK CHAND, J.

H. Daly, In the matter of.

Criminal Misc. No. 162 of 1927, in Criminal Revn. No. 373 of 1927, Decided on 12th July 1927, to delete some portion from the record of judgment of 1st Class Mag. Jhelum, in Criminal Case No. 20/15 of 1925, D/- 17th November 1926.

* *Criminal P. C., (Amended 1923), S. 561-A --High Court can expunge objectionable remarks in lower Court's judgment — The power should be sparingly used — Court should not make remarks against a person who has no chance to explain his conduct.*

The High Court has power to expunge passages from judgments delivered by itself or by a Subordinate Court but this jurisdiction is of an extraordinary nature and has to be exercised with great care and caution. On the one hand it has to be borne in mind that in weighing evidence and arriving at conclusions on questions of fact, lower Courts have to review the conduct of witnesses with reference to particular incidents and at times have to adjudge generally on the veracity or otherwise of such persons and in doing so they have often to make remarks which reflect adversely on their character. It is of the utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without undue interference by the High Court. At the same time it is equally necessary that the right of Magistrates to make disparaging remarks on persons who appear, or are named, in the course of a trial, is one that should be exercised with great reserve and moderation, especially where the person disparaged has had little or no opportunity of explaining or defending himself. If the conduct of the witness appears to the Judge to be suspicious or otherwise not above board, he has the right and the duty to test his evidence by putting questions to him. But before he is justified in commenting adversely upon his evidence he must establish the particular fact warranting such criticizm by proper evidence in Court and not on conjectures or by reference to materials which are not properly on the record. Again, a Magistrate should not in his judgment make observations prejudicial to the character of a person, who is neither a witness nor a party to the proceedings and who has no opportunity of being heard : *A. I. R.* 1926 *Lah.* 382, *Foll.* ; *A. I. R.* 1925 *Lah.* 187 ; *A. I. R.* 1925 *Lah.* 392 ; 27 *P. R.* 1903 *Cr.* ; and *A. I. R.* 1927 *All.* 193, *Rel. on.* [P 742 C 1, 2]

Abdul Rashid—for Secretary of State.

Judgment.—On 29th April 1927, the learned Government Advocate acting under instructions from the Government of India, presented to this Court a petition under S. 561-A, Criminal P. C., praying for the expunction of certain passage from the judgment of Diwan Sita Ram, Magistrate, First Class, Jhelum, in Criminal Case 20/15 of 1925 (*Crown v. Ram Lal and Muhammad Said*) in so far they contained remarks which reflected adversely on one N. D. Daly, Superintendent, Salt Mines, Khewra and certain "other clerks" of the Salt Department. Another application, containing a similar prayer was filed by N. D. Daly himself on 3rd May 1927. It was stated in the petitions that the remarks complained of were not supported by any materials on the record but were wholly unjustified. These petitions were laid before a Judge of this Court on 20th May 1927, who directed that copies thereof be sent to the learned Magistrate for any remarks that he might wish to make. The Magistrate has accordingly submitted an explanation, dated 7th June 1927. I have examined the record in the light of this explanation and have heard the learned Government Advocate at length in support of the petitions.

It is necessary to briefly state here the facts, which gave rise to and resulted in the prosecution and conviction of Ram Lal and Muhammad Said. Ram Lal was a clerk employed under the Salt Department and was at the time in question posted at Khewra. Muhammad Said was a contractor who used to supply powder to the department at certain fixed rates. In 1922, Muhammad Said, on various occasions, supplied large quantities of

powder to the Salt Department for which he submitted bills in due course and received payments. Subsequently when accounts were checked it was discovered that the sum of Rs. 260-8-5 had been twice paid to Muhammad Said in the month of February 1922 for a single supply of 15 maunds 13 seers of powder. An enquiry was ordered and it was discovered that Muhammad Said had received double payment in collusion with Ram Lal, Powder Clerk. Both Ram Lal and Muhammad Said were tried of offences under Ss. 409, 420 and 467, I. P. C., and convicted by Diwan Sita Ram, Magistrate, First Class On appeal the learned Sessions Judge found that the charges under Ss. 409 and 467, I. P. C., were not established and acquitted the convicts of those offences, but maintained the conviction under S. 420

At the close of his judgment the trial Magistrate after holding that Ram Lal and Muhammad Said had conspired together to defraud the Salt Department, made the following remarks :

Not only that I am convinced that Mr. Daly also was a partner along with them (Ram Lal and Muhammad Said), Mr. Daly's conduct shows that he has been neglecting his duties in a reckless manner. Had he been a little prompt and careful, this defalcation would not have taken place. The report of Daulat Ram appears to be correct that Ram Lal and Mr. Daly are responsible for all this. Mr. Daly has been let off with no action having been taken against him except a formal explanation. I am also of opinion that not only Mr. Daly but other clerks who were charged with the supervision of this work must have been taking share out of the defalcations. Hence I am of opinion that the two accused deserve some consideration on that score, as they are out of lot of persons who were participating in the profits of these defalcations. Ram Lal is a young man with some education. It is just possible that he may be a mere tool in the hands of Mr. Daly.

It will be seen that in the passage, above cited the learned Magistrate finds.

(a) that Daly was guilty of gross negligence in the discharge of his official duties ;

(b) that Daly was a partner with Ram Lal and Muhammad Said in appropriating the amount which they had received by cheating the Salt Department ;

(c) that it was possible that Ram Lal was a tool in the hands of Daly ; and

(d) that "other clerks" of the Salt Department, whose duty it was to supervise this work must have been sharing the proceeds of these defalcations.

The petitioner Daly objects that during his lengthy examination as a witness no questions were put to him by counsel for either party or by the Court suggesting that he was guilty of any or all of the charges in (a), (b) or (c) above, nor was any other opportunity afforded to him to explain away these allegations against him and that he should not have been condemned unheard in this manner. The Government of India support this prayer of Daly and further object that the remarks in (d) against the "other clerks" of the Salt Department whose names are not even mentioned in the judgment or the evidence, are absolutely unwarranted and ought to be expunged. The learned Magistrate, in his explanation, adheres to his former opinion and states that the remarks made by him in his judgment in the passage complained of are fully justified.

I have carefully considered the reasons given by the Magistrate in support of his conclusion and have gone through the voluminous oral and documentary evidence on the record. Before giving my findings on the contentions raised in the petition, I think it necessary to refer to the principles which this Court has to bear in mind in dealing with applications by witnesses and persons other than the parties to a litigation for expunction of remarks made against them in judgments of Subordinate Courts. The power of this Court to expunge passages from judgments delivered by itself or by Subordinate Court, is undoubted. The Chief Court of the Punjab exercised this power in various cases, see for example *Nur Din* v. *Emperor* (1), *Gopal Singh* v. *Emperor* (2), *Modi Shah* v. *Emperor* (3), *In re Malik Umar Hayat Khan* (4), and *Naha* v. *Emperor* (5). Similarly in other provinces Courts in the exercise of their revisional jurisdiction directed the expunction of remarks from judgments in appropriate cases *Ma Kya* v. *Kin Lat Gyi* (6) *Emperor* v. *Thomas Pellako* (7),

(1) [1903] 27 P. R. 1903 Cr.=21 P. L. R. 1904.
(2) [1901] 164 P.L.R. 1901.
(3) [1904] 80 P.L.R. 1904.
(4) [1910] 2 P.W.R. Cr. 1910=5 I.C. 611=11 Cr. L.J. 178.
(5) [1911] 193 P.L.R. 1911=11 I.C. 577=12 P. W.R. Cr. 1911.
(6) [1911] 4 Bur. L.T. 173=11 I.C. 1000=12 Cr. L.J. 464.
(7) [1912] 5 Bur. L.T. 20=14 I.C. 643=13 Cr. L.J. 259.

Baroda Nath v. *Karait Sheikh* (8) and *Lachchu* v. *Emperor* (9). A discordant note was, however, struck by the Allahabad Court in *Emperor* v. *C. Dun* (10), where a Division Bench held that the powers of a High Court were restricted to making an amendment of an effective order of the Court below and not of expunging passages which did not commend themselves to it. The matter has, however, been now put beyond controversy by the legislature by the enactment of S 561-A, Criminal P. C, wherein it is provided :

> Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

Since this amendment was made in the Code of 1923, the Allahabad Court also has entertained and granted applications for expunction of remarks. In *A. I. R.* 1927 *All.* 193, it was held that the High Court has inherent power to order deletion of passages, which are either irrelevant or inadmissible and which adversely affect the character of persons before the Court. Similarly the Lahore High Court in *Amar Nath* v. *Emperor* (11) and *Benarsi Das* v. *Emperor* (12) expunged remarks made in judgments of lower Courts.

This jurisdiction, which undoubtedly exists in this Court is, however, of an extraordinary nature and has to be exercised with great care and caution. As pointed out by the learned Chief Justice in *A. I. R.* 1926 *Lah.* 382.

> The power to expunge a portion of a judgment delivered by a competent Court, is intended for cases of exceptional circumstances and should be exercised sparingly.

On the one hand it has to be borne in mind that in weighing evidence and arriving at conclusions on questions of fact, lower Courts have to review the conduct of witnesses with reference to particular indicants and at times have to adjudge generally on the veracity or otherwise of such persons and in doing so they have often to make remarks which reflect adversely on their character. It is of the utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without undue interference by this Court. At the same time it is, as remarked by Clark, C. J., in *Nur Din* v. *Emperor* (1), equally

> necessary that the right of Magistrates to make disparaging remarks on persons who appear, or are named, in the course of a trial, is one that should be exercised with great reserve and moderation, especially where the person disparaged has had little or no opportunity of explaining or defending himself.

If the conduct of the witness appears to the Judge to be suspicious or otherwise not above-board, he has the right and the duty to test his evidence by putting questions to him. But before he is justified in commenting adversely upon a witness' evidence he must establish the particular fact warranting such criticizm by proper evidence in Court and not on conjectures or by reference to materials which are not properly on the record: *Amar Nath* v. *Emperor* (1). Again it is well settled that a Magistrate should not in his judgment

> make observations prejudicial to the character of a person, who is neither a witness nor a party to the proceedings and who has no opportunity of being heard: *Benarsi Das* v. *Emperor* (12).

Bearing in mind these principles, I have to see if the petitioners have made out a case for the expunction of the passages complained of. Now as to the remarks in the Magistrate's judgment against the the "other clerks" of the Salt Department, I must say at once that there was absolutely no justification to suggest that they were taking any share out of the defalcations of which Ram Lal, Muhammad Said or both were guilty. There is no indication in the judgment as to who these "other clerks" are, nor is there anything on the record to establish what their duties were. These clerks were not examined at the trial and had no opportunity of explaining any suspicions that might have existed against them. I have carefully examined the record and fail to find any warrant for this wholesale condemnation of a section of the clerical establishment of the Salt Department of Khewra. I would, therefore, direct that the passage in the learned Magistrate's judgment relating to the "other clerks" be expunged.

The aspersions against the petitioner are of a twofold nature : firstly it is stated that he was grossly negligent in the discharge of his duties ; and secondly, that he was a partner with Ram Lal in

(8) [1898] 2 C.W.N. 256 notes.
(9) [1914] 1 O.L.J. 141=24 I.C. 156=15 Cr. L.J. 420.
(10) A.I.R. 1922 All. 107=44 All. 401.
(11) A.I.R. 1925 Lah. 187=5 Lah. 476.
(12) A.I.R. 1925 Lah. 392=6 Lah. 166.

appropriating the amount which had been received from the treasury by double payment and that Ram Lal convict was in all probability a mere tool in his hands I have examined the evidence of Daly, of P. W. 1 Pitt who was the Assistant General Manager and of other witnesses produced by the prosecution and the defence and have failed to find anything to indicate that Daly was a partner with Ram Lal or Muhammad Said in these defalcations or that he was taking a share from them out of their ill-gotten gains. Daly was in the witness box for a number of days and was crose-examined at great length. No questions were put to him by either counsel or by the Court from which it could be inferred that he was privy to Muhammad Said receiving the double payment or to Ram Lal allowing Muhammad Said to do so. There is, again, nothing to indicate that Ram Lal was a mere tool in the hands of Daly. In these circumstances I am of opinion that there was no justification for holding Daly to be guilty of the charge of receiving a portion of the amount in question or of Ram Lal being a mere tool in his hands. The remarks relating to these two matters must, therefore, be expunged from the judgment.

As to the charge of gross negligence on the part of Daly, however, I am of opining that there was sufficient material on the record, from which the Magistrate could infer that Daly was neglecting his duties. In the first place there is the evidence of Daulat Ram (P. W. 3), a clerk in the Salt Department, who seems to have first discovered the double payment and who after auditing the accounts, made a report on which an enquiry was started resulting in the prosecution of Ram Lal and Muhammad Said. This report was put in by the prosecution and formally proved at the trial. In this report Daulat Ram had stated that the defalcations were due to the negligence of Ram Lal and Daly. Secondly, we have the documentary evidence in Exs. P. A/1 P. B., the voucher P. C. and the receipt P. J./1, all of which are duly attested by Daly and should have satisfied himself that double payment was not being made for a single supply. The learned Government Advocate has argued that it was really the duty of P. W. 1, Pitt; who was at that time the Assistant General Manager of the Salt Mines at Khewra, to check the bills and to see that double payments were not made and that the blame, if any, attaches to Pitt rather than to Daly. I see, however, no force in this contention and am not prepared to endorse the view that the real person to blame was P. W. 1, Pitt. Ex. P. J., the voucher for Rs. 1,639-3-7, which includes the double payment in question seems to me to put the matter beyond all doubt. The case for the prosecution was that this quantity of 96 maunds, 17 seers included the 15 maunds 13 seers which had already been paid for and which ought not to have been included again in this voucher. Daly admittedly was in charge of the powder that was actually received, and I can find no justification for his signing this bill without satisfying himself that the whole of this quantity had been actually received and had not yet been paid for. In his statement as a witness Daly admitted his signatures on this voucher. This payment of the sum of Rs. 1,008-1-7, after it had been passed was made in the presence of Daly and the receipt (Ex. P. J.) was also taken by him. From the materials on the record I cannot see that the inference drawn by the Magistrate that Daly was grossly negligent in the discharge of his duties could not possibly have been drawn. I can only order the expunction of these remarks, if I come to the conclusion that they were wholly unwarranted by the materials on the record and this I am unable to do. I cannot, therefore, accept the prayer for holding that the passage imputing negligence to Daly should be expunged.

The result is that I direct that from the judgment delivered by Lala Sita Ram in the aforesaid case the following passages be expunged:

Not only that I am convinced that Mr. Daly also was a partner along with them.

Mr. Daly has been let off with no action having been taken against him except a formal explanation. I am also of opinion that not only Mr. Daly but other clerks who are charged with the supervision of this work must have been taking share out of the defalcations. Hence I am of opinion that the two accused deserve some consideration on that score, as they are out of a lot of persons who were participating in the profits of these defalcations. Ram Lal is a young man with some education. It is just possible that he may be a mere tool in the hands of Mr. Daly.

The rest of the judgment will stand.

D.D *Petition allowed in part.*

* A. I. R. 1928 Lahore 744

TEK CHAND AND BHIDE, JJ.

Ram Chand—Alienee—Appellant.

v.

Parma Nand—Respondent.

Misc. First Appeal No. 942 of 1927, Decided on 3rd April 1928, from order of Dist. Judge, Dera Ghazi Khan, D/- 21st February 1927.

(a) *Provincial Insolvency Act* (1920), *S.* 54—*Onus to prove preference is on the person who challenges the alienation.*

The onus is on the person challenging an alienation under S. 54, Provincial Insolvency Act, to prove that it was made with the dominant view of giving the particular creditors a preference over others. [P 744 C 2]

* (b) *Provincial Insolvency Act* (1920), *S.* 54—*To constitute "preference" payment must be "voluntary."*

A mere payment of a debt by a debtor in imminent expectation of bankruptcy is not by itself sufficient to prove the intention to give preference. The word "preference" involves and imports a free choice and it is necessary to prove that the debtor's act was "voluntary" and not due to extraneous influence such as pressure or threats from creditors : 130 *P. R.* 1919, *Foll.* [P 745 C 2]

Amin Chand Mehta—for Appellant.

Azimullah—for Respondent.

Bhide, J.—Four transfers of house property made by one Khem Chand within three months before the presentation of a petition for his being declared an insolvent have been cancelled by the District Judge, Dera Ghazi Khan, under S. 54, Provincial Insolvency Act, 1920. Two out of these transfers were made in favour of the appellant Seth Ram Chand. One was a transfer of mortgage rights for Rs. 900, while the other was a sale of a house for Rs. 2,000. Two out of the issues framed by the District Judge were as follows :

(1) Was the debtor insolvent at that time (i.e., at the time of making the alienations in dispute) ?

(2) If so were the alienations in suit made in good faith and for valid consideration ?

He found the issue against Seth Ram Chand and annulled the transfers. From this decision Seth Ram Chand has appealed.

It will appear from the issues as given above that the learned District Judge considered proof of the mere fact that the alienor was insolvent at the time of making the alienations to be sufficient to shift the onus to the alienee of proving that the alienations were not made with the intention of giving fraudulent preference. He has based this view on the authority of *Labhu Ram* v. *Puran Chand* (1). This appeal came up at first before my learned brother Tek Chand, J., who thinking that an authoritative decision on the question of onus in such cases was necessary referred it to a Division Bench.

We have heard arguments at length on the question of onus. There seems consensus of authority in England as well as in India that the initial onus is on the person challenging an alienation under S. 54, Provincial Insolvency Act, 1920, to prove that it was made with the dominant view of giving the particular creditors a preference over others. This point was not disputed before us and it does not appear that the view taken in *Labhu Ram* v. *Puran Chand* (1), was different in this respect. As stated in the quotation from Halsbury's Laws of England given in *Labhu Ram* v. *Puran Chand* (1),

The intention or view to prefer the creditor as the causa causans of the debtor's conduct is the cardinal point round which the whole question turns. If that intention be shown not to have existed. it is of no importance that the creditor had knowledge of the debtor's insolvency or that the debt was not due ; nor for this purpose is it true that the debtor must be taken to have intended the natural consequences of his act.

The crucial question as regards the onus, however, is : what are the facts which are prima facie sufficient to make out the requisite dominant intention and shift the onus to the respondent in such cases ? In two of the English cases cited in *Labhu Ram* v. *Puran Chand* (1), Vaughan Williams, L. J. appears to have laid down that ,

if a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving a preference to that creditor over his other creditors.

In other words, the fact that the debtor was insolvent and knew that he was insolvent, when he made the payment in dispute, was considered sufficient to shift the onus to the respondent to prove that the payment was not made with a view to prefer him (1901) 1 *K. B.* 717 *and* (1897) 2 *Q. B.* 16. But the decision in *Labhu Ram* v. *Puran Chand* (1), does not appear to be really founded on any presumption based merely on the fact that the debtor was insolvent when he made the payment. The learned Chief Judge, Sir Henry Rattigan, after quoting the

(1) [1919] 130 P. R. 1919=53 I. C. 421.

passage from Halsbury's Laws of England referred to above remarked as follows :

> Speaking generally, I think the authorities support the view that the words "with a view of giving such creditors a preference over the other creditors," bear the same meaning that the word "voluntarily" was construed to have in the old Bankruptcy Act in England and that a Court is justified in holding that the payment to a creditor made by a person, who at the time of such payment is unable to pay his debts, must be taken as a payment with a view to prefer that creditor, if it established that the payment is made of the debtor's own accord not in the ordinary course of business and without any sort of pressure being brought to bear upon him.

The learned Chief Judge himself found in that case that Umrao Singh, the debtor was not only hopelessly bankrupt at the time of payment but made the payment of his own accord and without any sort of pressure being brought upon him. The findings arrived at in *Labhu Ram* v. *Puran Chand* (1) cannot, therefore, be said to support the proposition that the mere fact that a payment or alienation was made at a time when the debtor was insolvent is sufficient to raise the presumption that it was made with the dominant view of giving him preference. This appears to have been realized by the reporter who introduced the word "voluntary" in the headnote to that ruling on the question of onus which runs as follows :

> Held, also, that if such a "voluntary" payment is made to one creditor within three months of the debtor being adjudged insolvent the onus of proving that the payment was not made to give him a preference is on the creditor concerned : 1 K. B., p. 717 and 2 Q. B., p. 16.

If the word "voluntary" is to be read into the dicta of Vaughan Williams, L. J., the law on the question of onus would appear to be correctly stated, but without that qualification the wide proposition enunciated by him does not appear to be supported by other English authorities. The dictum of Vaughan Williams, L. J., in 1897 2 *Q. B.* 16 was not followed by Wright J., in *in re Laurie* (2), and by Younger J., in *Bulteel and Colmore* v. *Trustee in Bankruptcy of Parker and Bulteel* (3), and by Pollock, M. R. in *in re Cohen* (4). In the leading case, *Sharp* v. *Jackson* (5), which came up before the House of Lords Lord Halsbury quoted with approval the following remarks of Lord Esher :

> The doctrine with regard to fraudulent preference is well known. The question whether there has been fraudulent preference depends not merely upon the fact that there has been a preference but also on the state of mind of the person who made it. The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that is true for this purpose.

To the same effect are the dicta in *re Cohen* (4) in which the question was recently considered and it was held by the majority of Judges (Pollock, M.R., dissenting) that when a bankrupt in imminent expectation of bankruptcy voluntarily pays a particular creditor with the result of giving him a preference in fact and the reason for such payment is unexplained prima facie the case of fraudulent preference is established. Pollock, M. R, went further and was of opinion that even if a payment is found to be voluntary and to have been made in imminent expectation of bankruptcy it would not be sufficient to establish prima facie fraudulent preference and that some further affirmative evidence was required as regards the intention to give preference. But even leaving aside the latter view it seems clear from the above that the mere payment of a debt by a debtor in imminent expectation of Bankruptcy is not by itself sufficient to prove the intention to give preference. The word "preference" involves and imports a free choice as pointed out by Lord Macnaghten in *Sharp* v. *Jackson* (5), and it is therefore necessary to prove at least that the debtor's act was "voluntary" and not due to extraneous influences such as pressure or threats from creditors. The findings in *Labhu Ram* v. *Puran Chand* (1), on which the decision in that case is based, are in accord with this view.

I am of opinion that in view of the authorities discussed above the issue framed by the learned District Judge cannot be considered to be correct. I would recast the issues under discussion as follows :

1. Was the debtor Khem Chand unable to pay his debts as they became due at the time he made the transfers in dispute?
2. Did he make the aforesaid transfers with a view to give the transferee a preference over other creditors?

(2) [1898] 67 L. J. Q. B. 431=5 Manson 48=46 W. R. 491.
(3) [1916] 32 T. L. R. 661.
(4) [1924] 2 Ch. 515.
(5) [1899] A. C. 419=68 L. J. Q. B. 866=80 L.T. 841=15 T. L. R. 418=6 Manson 264.

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The evidence on the record does not appear to be sufficient for determination of the above issues. This was conceded by the learned counsel for both the parties and in view of the fact that the onus of proving the intention of giving preference has now been placed on the Receiver who is seeking to avoid the transfers It seems fair i cremand the case to enable the parties to produce their evidence on the above issues. The whole case is practically being re-opened. I, would, therefore, accept the appeal, set aside the order of the learned District Judge and remand the case for a fresh decision. As the appeal has been accepted on a point of law which is not free from difficulty, I would leave the parties to bear their own costs.

Tek Chand, J.—I agree.

A.L./R K. *Case remanded.*

A. I. R. 1928 Lahore 746

JAI LAL, J.

Kirpa Ram—Plaintiff—Appellant.

v.

Bhagat Chand and *others*—Defendants—Respondents.

Second Appeal No. 3151 of 1927, Decided on 3rd May 1928, from decree of Addl. Judge, Kangra, D/- 29th August 1927.

(a) *Civil P. C., O. 22, R. 9—Failure of plaintiff to bring legal representatives on record within time—Abatement takes place automatically—No formal order is necessary.*

Where on the death of a sole defendant an application to make his legal representatives a party is not made within the prescribed time the suit abates automatically and no formal order giving effect to an abatement is necessary to be recorded by the Court. [P 747 C 1]

(b) *Civil P. C., O. 22, R. 9—Application to bring legal representatives on record made after prescribed time should ordinarily be treated as application under O. 22, R. 9.*

An application made to bring the legal representatives of the deceased defendant on record after the time prescribed therefor by law should ordinarily be treated as an application to set aside the abatement of the suit which has taken place, though it is not asserted that the delay was due to reasonable causes and on proof of sufficient cause for delay the application should be granted: *A. I. R.* 1924 *Lah.* 424 and 42 *All.* 540, *Foll.* [P 747 C 1]

(c) *Civil P. C, O. 22, R. 9—It is not necessary to state in application that applicant was prevented by sufficient cause from continuing suit.*

Though, as a matter of practice, the applicant should state in the application that he was prevented by some sufficient cause from continuing the suit, it is not legally necessary to do so. All that is needed is that he should satisfy the Court that there was a sufficient cause: *A.I.R.* 1926 *Lah.* 474, *Ref.* [P 747 C 2]

Mehr Chand Mahajan—for Appellant.

Anant Ram Khosla—for Respondents.

Jai Lal, J.—A suit for the recovery of Rs. 713-8-0 was instituted by Pandit Kirpa Ram against Mian Udham Chand on 29th January 1926. The description of the defendants, as it appears from the copy of the judgment of the trial Court, is as follows:

Mian Udham Chand, deceased son of Ram Dayal, represented by his sons Bhagat Chand, Sant Chand adults, Sakt Chand minor through Bhagat Chand, caste Rajput Katoch of Barwan, etc.

It appears that after the suit had been instituted against Udham Chand, it transpired that he had died and consequently on 18th June 1926 an application was filed by the plaintiff to bring his legal representatives, his sons, on the record. The persons proposed to be made the legal representatives appeared and pleaded to the plaint on its merits and also contended that Udham Chand had died before the institution of the suit and that in any case an application to bring the legal representatives on the record was made after the expiry of the period provided by the Limitation Act for the purpose.

The trial Court framed issues on all the points raised by the legal representatives and in its judgment of 7th March 1927, gave findings on all such issues but dismissed the suit on the ground that the same had abated.

On appeal, the Additional Judge of Kangra held that

Udham Chand had died some time in January, may be on 30th or 31st January, and therefore, the application to bring the legal representatives on the record was barred by time.

He further opined that the plaintiff should have taken action under O. 22, R. 9, Civil P. C., to have the abatement set aside and that this not having been done by him, the order of abatement could not be questioned on appeal. The plaintiff appeals to this Court.

Order 22, R. 4, Cl. (3), Civil P. C., provides that where on the death of a sole defendant an application to make his legal representives a party to the suit is not made within the time limited by law, the suit shall abate as against the deceased defendant. It has been held by this Court that no formal order

giving effect to an abatement is necessary to be recorded by the Court, but that the abatement takes place automatically on the failure of the plaintiff to bring on the record the legal representatives of the deceased defendant within the time prescribed by law. O. 22, R. 9 then provides that where a suit abates or is dismissed under O. 22, the plaintiff may apply for an order to set aside the abatement or dismissal, and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit. It is further provided that the provisions of S. 5, Lim. Act, apply to applications made to set aside the abatement or dismissal.

In the case before, me, abatement took place long before the application of the 18th June 1926, was made by the plaintiff. No order of abatement had been formally recorded by the trial Court and it was not necessary that it should have been done. The abatement had taken place as a matter of course. The application, therefore, made in June 1926 must be deemed to be an application under O. 22, R. 9, to set aside an abatement which had already taken place. In *A.I.R.* 1924 *Lah.* 424 it was held that an application made after the expiry of the time limited by law to bring on the record the legal representatives of the deceased defendant should be treated as an application to set aside an abatement under O. 22, R. 9. To the same effect is *Lachmi Narain* v. *Mahomed Yusuf* (1). The respondent's counsel, however, relies on *A. I. R.* 1926 *Lah.* 474 in which it was held that though an application purported to be under O. 22, R. 4, may in particular cases be treated as one in substance under O. 22, R. 9, still where there is no assertion that there has been a delay due to reasonable causes and also where in fact there could be no reason for the applicant to ask for an excuse of the delay because the applicant thought that there had been no delay, it was not possible to treat the application as one under O. 22, R. 9. It is to be observed that under O. 22, R. 9 the application is to set aside the abatement and though, as a matter of practice, the applicant should state in the application that he was prevented by some sufficient cause from continuing the suit, it is not legally necessary that he should do so. All that is needed is that he should satisfy the Court that there was a sufficient cause.

In the present case it is rightly contended by the appellant's counsel that sufficient cause is contained in the findings of the Courts below as to circumstances under which Udham Chand died. This, however, is not a point on which I need express any definite opinion at this stage. In my opinion an application made to bring on the record the legal representatives of a deceased defendant after the time limited by law should ordinarily be treated as an application under O. 22, R. 9 and granted on proof of sufficient cause for the delay. To an application made after the expiry of the period of limitation O. 22, R. 4, can have no application because that rule can only relate to an application made within the time limited by law. It is true that in the present case the plaintiff did not allege in the application of 18th June 1926, that he was prevented by any sufficient cause from making the application earlier. This in my opinion was not strictly speaking necessary. Moreover, his main attempt was to meet the plea of the alleged legal representatives that Udham Chand had died before the suit was instituted. I hold, therefore, that the Additional Judge should have treated the application of 18th June 1926 as an application under O. 22, R. 9, Civil P. C., and proceeded with the appeal accordingly. I accept this appeal and setting aside the decree of the Additional Judge remit the case to him with direction to dispose of the appeal in accordance with law. The costs will abide the result.

D.R./R.K. *Case remitted.*

(1) [1918] 42 All. 540=59 I.C. 903=18 A.L.J. 688.

A. I. R. 1928 Lahore 747

FFORDE AND AGHA HAIDAR, JJ.

Bar Dukan—Plaintiff—Appellant.

v.

Gopal Singh—Defendant—Respondent.

First Appeal No. 2335 of 1923, Decided on 11th April 1928, from decree of Sr. Sub-Judge, Lyallpur, D/- 12th July 1923.

Contract Act, S. 221—Agent spending large sums of money to buy goods on principal's behalf—He can recover as much of his outlay as possible by selling principal's goods in his possession.

An agent, pure and simple, may not be justified in selling his principal's goods without his authority, but where he has spent money from his own pocket in purchasing the goods on the principal's behalf he is in the position of a tacit pledgee, and can recover as much of his outlay as possible by selling the goods which are in his custody : *A. I. R.* 1927 *Lah.* 408 *Rel. on.* [P 750 C 2]

Sardha Ram, Mehr Chand Mahajan and *Hem Raj*—for Appellant.

Beni Parshad Kosla and *Anant Ram Khosla*—for Respondent.

Judgment.—There are two cross appeals (No. 2335 of 1923, *Bar Dukan* v. *Gopal Singh*, and No. 2570 of 1923, *Gopal Singh* v. *Bar Dukan*) arising out of the same judgment which disposed of the two suits, one brought by Bar Dukan and the other by Gopal Singh and may be conveniently disposed of together. The plaintiff brought a suit claiming a sum of Rs. 5,666-10-0 on the allegation that he was a commission agent ; that the defendant had dealings with him from 7th October 1917, up to 2nd April 1922, that during this period the defendant had purchased various commodities for the plaintiff for a sum of Rs. 83,762-8-0, that out of this sum the defendant had paid Rupees 78,095 and that a sum of Rs. 5,666-10-0 was due to the plaintiff from the defendant. The plaintiff further alleged that he gave repeated notices to the defendant demanding the amount due by him, but the defendant refused to pay the amount due to the plaintiff. Hence the claim.

The defendant in his written statement raised various pleas, some of which were purely technical and the other amounted to a denial of the plaintiff's claim and in fact a substantial sum was claimed from the plaintiff by the defendant. The pleadings are, as is usual in these cases, obscure and do not give an indication as to what were the respective cases of the parties.

The trial Court framed certain issues and appointed one Lala Bal Kishan Munim, commissioner to examine the accounts. The said commissioner went through the accounts and submitted a report dated 29th November 1922. Both parties filed objections to the report of the commissioner, and the Subordinate Judge, after cancelling the issues, which he had already settled in the case, framed fourteen issues which are printed at p 153 and again in the body of the judgment at pp. 175 and 176 of the paper book. These issues arose out of the objections of the parties to the commissioner's report. A good deal of the procedure adopted by the trial Court in this case appears to have been irregular. but the parties accepted it and in fact acted upon it and so no more need be said on the subject. The Subordinate Judge discussed all these issues seriatim and in the end granted a decree for a sum of Rupees 1,876-10-6 only to the plaintiff, namely Bar Dukan, and dismissed the rest of the claim. The cross suit brought by the defendant was dismissed. No appeal was filed against the dismissal of the suit which Gopal Singh had brought against the Bar Dukan. Both parties, however, filed appeals against the decree in the suit filed by Bar Dukan, the plaintiff, attacking the decree in respect of the parties as to which his claim had been dismissed and the defendant Gopal Singh challenging the amount for which the plaintiff's claim has been decreed.

I propose to deal with the findings of the Court below on each of the issues and shall in this way dispose of the subject-matter of the two cross-appeals.

(The judgment then dealt with issues 1 to 8 and affirming the findings of the Court below proceeded with issue 9). Issue 9 is the most important of all these issues. It refers to 51 bales of empty bags. The plaintiff had purchased 52 bales of empty bags for the defendant and had spent a sum of Rs. 10,160 from his pocket in paying their price. The plaintiff served a notice (Ex. P-16) dated 2nd August 1920, upon the defendant and claimed that a sum of Rs. 8,720 was due from the defendant to him and that fifty-two bales of bags purchased for the defendant were lying at his shop. The plaintiff, therefore, demanded the sum due to him and in the alternative suggested that if the amount were not paid within a week the bales lying in the plaintiff's shop would be sold and the sale proceeds would be credited to the defendant's account. The defendant replied on 7th August 1920, and forbade the plaintiff from selling the goods because a certain sum of money was due to the defendant from the plaintiff firm and that unless an account was made up

the plaintiff was not authorized to sell or otherwise dispose of the goods. This letter is maked as Ex. P-17 and makes it clear that the plaintiff, who was the commission agent for the defendant, was not authorized to sell the bales lying with him. More than eighteen months after, on 8th March 1922, the plaintiff sent a registered notice (Ex. P-8) through his pleader to the defendant. In this notice the plaintiff stated that a sum of Rs 11,674 was due by the defendants to the plaintiff and called upon him to pay up the amount due and also to remove the 51 bales of bags. It was further stated that the plaintiff was not prepared to keep the aforesaid bales any longer. The defendant was called upon to pay the amount within two days and to remove the bales failing which the plaintiff would sell the bales at the market rate. The Court held that this notice was not pr ved, and, therefore, the plaintiff was not authorized to sell the bales and that under these circumstances the plaintiff was liable to pay to the defendant Rs. 1,821-7-3, being the difference between the price actually realized by the plaintiff from the sale of the 51 bales of bags at the rate of Rs. 41-8-0 per hundred bags and the rate which prevailed on 31st May 1922, as deposed to by Panna Lal (P. W. 7). This finding is challenged in both the appeals. The plaintiff-appellant says that this sum should be wiped out and that he should be given a decree for a sum of Rs. 1,864, while the defendant claimed that this sum awarded by the Court below should be further increased. The question is whether the notice Ex. P-8 dated the 8th March 1922, sent by the plaintiff was actually sent by the plaintiff and received by the defendant.

We find an acknowledgment receipt dated the 10th March 1922, which shows that the notice was sent by a registered letter No. 92 addressed to Bhai Gopal Singh, defendant of the firm of Messrs. Gopal Singh Mangal Singh, Lyallpur. It is signed by one Bulaqi Ram. We also find a copy of the telegram sent by S. Iqbal Singh, the plaintiff's pleader, on the 11th March 1922. This telegram contains a peremptory demand of Rs 11,674-8-0 from the defendant and further says that the 51 bales of bags could be delivered on payment of the full amount and that otherwise they would be sold at the market rate and credited to the defendant's account. There are entries in the plaintiff's account books in the defendant's khata which show that on this date a registered letter was sent to the defendant. In the same account the cost of the telegram sent through Sardar Iqbal Singh to the defendant is also entered. The presumption under S. 114, Evidence Act, is in favour of the plaintiff. The defendant had been examined as plaintiff's witness in the case and was asked questions about the notices. His replies are not at all convincing and leave an impression upon one's mind that he was withholding the correct information from the Court. I may also point out that para. 2 of the plaint refers to these notices, and the corresponding para. 2 of the written statement meets the allegations in the plaint on this subject in a very evasive and disingenuous manner. On the whole, I do not think that the learned Judge of the trial Court was justified in holding that the plaintiff has failed to prove the notice relied upon by him. The plaintiff has, at any rate, made out a good prima facie case which the defendant, who never entered into the witness-box in support of his defence, has completely failed to rebut. This being so, the plaintiff, who had spent a large sum of money on the purchase of these bales of bags and in spite of repeated notices was not receiving his money from the defendants, was justified in selling the goods and crediting the sale proceeds to the defendant's account. An agent, pure and simple, may not be justified in selling his principal's goods without his authority. But the position of the plaintiff was different. He had spent a large sum of money from his own pocket in purchasing the goods on the defendant's behalf and was in the position of a tacit pledgee and could recover as much of his outlay as possible by selling the goods which were in his custody. The case decided by a Bench of this Court in *Alliance Bank of Simla* v. *Ghamandi Lal Jaini Lal* (1), lends support to this contention. Furthermore, paras. 372 (2) and 374 in Story's well-known work on Agency are also very instructive on this point. I, therefore, accept the plaintiff-appellant's contention and reversing the finding of the Court below as regards the sum of Rs. 1,821-7-3, for which the

(1) A. I. R. 1917 Lah. 409=8 Lah. 373.

Court had held the plaintiff liable, give him a decree for Rs. 1,864 against the defendant.

The parties were agreed before us at the time of the arguments that Rs. 1,864 would be added to the amount decreed to the plaintiff in case his contention in this Court prevailed. (The judgment then dealt with the remaing issues and concluded) The net result is that the plaintiff's appeal would be decreed to the extent of a further sum of Rs. 1,864. This sum shall be added to the sum of Rs. 1,876-10-6 already decreed to him, thus bringing the total to Rs. 3,740-10-6. The plaintiff's appeal is, therefore, allowed to this extent only. The rest of his appeal is dismissed. He is admittedly accountable to the defendant for the price of one bale of bags. The plaintiff shall be entitled to interest at the rate of 6 per cent per annum up to the date of realization. The cross-appeal filed by the defendant (2570 of 1923) necessarily fails except as regards one odd bale and is hereby dismissed with costs. The parties to the plaintiff's appeal (No. 2335 of 1923) would pay and receive costs in proportion to their success and failure.

Fforde, J.—I agree.

N.K. *Appeal partly allowed.*

A. I. R. 1928 Lahore 750

JAI LAL, J.

Kanaya Lal and *another*—2nd Party—Appellants.

v.

Official Receiver of the property of Chiman Lal Gaba—1st Party—Respondent.

Misc. Second Appeal No. 2570 of 1927, Decided on 23rd April 1928, from order of Dist. Judge, Multan, D/- 31st March 1927.

(a) *Provincial Insolvency Act, S. 53—The expression "voluntary transfer" is not limited to any particular form of alienation.*

Section 53 does not limit the expression "voluntary transfer" to any particular form of alienation of the property by the insolvent. The expression covers all sorts of devices to deprive creditors of the benefit of the property of the insolvent. [P 750 C 2]

(b) *Provincial Insolvency Act, S. 53—Transaction evidenced by decree passed on confession of judgment by insolvent is voluntary.*

The transfer of the property by the insolvent under a decree passed on confession of judgment by him does not cease to be a voluntary transfer. [P 751 C 1]

Hargopal—for Appellants.

Shamair Chand and *Qabal Chand*—for Respondent.

Jai Lal, J.—One Chaman Lal was adjudicated an insolvent and the Official Receiver assumed charge of his estate. An application was then made by the Official Receiver, under Ss. 53 and 4, Provincial Insolvency Act, to have a certain transaction entered into by the insolvent with the appellant annulled. The transaction in question was a reference to arbitration of a so-called dispute about certain property between the insolvent and his two sons. The award of the arbitrator thereon was to the effect that property of the insolvent was subject to a charge of Rs. 4,000 in favour of his sons and subsequently decree was passed on confession of the insolvent in favour of his sons on the basis of such an award. It was alleged by the Official Receiver that the whole transaction was fraudulent, fictitious and collusive. I am not at this stage concerned with the allegations of the parties as to the nature of this transaction on its merits. The Senior Subordinate Judge has held that he was not competent to entertain the application as the transaction referred to above did not amount to a "transfer" as that term is used in S. 53, Insolvency Act, and has consequently dismissed the petition.

On appeal, the learned District Judge has held that such a transaction is a voluntary transfer and that the same could be attacked by means of an application under S 53, Insolvency Act.

The only point raised on this second appeal before me on behalf of the appellants, who are the sons of the insolvent, is that the transaction mentioned above, is not a voluntary transfer and cannot therefore be made the subject of an application under S. 53. In my opinion S. 53 does not limit the expression "voluntary transfer" to any particular form of alienation of his property by the insolvent. The expression is wide enough to cover all sorts of devices that may be practised or suffered by the insolvent to deprive the creditors of the benefit of his property. It consequently covers the transaction with which we are concerned in this case. It does not cease to be a

voluntary transaction because it is evidenced by a decree passed on a confession of judgment by the insolvent.

I dismiss this appeal with costs.

D.R./R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 751 (1)

DALIP SINGH, J.

Dosa and *others* — Accused — Appellants.

v.

Emperor—Opposite Party,

Criminal Appeal No. 8 of 1928, Decided on 18th February 1928.

Criminal P. C., S. 231—Joint trial under Ss. 366 and 368, Penal Code, is not illegal.

Joint trial of several persons for offences under Ss. 366 and 368, Penal Code, is not illegal : *A. I. R.* 1924 *Cal.* 389, *Rel on.*

[P 751 C 1]

N. C. Mehra—for Appellants.

Ram Lal—for the Crown.

Judgment.—The three appellants in this case have been convicted by the learned Magistrate as follows : Dosa and Kalu under S. 366 and sentenced to five years' rigorous imprisonment with three months' solitary confinement and Mithu under S. 368 and sentenced to two years' rigorous imprisonment with three months' solitary confinement.

The facts of the case as fully given in the judgment of the learned Magistrate and from the prosecution evidence are that : Dosa and Kalu together with another brother Mathela joined in abducting Mt. Fatima, who is a girl of about 15 or 16 years old, from her village at a time when she went to fetch water. Having thus abducted her she was taken to the house of Mithu who is a brother-in-law of Dosa, etc. There she was confined against her will as is proved by the evidence of P Ws. Nos. 9 and 10. The story of the girl as to the abduction is corroborated by Mehra P. W. No. 2 and the fact that it was against her will, is proved by the evidence of P. Ws. Nos. 9 and 10 and others. The learned counsel has candidly admitted that he has little to say as regards the guilt of the accused and has only pressed before me the legal point that the joint trial of the three appellants under Ss. 366 and 368 was not legal under the provisions of the Criminal Procedure Code. *Kushai Malik* v. *Emperor* (1) is a direct authority against him and I, therefore, hold that there is no force in this contention.

Counsel has next pressed the question of sentence before me but this is a bad case of abduction of a young girl who further alleges that she was raped and though the appellants have not been charged with it, there is nothing very improbable in her story. I, therefore, consider that the sentence on Dosa and Kalu is fully deserved and I dismiss their appeals.

As regards Mithu, I see no reason why he should have a sentence of solitary confinement and I accept his appeal to the extent that while maintaining the conviction and sentence of two year's rigorous imprisonment, I direct that he shall have no solitary confinement.

A.L./R.K. *Appeal dismissed.*

(1) A. I. R. 1924 Cal. 389=50 Cal. 1004.

A. I. R. 1928 Lahore 751 (2)

JAI LAL, J.

Fakir Singh—Plaintiff—Petitioner.

v.

Secretary of State—Defendant— Respondent.

Civil Revn. Petn. No. 402 of 1928, Decided on 22nd June 1928,

Civil P. C., S. 10—Suitstayed under S. 10—The Court has no jurisdiction to fix a further date for appearance unless moved.

Once a Court has made an order under S. 10 staying the proceedings in a suit, it has no jurisdiction to fix further dates for the hearing of the suit unless moved to do so by either party. [P 752 C 2]

R. C. Soni—for Petitioner.

Abdul Rashid—for Respondent.

Judgment—A suit for recovery of compensation for loss of goods was instituted by Bawa Fakir Singh, against the Secretary of State in the Court of Small Causes at Lahore, but on an objection by the defendant to the jurisdiction of the Court the plaint was returned for presentation to the proper Court. The plaintiff thereupon instituted two suits for the same account : one in the Court of Small Causes at Jullundur and the other in the Court of Small Causes at Gujranwala, apparently on the same date. On an objection being raised on behalf of the defendant, the Secretary of State, in the Gujranwala Court the proceedings were stayed under S. 10, Civil P. C. which prohibits the trial of two suits simultaneously on the same cause

of action and between the same party. The order staying the suit was passed by the Judge, Small Cause Court on 16th November 1927 ; at the end of the order a direction was added that " the case to come up on 20th December 1927. " Counsel for parties appeared on 20th December 1927 and informed the Court that the case at Jullundur was still pending. The 17th January was the next date fixed which was changed to 20th January on an application by the parties. On the 20th counsel again imparted the same information to the Court with the result that the 14th March was fixed as the next date. On that date there being no appearance on behalf of the plaintiff the suit was dismissed by the learned Judge Small Cause Court.

In the meantime the hearing of the suit in Jullundur continued and it appears that an objection was taken on behalf of the defendant to the jurisdiction of that Court also, but on the ground that a previously instituted suit was pending in the Court at Gujranwala. An issue in a comprehensive form was, however, framed by the Court " whether the Court had no jurisdiction to entertain the suit. " After some witnesses had been examined the plaintiff filed an application in this Court stating that he admitted the validity of the objection as to the jurisdiction and wanted his plaint to be returned to him for presentation to the proper Court. This prayer was granted and the plaint was returned to him for presentation to the proper Court.

An application was thereupon filed before the Judge, Small Cause Court, Gujranwala, for restoration of a suit dismissed by him in default on the 14th March. This application was dismissed as barred by time. The present petition was then filed by the plaintiff for revision of the order of the Judge at Gujranwala, and it is directed both against the order dismissing the suit by default on the 14th March and the order rejecting the subsequent application to set aside the dismissal for default.

Mr. Abdul Rashid, who appeared on behalf of the respondent, objects that no application for revision of the order dismissing the application to restore or review the order of the 14th March lies, and that in any case the order of the Court passed was perfectly justified. I do not propose to discuss this aspect of the case because in my opinion the order dismissing the suit by default cannot be sustained in law.

Once a Court has made an order under S. 10, Civil P. C., staying the proceedings in a suit it has no jurisdiction to fix further dates for the hearing of the suit unless moved to do so by either party. The later order of 16th November 1927 is in direct contravention of the main order staying the suit. If on, the other hand, the Court had fixed a date merely in order to enable the plaintiff to inform it as to the stage at which the previously instituted suit was on a particular date then the date fixed cannot be held to be a date for the hearing of the suit. In either case if the plaintiff did not appear on the date fixed by the Court, the suit could not be dismissed. Ordinarily it is the business of the plaintiff to move the Court in which the subsequently instituted suit is pending to pass proper orders, after the proceedings in the previously instituted suit have come to an end. If the Court finds that it is necessary to obtain further information about the other suit it must call upon the plaintiff to appear before it on a date fixed by it and then to proceed in accordance with law. Till a date is fixed for the hearing of the suit I am unable to see that the provisions of O. 17, Civil P. C., under which alone an order like the one passed on 14th March 1927, could have been passed, could come into operation.

I, therefore, hold that the order dismissing the suit by default was illegal in this case and as, under the circumstances disclosed, if sustained, it will deprive the plaintiff of his right to prosecute his remedy in a civil Court, I feel fully justified in setting aside that order in exercise of my revisional jurisdiction.

I accept this petition, set aside the order of dismissal of the suit by default of the 14th March and direct the Judge, Small Cause Court, Gujranwala, to restore it to its original number and to proceed with it in accordance with law. The conduct of the plaintiff in this case is not such as to entitle him to any costs of these proceedings. There is therefore no order as to costs.

A.L./R.K. *Petition accepted.*

A. I. R. 1928 Lahore 753

JAI LAL, J.

Harbhajan Singh and *others* — Plaintiffs—Appellants.

v.

Mewa Singh and *others*—Defendants—Respondents.

Misc. Second Appeal No. 2567 of 1927, Decided on 9th March 1928

(a) *Civil P. C., Sch. 2, para. 8—"making the award" includes its announcement and filing in Court—Date fixed for filing an award—Award not ready—Extension of time granted—Award filed bearing a date a day previous to the date originally fixed—Award was held to be valid.*

The expression "making the award" includes the announcement of the award and the award cannot be deemed to have "been made" till it is announced and one way of announcing it is by filing in Court. [P 755 C 1]

A suit was referred to arbitration and a certain date was fixed for the filing of the award. The arbitrator asked for an extension of time as his award was not ready by that date. Court extended the period to another date. Award was filed on this date but it bore a date a day previous to the date originally fixed. It was contended that the award was ready on the date on which it was signed and, therefore, the extension of time was illegal and the award was invalid.

Held: that the award is not final till it has been promulgated either by its being filed in Court or by its being announced to the parties and hence the extension of time was proper and the award was valid: 49 *I. C.* 522 and 59 *P. R.* 1907 *(F. B.), Foll.* [P 754 C 2]

(b) *Civil P. C., O. 41. Rr. 23 and 25— Appealability.*

Though an order of remand should properly be under R. 25, but if it is actually made under R. 23, an appeal does lie from such an order. [P 753 C 2]

(c) *Civil P. C., S. 105—Order setting aside an award amounting to irregularity—It can be taken as a ground in appeal.*

Order setting aside an award though not appealable can be taken as a ground in appeal if it amounts to a defect or irregularity affecting the decision of a case: *A. I. R.* 1925 *Lah.* 465, *Dist*: *A. I. R.* 1921 *Lah.* 145, *not Foll.* [P 754 C 1]

Badri Das—for Appellants.

J. N. Bhandari—for Respondent 1.

Judgment.—Two suits were instituted for possession of land. They were both referred to arbitration. The 10th April 1923 was finally fixed as the date for the filing of the award. On that day the arbitrator represented to the Court that his award was not ready and, therefore, he asked for an extension of time for the filing of the award. The Court thereupon fixed the 18th April to enable the arbitrator to file the award. On that day the award was filed by the arbitrator but it was dated 9th April 1923, i. e., a day previous to the date on which the extension for filing the award was granted by the Court.

An objection was thereupon taken to this award by one of the parties that it was invalid, having been made after the date fixed by the Court for filing it. The precise form in which the objection appears to have been taken was that the award having been signed on 9th was complete on that date, and, therefore, the Court was not competent to give an extension of time for filing it. There were other objections to the award, but the trial Judge set it aside merely on the ground that the extension of time given on 10th April was illegal and, therefore, the award filed after that date was invalid. The Court thereupon proceeded to decide the case on its merits and finally decreed the suits. The defendants presented two appeals against the decrees of the trial Court to the District Judge who has held that the award was not invalid on the ground mentioned above and has remanded the case to the trial Court to decide the other objections taken to the award.

A preliminary objection is taken on behalf of the respondents that this appeal does not lie because the trial Court had not decided the suits on a preliminary point only but had decided them on their merits, and, therefore, a remand under O. 41, R. 23 could not have been made. The remand on the face of it is not one under O 41, R. 25, though probably that was the proper rule under which it should have been made. It is in the form of a remand under O. 41, R. 23. No doubt a Court is competent to make a remand under its inherent powers, but apparently in this case the Court did not purport to do so. I hold, therefore, that an appeal lies to this Court because the remand purports to be one under O. 41, R. 23 and I overrule the preliminary objection.

On the merits the first contention of the counsel for the appellants was that an appeal did not lie to the District Judge on the ground that the award had wrongly been set aside by the first Court. It may be mentioned that a petition for revision was filed in this Court against the order of the trial Court setting aside the award but it was dismissed as incompetent. The learned District Judge has held that an appeal lay to him under

S. 105, Civil P. C, which provides that no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction: but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set fourth as a ground of objection in the memorandum of appeal. The learned District Judge has held that the order setting aside the award was a defect or irregularity affecting the decision of the case and, therefore, the ground could be taken in the appeal before him from the decree of the trial Court.

In this view of the learned District Judge I agree. The appellant's counsel based his contention on *Sundar Singh* v. *Nighaiya* (1). In that case an ex-parte decree had been set aside by the trial Court and finally the suit had been dismissed. The plaintiff appealed against the decree and raised among others the ground that the ex-parte decree had been wrongly set aside by the trial Court. It was held that this objection could not be taken under S. 105, Civil P. C. because the setting aside of the ex-parte decree was not an order affecting the decision of the case. Obviously there is a distinction between the reported case and the present case In setting aside the ex-parte decree the trial Court did not in any way enter into the merits of the case and the order did not, therefore, in any way affect the decision of the case by the trial Court at the later stage. On the other hand, the proceedings relating to the setting aside of the ex-parte decree were separate and independent of the adjudication of the dispute on its merits. Here the case is quite different. The award decided the dispute between the parties in a particular manner and the essential question before the Court is whether it is the award that should be taken as the decision between the parties or the decree of the trial Court which takes no notice of the award. The validity of the award, therefore, is essentially a question which affects the decision of the present case.

Another case which was relied upon by the learned counsel was a judgment of a Judge in Chambers of this Court in *Budhu Ram Honda Ram* v. *Ramzan* (2). That case is certainly a direct authority in favour of the appellant's contention, but with great respect I am unable to agree with the view taken by the learned Judge in that case. There is no real discussion of the point involved and for reasons which I have already given I am unable to follow that case. I hold, therefore, that an appeal lay to the learned District Judge.

The next question is whether the award was invalid on the ground that it was dated 9th April whereas an extension of time for making it was given by the trial Court on 10th April. A number of authorities were cited by counsel for the appellant in support of the contention that the award made under the circumstances was invalid. The learned District Judge has noticed them in detail in his judgment and it is not necessary for me to examine them again. I agree with the conclusion of the District Judge that all those authorities are distinguishable from the facts of the present case. It is quite a different thing to extend the time when an award has actually been made and filed in Court after the time originally fixed. In such a case it has been held that the Court has no jurisdiction to extend the time if the award has actually been filed in Court after the time originally fixed by the Court has expired. In the present case on 10th April the arbitrator had represented to the Court that his award was not ready and on that assumption the Court had granted an extension of time. It cannot, therefore, be said that on the facts as they were represented to the Judge his order extending the time was illegal. The learned counsel for the appellant admitted that even assuming that the award was actually signed on 9th April by the arbitrator it was open to him to alter it or to write another award. He admitted that an award is not final till it has been promulgated either by its being filed in Court or by its being announced to the parties. Till this is done it is open to the arbitrator to change his views.

What apparently happened in this case is this ; though the arbitrator had actually signed the award on 9th, still apparently he was doubtful whether his conclusions were the correct ones. He was, therefore, reconsidering the situation. This he was entitled to do, and therefore, he asked for an extension from the Court. He finally decided that

(1) A. I. R. 1925 Lah. 466=6 Lah. 94.
(2) A. I. R. 1921 Lah. 145.

his view was the correct one and omitted to alter the date on the award and filed it in Court on 18th, i. e., within the extended time fixed by the Court. I am unable to see any objection to this. *Babu Lal* v. *Badri Lal* (3), a judgment of a Division Bench of the Patna High Court, directly bears on the point. There it was held that until an award is communicated to the parties, there is nothing to prevent an arbitrator from changing his mind. He cannot be said to be functus officio until the pronouncement is actually made, and even if he has signed the award, this does not preclude him from further considering the matter. *In Gokul Chand* v *Rahman* (4) it was held that an award made and signed before the date fixed by the Court but filed after the date so fixed is valid. Applying this view to the present case, even if the extension granted by the Court was illegal the award was signed before the date originally fixed, i. e., 10th April, and was, therefore, valid though filed after such date. It would be observed that Sch. 2, Civil Procedure Code speaks of time to be fixed by the Court for the "making" of an award by the arbitrator, except that para. 8 provides that where the arbitrators or the umpire cannot "complete" the award within the specified time the Court may extend the time either before or after the expiration of the date fixed for the "making" of the award. That under para. 15 an award may be set aside, inter alia, if it has been made after the expiration of the period allowed by the Court. The question is what is the meaning of the expression "making the award."

In my opinion it includes the announcement of the award and the award cannot be deemed to have "made" till it is announced and one way of announcing it is by filing it in Court, and, therefore, the Court is competent to extend the time if the award has not been filed in Court or announced to the parties even if the arbitrator has finally made up his mind how to decide the dispute and even if he has recorded his views and signed such record. I hold, therefore, that there is no force in this appeal and I dismiss it with costs. This order will also cover the connected appeal.

A L/R K. *Appeal dismissed.*

(3) [1919] 49 I. C. 522.
(4) [1907] 59 P. R. 1907 (F. B.).

* A. I. R. 1928 Lahore 755

JAI LAL, J.

Jagiri Ram—Plaintiff—Appellant.

v.

Daulat Khan — Defendant — Respondent.

Second Appeal No. 3110 of 1927, Decided on 3rd May 1928, from decree of Addl. Dist. Judge, Hoshiarpur, D/- 15th August 1927.

(a) Limitation Act, S. 12—Judgment passed on review not giving all facts of the case and modifying a portion of first judgment—The two judgments are really one—Appellant must file copies of both—Appellant is entitled to deduct time spent in obtaining copies also of first judgment.

Where the judgment passed on review by the trial Court does not give all facts of the case but is merely supplementary to the first judgment, inasmuch as it modifies a portion of the first, it is necessary for the appellant to file copies of both the judgments, as the two must be regarded as one judgment, and the appellant is entitled to deduct time spent in obtaining copies of the first judgment also and not only of the second. [P 756 C 2]

(b) Civil P. C., O. 47, R. 7—R. 7 limits the grounds on which an order granting review can be attacked—Appellate Court is not entitled to set aside decree passed on review merely on ground that no sufficient ground for review was made.

Rule 7 limits the grounds on which an order granting an application for review can be attacked in appeal and the object of the rule is to confine the applicant to those grounds: 22 *Cal.* 984, *Foll.*; and *A. I. R.* 1922 *P. C.* 112, *Dist.* [P 756 C 2]

The appellate Court is not entitled to set aside the decree of the trial Court passed on review merely on the ground that the same was a nullity as no sufficient ground for granting the application for review was made out. [P 757 C 1]

Khurshid Zaman—for Appellant.
Shamair Chand—for Respondent.

Judgment.—A suit for recovery of money and possession of property as a mortgagee was filed by the plaintiff, the appellant before me, against the respondent. It was first dismissed by the Subordinate Judge on the ground that the same was barred by time. Then an application for review of the decree of

the Subordinate Judge was filed in this Court by the plaintiff on the ground that his conclusion of the question of limitation was erroneous, inasmuch as he had failed to take into consideration an article of the Indian Limitation Act, which applies to the case. The Subordinate Judge after notice to the defendant held that his conclusion holding that the suit was barred by time, was erroneous and was made in ignorance of the provisions of the article concerned. He consequently granted the application for review and finally decreed the plaintiff's suit. Against this decree the defendant filed an appeal in the Court of the Additional District Judge of Hoshiarpur.

A preliminary objection was taken before the lower appellate Court by the plaintiff that the appeal was barred by time. This objection was overruled by him and the appeal accepted on the ground that the Subordinate Judge had granted the application for review in contravention of the provisions of O. 47, R. 1, which prescribes the ground on which an application to review a judgment can be entertained. He further held that the decree passed on review by the Subordinate Judge under such circumstances was null and void and, accepting the appeal, set aside that decree. This is an appeal by the plaintiff from the decree of the Additional District Judge. The first point raised is that the appeal before the Additional District Judge was barred by time. I am unable to agree with this contention. What happened is this. The first defendant first obtained copies of the judgment and decree passed against him on review by the Subordinate Judge. He then applied for a copy of the original judgment of the Subordinate Judge. It was conceded before the lower appellate Court that the defendant was entitled to deduct the time spent by him in obtaining the copy of the judgment and the decree passed after the application for review had been granted. But it was contended that he was not entitled to deduct the time spent in obtaining the copy of the original judgment which was reviewed. The Additional District Judge did not give effect to this contention and held that the defendant was entitled to deduct the period spent by him in obtaining both sets of copies. In my opinion the learned Judge below was correct in this conclusion.

The appellant's counsel before me has cited some authorities which lay down that an appellant to this Court is not entitled to deduct the time spent in obtaining copies of the judgment of the trial Court in a second appeal, but only the period spent in obtaining copies of the judgment and decree appealed against, that is, the judgment and decree of the lower appellate Court. This view is based on the provisions of S. 12, Lim. Act, which expressly provides that in calculating the time for appeal the appellant is entitled to deduct the time spent in obtaining copies of the judgment and decree appealed against. It has consequently been held that the Court is not entitled to extend the operation of that section, though by a rule made by this Court it is necessary to file a copy of the judgment of the trial Court. The present case, however, is quite different. Here the two sets of judgments, that is, the one passed before the application for review and the second passed after the application for review had been granted are really one judgment. The second judgment does not give all the facts of the case. They are given in the first judgment and the second judgment merely is supplementary to the first inasmuch as it modifies a portion thereof. In the second judgment reference is expressly made to the first judgment to the effect that full facts are discussed therein. In my opinion, therefore, it was necessary in this case for the appellant to file the copies of both the judgments as these two really are one judgment from which an appeal is made. I hold, therefore, that there is no force in the first ground of appeal that the appeal in the Additional District Judge's Court was barred by time.

I, however, consider that the next contention of the appellant's counsel has force. It is that the Additional District Judge was not competent to accept the appeal from the decree passed on review of judgment on the ground that no sufficient ground for review had been made out as O. 47, R. 7, Civil P. C., limits the grounds on which an order granting an application for review can be attacked on appeal, whether in an appeal from the order granting the application for review or from the decree passed subsequent to such an order. Under that rule an order of the Court granting an application for

review may be objected to on the ground that the application was:

(a) In contravention of the provisions of R. 2;

(b) in contravention of R. 4, or

(c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

The same rule further provides that such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

The respondent's counsel says that this rule is an enabling rule and is not intended to confine the appellant to the grounds mentioned therein, because he contends the word " only " does not appear in that rule. But in my opinion that rule read as a whole does limit the appellant to the grounds mentioned therein and the object of the rule is to confine an appellant to the grounds mentioned therein, otherwise the rule has no meaning. This view finds support from *Baroda Churn Ghose* v. *Gobind Prosad* (1) and *Chhaju* v. *Neki* (2), relied upon by the respondent's counsel, has no bearing on this case, because that case relates to an appeal heard by their Lordships of the Privy Council against a decree passed on review of judgment, and though they entertained grounds attacking the order granting application for review, which were not confined to O. 47, R. 7; but their Lordships were not in any way controlled by the provisions of that rule. My conclusion, therefore, is that the Additional District Judge was not entitled to set aside the decree of the Subordinate Judge passed on review merely on the ground that the same was a nullity as the application for review could not be granted under O. 47, R. 1.

The grounds mentioned in Rr. 2 and 4, O. 47 on which an appeal can be entertained are, where a Judge other than the one who passed the original decree grants the application for review thereof or where notice has not been given to the opposite party or where application has been granted on the ground of discovery of new matter or evidence under certain circumstances mentioned in R. 4. None of these apply to the present case. I, therefore, accept this appeal set aside the decree of the District Judge and remand the case to him with direction to hear the appeal from the decree passed by the Subordinate Judge on its merits. The Court-fee on the memorandum of appeal shall be refunded to the appellant. The other costs will abide the result.

D.R./R.K. *Case remanded.*

(1) [1895] 22 Cal. 934.

(2) A. I. R. 1922 P. C. 112=3 Lah. 127=49 I. A. 144 (P. C.).

A. I. R. 1928 Lahore 757

TEK CHAND, J.

Hari Krishen Das — Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 64 of 1928, Decided on 13th June 1928, for transfer of the case.

(a) *Criminal P. C., S. 526 — Complainant exempted from personal appearance on certain dates, while accused ordered to furnish bail on his coming late on account of the missing of the train—This does not amount to a sufficient ground for transfer.*

A Magistrate allowed exemption to the complainant in a case under S. 500, I. P. C., from personal appearance in Court on certain dates, while he ordered the accused, who was late in coming to Court by reason of having missed the train, to furnish bail instead of a personal recognizance. The accused asked for a transfer under S. 526.

Held: that the matter of exemption and order for security are matters within the judicial discretion of the Magistrate and that there was no sufficient ground for an apprehension in the mind of a reasonable man that the Magistrate was baised against him. [P 758 C 1]

(b) *Criminal P. C., S. 526—Atmosphere causing apprehension of improper interference with justice is a good ground for transfer.*

The trial of a case should be in an atmosphere which does not create even a suspicion that there has been or is likely to be an improper interference with the course of justice. It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly be seen to be done: *Sargeant* v. *Dale*, (1877) 1 *Q. B. D.* 537; *King* v. *Sussex Justices ex parte McCarthy*, (1914) 1 *K. B.* 256; *Rex* v. *ex parte Parkins*, (1927) 2 *K. B.* 475; *A. I. R.* 1923 *Lah.* 264 and *A. I. R.* 1925 *Lah.* 361, *Foll.* [P 758 C 2]

Anant Ram Khosla—for Petitioner.

Jumna Das—for the Crown.

Niaz Mohammad—for Complainant.

Order.—This is an application under S. 526, Criminal P. C., for transfer from

the Court of the Sub-Divisional Magistrate, Fazilka, of a criminal case under S. 500, I.P.C., instituted against the petitioner by the respondent, in respect of an article headed "*Riasat Jalalabad ke halat*" printed in a newspaper of which the petitioner is said to be the printer, publisher and editor. Several grounds are urged in the application, in respect of which I have heard counsel for the petitioner and for the Crown and the complainant at length and have examined the affidavits and the counter-affidavit filed before me and the remarks of the learned Magistrate thereon.

It is first urged that the Magistrate has been purposely delaying the disposal of the case, with a view to harass the petitioner. But the Magistrate has explained that most of the adjournments were due to the heavy arrears in his Court, and that he had naturally to give preference to chalan cases pending before him over this case. I accept this explanation and overrule this contention.

Next it is contended that the Magistrate had on one occasion made certain objectionable and disaparaging remarks against the petitioner in open Court and on another occasion offered a chair to the complainant, while the petitioner and his counsel were standing. Both these allegations are denied by the complainant and the Magistrate and I hold them unproved.

Stress is next laid on the fact that while the Magistrate had been indulgent enough to the complainant to exempt him from personal appearance in Court on certain dates, when on a later date the petitioner was late in coming to Court by reason of having missed the train, he ordered the petitioner to furnish bail for Rs. 1,000 instead of a personal recognizance of Rs. 500. But both these were matters purely within the judicial discretion of the Magistrate and cannot, in my opinion, afford grounds for an apprehension in the mind of a reasonable man that the Magistrate is biased against him. I do not consider that the grounds mentioned above individually or collectively are sufficient to justify a transfer.

There is, however, one matter which has emerged from the affidavit and the counter-affidavit and which stands on an entirely different footing. As pointed out above, the article which is the basis of the prosecution is headed "*Riasat Jalalabad ke halat*" and the alleged defamatory statement relates to the complainant's failure to perform his duties as the medical officer-in-charge of the State hospital. Among the principal witnesses for the prosecution are the manager of the Court of Wards and other officers of the Jalalabad (Mamdot) Estate. In these circumstances the Magistrate should have kept himself as much aloof from the estate and its officials as possible. It is, however, admitted that during his frequent visits to Ferozepore he puts up at the Mamdot house and occasionally holds his Court there. At one hearing (15th March) he had fixed this very case for hearing at the Mamdot house. The Magistrate appears to have done all this in the ordinary course of things and I am sure, he is not in fact influenced in any way there against the petitioner. But I consider this circumstance sufficient to establish a connexion between him and the complainant and his supporters which might justify a reasonable apprehension in the petitioner's mind of partiality towards the complainant. In my opinion this fact brings the case within the rule laid down by Lush, J., in the well-known case of *Sargeant* v. *Dale* (1), which has always been regarded as embodying the principles on which the High Courts in India deal with applications under S. 526. Reference may in this connexion be made to the following observations of Lord Hewart, C. J., in *The King* v. *Sussex Justices Ex parte McCarthy* (2):

> The trial of a case should be in an atmosphere which does not create even a suspicion that there has been or is likely to be an improper interference with the course of justice. * * * A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly be seen to be done.

This has again been emphasized in the recent case of *Rex* v. *Ex parte Parkins* (3). See also the decisions of our High Court in *Sardari Lal* v. *Emperor* (4) and *Amar Singh* v *Sadhu Singh* (5). The case must, therefore, be transferred to another Court. Accordingly I withdrew it from the Court of the Sub-Divisional Magistrate, Fazilka, and remit it to the

(1) [1877] 2 Q. B. D. 537.
(2) [1914] 1 K. B. 256.
(3) [1927] 2 K. B. 475.
(4) A. I. R. 1923 Lah. 264=3 Lah. 443.
(5) A. I. R. 1925 Lah. 361=6 Lah. 396.

District Magistrate, Ferozepure, who will try it himself or send it to another Magistrate at the headquarters having no connexion of any kind with the Mamdot Estate or its officials.

As the disposal of the case has already been delayed for a very long time the trying Magistrate will see that no further delay takes place. The petitioner has stated before me that he does not want a de novo trial.

A.L./R.K. *Application allowed.*

A. I. R. 1928 Lahore 759 (1)

DALIP SINGH, J.

Murli Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1675 of 1927, Decided on 9th January 1928, reported by Dist. Magistrate-Gurgaon, on 11th October 1927.

Arms Act, S. 14—License for a full sized gun—Possessing half barrel gun is an offence.

Where a license granted relates to a full-sized gun, the person holding such a license cannot keep a half-barrel gun under it.

[P 759 C 2]

N. C. Mehra—for Petitioner.

Order.—The petitioner was convicted under S 19 (1), Arms Act, in the following circumstances: He had a license for a half-barrelled gun. On 20th November 1926, he applied for a license for a full sized gun This was granted on 8th February 1927. He deposited the license for the half-barrelled gun in the District Magistrate's Court, but failed to deposit the gun itself. An order was issued by the District Magistrate and duly served on the accused asking him to deposit his half-barrelled gun as its license had been cancelled. The petitioner was personally served but failed to deposit the gun and was accordingly challaned under S. 19, Arms Act. The accused admits the fact but stated that he thought he could keep his half-barrelled gun under his new license for a full sized gun. He was sentenced to a fine of Rs. 25 or in default to suffer one month's rigorous imprisonment. The proceedings have been forwarded for revision by the District Magistrate on the ground that under S. 14, Arms Act the petitioner was entitled to keep a full sized gun and, therefore, did not exceed the extent of the license by keeping a half-barrelled gun. The form of the license, however, clearly contains a description of the weapon kept and a half-barrelled gun cannot be described as a full barrelled gun. I, therefore, consider that there is an offence.

The next point urged is that the offence is only technical and the sentence of Re. 1 would be sufficient. There would have been great force in this contention if the accused had not been personally served and ordered to deposit his gun with the District Magistrate. If he chose to take the risk of interpreting the law as he thought it should be or was, he must suffer the consequence. However, the accused is an ignorant man and his gun has been confiscated and I think that a fine of Re. 1 with one day's rigorous imprisonment in default will meet the ends of justice and I order accordingly.

A.L./R.K. *Sentence reduced.*

A. I. R. 1928 Lahore 759 (2)

JAI LAL, J.

Faqir Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Appln. No. 88 of 1928, Decided on 22nd June 1928, for quashing the proceedings for warrant of petitioner's arrest.

(a) *Criminal P. C. Ss. 476 and 195—Sections refer to the "Court" and not to the "Judge" or "Presiding Officer" of the Court.*

Sections 195 and 476, Criminal P. C., make reference to the "Court" and not to the "Judge" or even the "Presiding Officer" of the Court. It is clear that, whether the Judge or the presiding officer is the same or a different person, the Court remains the same and it is the Court that is competent to make the complaint. [P 761 C 2]

(b) *Civil P. C., O. 20, R. 20—Proceedings arising out of an application to obtain a copy must be deemed to be pending before the Court which decided the case—Application made to an official to grant a copy must be deemed to have been made to the Court.*

Under O. 20, R. 20, it is the duty of the Court which has decided a case to give a copy of the judgment and the decree to the parties on application, and such an application, has to be made to that Court. The proceedings arising out of an application to obtain a copy therefore must be deemed to be pending before that Court. It is open to the Court to delegate its functions to somebody else and the official to whom such functions are delegated really

exercises them on behalf of the Court and acts as its ministerial officer. He is the custodian of the records of the Court on its behalf and therefore any application made to that official must also be deemed to have been made to the Court. [P 761 C2]

R. C. Soni—for Petitioner.

Abdul Rashid and *Ahmad Hassan*—for the Crown.

Order.—The facts of this case are peculiar. On 7th June 1926 the petitioner Rawa Faqir Singh, who is an advocate of this Court, instituted a suit in his personal capacity in the Court of the Subordinate Judge, 4th Class, of Amritsar for the recovery of Rs. 800 against one Mr. Grosse. A decree was granted in his favour for Rs. 160 on 13th December 1926. The petitioner apparently decided to appeal against the decree dismissing a large portion of his claim. Such an appeal should ordinarily have been filed within 30 days; but this was not done. It is alleged that on 31st January 1927, he filed an application for a copy of the judgment and the decree in the case. An examination of the application shows that it was addressed to the officer in charge of the Copying Department of the Amritsar District and the signature of the petitioner bears the date of 4th January 1927. It appears that the Registrar of the Small Cause Court at Amritsar is the officer-in-charge of the Copying Department, and incidentally it happened that the same officer, that is to say, the Subordinate Judge, 4th Class, who decided the suit in question, exercised the powers of the Registrar, Small Cause Court.

After the application of the copies had been presented a clerk in the office of the Registrar wrote an order to the effect that the copy applied for may be granted. This order bears the date of 7th January 1927. It was placed before the Registrar for signature on 31st January 1927, along with other papers. The suggestion of the prosecution is that there was collusion between the clerk and the petitioner and a wrong date had been written on the order under the expectation that the Registrar would not notice the date and would sign the application in ordinary course. Admittedly application for copies made on 7th January 1927, would have enabled the petitioner to file an appeal within limitation, but an application made on 31st January would have the contrary effect. The Registrar, however, noticed the wrong date and held a departmental enquiry with the result of which we are not concerned.

On 9th March 1928 the police appealed to the District Magistrate for permission to investigate this matter, alleging that an offence under S. 468, I P. C., had been committed by the petitioner. This permission having been granted investigation was taken up by the police and the petitioner was arrested and sent up for trial under S. 463, I. P. C., the warrant for his arrest having been issued on 26th March 1928. Up to that stage no complaint had been filed against the petitioner in respect of this matter by any competent Court. Indeed it does not appear that the attention of the Court was drawn by the police to the necessity of a complaint. After the proceedings had been instituted in the Court of the Magistrate, however, whether on the objection of the petitioner or for some other reason the police moved the Court of the Subordinate Judge 4th Class, and the Registrar of the Small Cause Court to file a complaint against the petitioner. It may be mentioned that the Presiding Officer who originally decided the suit and before whom the application for the copies was placed for signature had in the meantime been transferred and another officer, Lala Guru Datt, had succeeded him, consequently it was Lala Guru Datt who was approached by the police to file a complaint and he did so on 14th April 1928, as Subordinate Judge, 4th Class, and Registrar, Small Cause Court.

An appeal against the filing of the compliant was preferred by the petitioner to the District Judge of Amritsar who by his order of 2nd June 1928, directed the withdrawal of the complaint of 14th April 1928. This order is based on two grounds: first that the offence concerned came to the knowledge of Lala Guru Datt in his executive capacity as the officer in charge of the Copying Department, and that "he could not act as a judicial officer under S. 476, Criminal P. C." The other ground was that the form of the complaint was incorrect. A reference to the grounds of appeal to the District Judge shows that the first ground was that the Subordinate Judge and the Registrar, Small Cause Court, was not competent to file the complaint.

The learned counsel for the petitioner explains that what his client meant was that the complaint should have been preferred by the Presiding Officer before whom the application for copy was put up for signature and not by his successor. But this is not what appears to have been argued before the District Judge, and whether there is any force in this contention of the learned counsel on its merits or not, it is quite clear that the ground taken up before the learned District Judge was that the Subordinate Judge 4th Class, and the Registrar, Small Cause Court, as such was not competent to file a complaint, but that he could do so only in his executive capacity. I may mention at this stage that a complaint is necessary under S. 195 (1) (c), Criminal P. C., only if the offence is committed in connexion with proceedings pending in a Court and not before an "executive officer" and therefore if the present contention of the petitioner is correct as to his object in raising the first ground before the District Judge, then no complaint under S. 195 would be necessary.

It appears that subsequent to the withdrawal of the complaint in pursuance of the order of the District Judge, Lala Guru Datt has filed another complaint whether in his personal capacity or as an officer in charge of the copying department does not appear from the present record as that complaint is not before me.

The present petition is by Bawa Faqir Singh, praying that the proceedings against him, which were started on the report of the police, be quashed. From what I have stated above it seems to me that the position taken up by the petitioner is curious, to say the least of it, and this matter I will have to consider when deciding whether I should exercise my discretionary jurisdiction in his favour.

It is now contended before me that the prosecution under S. 468, I. P. C., could not be instituted against the petitioner except on a complaint made under S. 476, Criminal P. C., by the Court before whom the proceedings in respect of the application were pending. The learned counsel for the petitioner concedes that such Court is the Court of the Subordinate Judge, 4th Class and the Registrar, Small Cause Court. He, however, about the end of his arguments, made a half-hearted attempt to urge when it was pointed out by the learned counsel for the Crown that as a matter of fact a complaint had been made by the Subordinate Judge, 4th Class, and the Registrar, Small Cause Court, and was withdrawn on his objection that such officer had no jurisdiction, that the complaint should have been filed by the Presiding Officer of the Court before whom application for copy was placed for signature and not by his successor in office. No authority was cited in support of this contention and Ss. 195 and 476, Criminal P. C, make reference to the "Court" and not to the "Judge" or even the "Presiding Officer" of the Court. It is clear that whether the Judge or the Presiding Officer is the same or a different person, the Court remains the same and it is the Court that is competent to make the complaint. There is, therefore, no force in this contention of the learned counsel.

As there has been a good deal of controversy on the subject between the parties before me, it would be better if I gave a finding as to the necessity of a complaint by the Court and as to the Court which should file a complaint in a case like this.

Under O. 20, R. 20, Civil P. C. it is the duty of the Court which has decided a case to give a copy of the judgment and the decree to the parties on application and such an application has to be made to that Court. The proceedings arising out of an application to obtain a copy therefore must be deemed to be pending before that Court. It is open to the Court to delegate its functions to somebody else and the official to whom such functions are delegated really exercises them on behalf of the Court and acts as its ministerial officer. He is custodian of the records of the Court on its behalf and therefore any application made to that official must also be deemed to have been made to the Court.

In the present case no question arises even of such delegation because the application was made to the officer-in-charge of the Copying Department who happened to be also the Presiding Officer of the Court which decided the suit. Even if it be held that the application was made and was put before the official concerned as a Registrar of the Small Cause Court who ex-officio was in charge of the Copy-

ing Department, then the Registrar was acting as a ministerial officer of the Court concerned, and in that capacity he did not exercise any executive functions in the matter of granting of the copies but the judicial functions of the Court concerned under O. 20, R. 20, which are subject to the control of the superior Courts. I, am therefore, clear that the offence, if any, committed by the petitioner was committed in connexion with proceedings in a Court and consequently a complaint was necessary by virtue of Ss 195 and 476, Criminal P. C. I also hold that the only Court competent to file a complaint was the Court of Subordinate Judge, 4th Class. or the Court to which such Court is subordinate.

In view of what I have stated above and the peculiar attitude taken up by the petitioner in this case, I do not think I would be justified in exercising my discretionary jurisdiction by quashing the proceedings in this case. Whatever might have been said about the action taken by the police initially, it appears that if proper proceedings are not now pending in the Court of the Magistrate, it is due to the self-contradictory attitude taken up by the petitioner. It is open to him to raise any objection that there may be as to the jurisdiction of the Magistrate before him, and, as I am not at present cognizant of the exact proceedings that are being taken against the petitioner or of the nature of the complaint that now has been made against him, I do not feel justified in quashing such proceedings. I dismiss this petition.

N.K. *Petition dismissed.*

A. I. R. 1928 Lahore 762

DALIP SINGH, J.

Wasakha Singh and *others*—Defendants—Appellants.

v.

Mt. Gutti and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No 660 of 1927, Decided on 23rd May 1928, from decree of Addl. Dist. Judge., Amritsar, D/- 10th February 1927.

(a) Custom (Punjab)—Daughters of Kambohs are excluded from succession even to urban self-acquired property.

Daughters of Kambohs are excluded from succession even to self-acquired property, though this property is situated in the urban area : *A. I. R.* 1926 *Lah.* 142 ; *A. I. R.* 1927 *Lah.* 241 and *A. I. R.* 1925 *Lah.* 556, *Rel. on.* [P 762 C 2]

(b) Riwaj-i-am—Urban property.

Riwaj-i-am of Amritsar District applies also to urban house property : 55 *P. R.* 1908 ; 2 *L. L. J.* 27 and *C. A. No.* 2206 *of* 1922, *Dist.* [P 763 C 1]

Muhammad Rafi—for Appellants.

Mukand Lal Puri—for Respondents.

Judgment.—The parties are Kambohs residing in Amritsar city. The dispute is about a house left by one Mian Singh, father of the plaintiff who is his daughter. The defendants are near collaterals of the deceased. The daughter plaintiff claimed to be entitled to succeed to the house on the ground that the family was governed by Hindu law and that the property was self-acquired property of her deceased father.

The trial Court held that the daughter was entitled to succeed, because the house was not ancestral landed property and, therefore, the entry in the Riwaj-i-am did not apply to this case. It relied on *Gujar* v. *Sham Das* (1), *Achha* v. *Gaman* (2) and *Mahomed Hayat Khan* v. *Sandhe Khan* (3).

On appeal by the defendants collaterals, the learned District Judge held that *Mahomed Hayat Khan* v. *Sandhe Khan* (3) governed the case and that even under the general customary law daughters could succeed to it in preference to collaterals.

The defendants have come on second appeal, having obtained a certificate from the learned Additional District Judge. On behalf of the appellants it has been contended that there are rulings of this Court namely, *A. I. R.* 1926 *Lah.* 142, *Labh Singh* v. *Mt. Mango* (4), *Nadhen Singh* v. *Mt. Rajo* (5) of which *A. I. R.* 1926 *Lah.* 142 relates to Kambohs wherein it was held on the authority of this very Riwaj-i-am that daughters are excluded from succession even to self-acquired property. Reference is also made to a judgment on the record by the then District Judge Mr. Brasher subsequently referred to in *A. I. R.* 1926 *Lah.* 142.

On behalf of the respondent it is contended that the Riwaj-i-am does not ap-

(1) [1887] 107 P. R. 1887.
(2) [1893] 120 P. R. 1893.
(3) [1908] 55 P. R. 1908=105 P. W. R. 1908.
(4) A. I. R. 1927 Lah. 241=8 Lah. 281.
(5) A. I. R. 1925 Lah. 556.

ply to urban house property and for this reliance has been placed on *Mahomed Hayat Khan* v. *Sandhe Khan* (3) *Ghulam Mahomed* v. *Bhura* (6) and civil appeal No. 2206 of 1922, a Division Bench ruling. All these cases, however, refer to the question of the onus in view of the general custom as regards urban house property not connected with ancestral land which had been alienated by the then proprietor. Questions of alienation and questions of succession are different, and I am unable to see that the Riwaj-i-am does not apply to all property of all kinds whether situate in a town or whether situate in a village. The distinction about the right to alienate ancestral moveable obviously does not apply to a question of succession. The point, however, is not entirely free from difficulty, and it has also been contended that the Riwaj-i-am with reference to this particular question has not been placed on the record. However, the Riwaj-i-am is given in detail in *Labh Singh* v. *Mt. Mango* (4), and it should be a mere piece of formality to require that the appellant should put the Riwaj-i-am on the record before referring to it. The Riwaj-i-am obviously was in the minds of all the parties and no prejudice is caused to the plaintiffs, because, as pointed out by the trial Court, it had warned the parties to produce all the evidence necessary on the point. I, therefore, hold that this argument and the judgment of the District Judge based on *Mahomed Hayat Khan* v. *Sandhe Khan* (3) have no force in face of the Riwaj-i-am.

It is next contended that it has been proved that Mian Singh, the deceased father, had settled in Amritsar and followed the occupation of trade and had presumably given up the customs of Kambohs who follow agricultural pursuits and therefore, the Riwaj-i-am did not govern him. I have been through the evidence on the record and it is clear to me, as held by the trial Court, that there is no good evidence to show that the father of Mian Singh ever resided in Amritsar. There is evidence to show that Mian Singh himself resided at Amritsar where he carried on trade in cows and buffaloes. There is evidence, however, also to show that originally he lived in Bharu village and that even after taking up residence in Amritsar he took land on lease for the purposes of cultivation at village Bharu and at village Sultan-wind. The trial Court accepted this evidence as more reliable than that produced by the plaintiff, and I see no reason to dissent from that finding. I, therefore, hold that it is not proved by the plaintiff on whom the onus lay in the circumstances that Mian Singh had abandoned the customs governing the Kambohs of villages, for the customs, if any, governing the Kambohs of Amritsar or the personal law of the parties if that is followed by the Kambohs who have been long residents in Amritsar.

For these reasons, I accept the appeal and dismiss the plaintiff's suit. In the circumstances, I leave the parties to bear their own costs throughout.

Note.—I must note that I declined to allow counsel for the respondents to contend that the Riwaj-i-am unsupported by instances opposed to the general custom did not shift the onus in view of *Labh Singh* v. *Mt. Mango* (4) and *Jugal Das* v. *Mt. Jasodhan Bai* (7).

N.K. *Appeal accepted.*

(6) [1920] 2 L. L. J. 27=8 P. L. R. 1920=54 I. C. 387=14 P. W. R. 1920.

(7) A. I. R. 1928 Lah. 212=9 Lah. 110.

A. I. R. 1928 Lahore 763

JAI LAL, J.

Jagdish Ram and *another*—Plaintiffs—Appellants.

v.

Mukand Lal — Defendant — Respondent.

Second Appeal No. 2716 of 1927, Decided on 28th February 1928, from decree of Addl. Judge, Hoshiarpur, D/- 16th June 1927.

(a) *Civil P. C., O. 7, R. 6—Onus.*

Where, prima facie, suit is barred but for the alleged minority of plaintiffs onus is on plaintiffs to prove that suit is within time.

[P 764 C 1]

(b) *Evidence Act, S. 101—Onus immateria'—Rule, that where parties have led evidence on particular issue, wrong allocation of burden of proof does not entitle the party on whom burden is subsequently placed to claim remand, is not inflexible.*

The rule that where parties have led evidence on a particular issue, the wrong allocation of the burden of proof does not entitle he party on whom the burden of proof is subsequently placed to claim a remand, is not inflexible but its applicability must depend upon the facts of the case, the nature of the point involved and the evidence produced by both parties.

[P 764 C 1]

N. C. Pandit—for Appellants.
Mukand Lal Puri—for Respondent.

Judgment.—The only question which is raised in this second appeal before me is the question of limitation. In the trial of the case an objection was raised by the defendant that the plaintiffs' suit was barred by time. The trial Court framed an issue on the question of limitation and placed its burden on the defendant, and finally held in favour of the plaintiffs and decreed the suit. On appeal by the defendant the District Judge held that the burden of proving that the suit was within time was on the plaintiffs. He, however, considered that as both the parties had led evidence on the question of the plaintiffs' age which was the determining factor on the question of limitation, the wrong allocation of the burden of proof by the trial Court was immaterial and therefore declined to remand the case as prayed for by the plaintiffs and proceeded to decide the question of limitation on the evidence which was already on the record and thereupon held that the plaintiffs had failed to prove that their age was such as to entitle them to claim that the suit was within limitation.

Before me it is contended that the burden of proof lay on the defendant. I am unable to agree in this contention. It was for the plaintiffs to establish that their suit was within limitation. Normally it would have been barred by time, but for the alleged minority of the plaintiffs. I consider, therefore, that the view of the District Judge that the burden of proof lay on the plaintiffs is correct.

I am not, however, prepared to agree with the learned Judge that the plaintiffs were not entitled to a remand after he had changed the burden of proof. The counsel for the respondent has cited certain authorities in support of the District Judge's view that where parties have led evidence on a particular issue, the wrong allocation of burden of proof does not entitle the party on whom such burden of proof is subsequently placed to claim a remand. This rule, in my opinion, cannot be held to be inflexible, but its applicability must depend upon the facts of each particular case, the nature of the point involved and of evidence given by both parties. There may be cases where the person on whom the burden of proof lay gave evidence in support of his allegations which on the face of it is of no value and the other party did not consider it necessary to take up the time of the Court by producing the whole of the evidence which he could produce to rebut the allegations of the other side. In this case, in my opinion, the plaintiffs did not produce the whole of the evidence which they could produce if the burden of proof had initially been placed upon them. I consider, therefore, that they are entitled to an order of remand

I accept this appeal, set aside the decree of the District Judge and remand the case to the trial Court with directions to take evidence of the parties on the question of limitation assuming that the burden of proving that the suit is within time is on the plaintiffs and then to decide the suit on its merits. The costs of the proceedings hitherto taken will abide the result. The Court-fee on the memorandum of appeal will be refunded to the appellants.

D.R./R.K. *Appeal accepted.*

A. I. R. 1928 Lahore 764

TEK CHAND, J.

Banarsi Das—Plaintiff—Appellant.

v.

Muhammad Hussain and *others* —Defendants—Respondents.

Second Appeal No. 2425 of 1927, Decided on 16th May 1928, from decree of Dist. Judge, Delhi, D/- 12th April 1927.

Punjab Courts Act, S. 42—Course of appeal is determined by the original character of the plaint—Civil P. C. S. 102.

The course of appeal is determined by the character of the plaint as originally made and is not affected by the plaintiff subsequently dropping or being unable to seek relief with regard to a part of his claim : *A. I. R.* 1925 *Bom.* 440 and 22 *M. L. J.* 47, *Rel. on.*

A plaintiff sued a defendant for ejectment. But later he withdrew his prayer for ejectment and confined his claim merely to recovery of rent, the amount of which was below Rs. 500/- It was contended that no second appeal could lie from the decision in that case because after the withdrawal of the prayer for ejectment the suit assumed a character of a small cause.

Held : second appeal would lie. [P 765 C 2]

Bishan Narain—for Appellant.
Muhammad Amin and *Nanwa Mal*—Respondents.

Judgment.—The relevant facts relating to the dispute, which has given rise to this second appeal, appear to be as follows :

Muhammad Ahmad, respondent was the original owner of a house which he sold to the plaintiff Benarsi Das in 1921 and of which he became the tenant under the vendee for the date of the sale. The house was actually in the possession of Muhammad Hussain and Muhammad Akbar respondents, who were originally tenants under Muhammad Ahmad and who after the sale continued to occupy it as his sub-tenants. Muhammad Ahmad made default in payment of rent to Benarsi Das who had from time to time to sue him for recovery thereof. All these suits except the one relating to rent from 26th July 1923 to 18th February 1924 were decreed. In that suit Muhammad Ahmad pleaded that rent up to 15th January 1924 had been paid to the plaintiff and in support of his contention produced a receipt by plaintiff giving him a complete discharge up to that date. He also stated that the two sub-tenants Muhammad Hussain and Muhammad Akbar had attorned direct to the plaintiff. The Judge, Small Cause Court, held the payment proved and dismissed the suit on 26th March 1924.

Shortly afterwards, the plaintiff relying on the defence of Muhammad Ahmad sued Muhammad Hussain for ejectment and recovery of rent from 8th January 1924 to 30th August 1924. Muhammad Hussain pleaded that no pivity of contract existed between him and the plaintiff and that he along with Muhammad Akbar was holding the house under Muhammad Ahmad. On this Muhammad Ahmad and Muhammad Akbar were impleaded as defendants. The trial Court upheld Muhammad Hussain's plea that the relationship of landlord and tenant did not exist between him and the plaintiff and dismissed the suit as against him and Muhammad Akbar, but passed a decree for Rs. 115-8 against Muhammad Ahmad alone. It may be mentioned that during the pendency of this suit the plaintiff had sold the house to Muhammad Hussain and had made a statement that in view of this sale he could not get any relief by way of ejectment as originally prayed and that that part of his claim might be dropped.

On appeal by Muhammad Ahmad the learned Additional District Judge was of opinion that the decision of the Small Cause Court Judge dated 26th March 1924, though "not strictly" operating as "res judicata" was on general principle a bar to the plaintiff's claim against Muhammad Ahmad, and that for this reason and also because Muhammad Ahmad had not been originally impleaded as a defendant no decree could be passed against him. He further held that the relationship of landlord and tenant did not exist between the plaintiff and Muhammad Hussain, and accordingly he accepted Muhammad Ahmad's appeal and dismissed the suit in its entirety. Benarsi Das has come up in second appeal to this Court.

A preliminary objection is raised by Mr. Nanwa Mal on behalf of Muhammad Ahmad respondent that as the plaintiff had before the decision of the suit by the trial Court, withdrawn his prayer for ejectment and had confined his claim merely to recovery of rent, the amount of which was below Rs. 500, no second appeal lies under S. 42, Punjab Courts Act. In my opinion this objection has no force and must be overruled. In *Ganapa Putta* v. *Hammad Saiba* (1) and *Cheriyonni* v. *Nherapoyill* (2), it was held, under somewhat similar circumstances, that the course of appeal is determined by the character of the plaint as originally made and is not affected by the plaintiff subsequently dropping or being unable to seek relief with regard to a part of his claim. I agree with this view of the law, and hold that the second appeal is competent.

Coming now to the merits, the plaintiff-appellant is not entitled to go behind the finding of fact concurrently arrived at by both the Courts below that no privity of contract existed between him and Muhammad Hussain or Muhammad Akbar, and I cannot interfere with the dismissal of the suit as against them.

As to Muhammad Ahmad, I am, however, of opinion that the judgment of the learned Additional District Judge cannot be sustained. The decision of the Judge, Small Cause Court, dated 26th March 1924, is admittedly not res judicata under S. 11, Civil P. C. But it has been

(1) A. I. R. 1925 Bom. 440=49 Bom. 596.
(2) [1911] 22 M. L. J. 47=13 I. C. 174=(1911) 2 M. W. N. 587.

held to be a bar to the trial of the issue relating to the rights of the plaintiff and Muhammad Ahmad, under the general principles of res judicata. That decree, however, really proceeded on the finding that payment of rent, up to 15th January 1924 had been proved and the receipt produced by Muhammad Ahmad was genuine. There was no well-considered decision on the question of the termination of the relationship of landlord and tenant between plaintiff and Muhammad Ahmad and any remarks incidentally made therein by the Judge, Small Cause Court, cannot operate as a bar to that point being re-agitated in this suit. After going through the record I agree with the finding of the trial Court that Muhammad Ahmad continued to be the tenant of the plaintiff and was bound to pay the rent.

There is no force in the further argument of the learned District Judge that in the plaint as originally lodged no relief had been claimed against Muhammad Ahmad. He had been impleaded subsequently on Muhammad Hussain's objection and a decree could be passed against him on the finding that he was still the tenant of the house under the plaintiff.

I cannot, however, see how the plaintiff could be granted a decree for rent from 8th January 1924 to 18th February 1924, for which his suit has been, rightly or wrongly, dismissed by the Judge, Small Cause Court.

The result is that I accept the appeal, set aside the judgment and decree of the lower appellate Court and in lieu thereof pass a decree for Rs. 98 as rent from 19th February 1924 to 13th August 1924 in favour of the plaintiff against Muhammad Ahmad defendant. The suit against Muhammad Hussain and Muhammad Akbar is dismissed.

Muhammad Ahmad must pay the costs of the appellant throughout.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 766

TEK CHAND, J.

Amar Singh—Defendant—Appellant.

v.

Chhajju Mal and others—Plaintiffs and Defendants—Respondents.

Misc. Second Appeal No. 755 of 1927, Decided on 28th Nov. 1927, from order of Addl. D. J. Lahore, D/-26th Feb. 1927

(a) *Execution—Suit for declaring execution proceedings null and void does not lie until the decree itself is set aside.*

No Court has jurisdiction to entertain a suit to declare proceedings in execution of a decree passed by a competent Court null and void so long as the decree itself is not set aside either on appeal or in a regular suit on the ground of fraud under conditions under which the law allows such a decree to be so challenged. [P 768 C 1]

(b) *Decree—Setting aside—Suit does not lie to set aside a decree on the ground of its being wrong—Appeal is the remedy.*

A party to a decree is not entitled to maintain a suit to have the decree set aside on the ground that it was wrong. His remedy is to have it set right in appeal: 41 *Cal.* 990 and 43 *Cal.* 217, *Rel. on.* [P 768 C 2]

(c) *Civil P. C., S.* 104 (2)—*Suit dismissed on a preliminary ground—Case remanded in appeal—Appeal preferred on the remand order—Appeal was held competent as the order of the trial Court was not one rejecting the plaint.*

A suit was filed for declaring ineffectual certain execution proceedings. It was dismissed by the Subordinate Judge on the ground that plaintiff having preferred no appeal from the decree, the present suit was not maintainable. On appeal by the plaintiff the District Judge held that the suit was maintainable and remanded the case under O. 41, R. 23. Against this order of remand a miscellaneous appeal under O. 43, R. 1 (u), was preferred by the defendant. It was contended that the order passed by the trial Court was really one rejecting the plaint, that the appeal to the District Judge by the plaintiff must be considered to have been filed under O. 43, and no further appeal lay against the order of the District Judge as laid down in S. 104, Cl. (2).

Held: that the order of the trial Court was not one rejecting the plaint, under O. 7, R. 11, but was clearly one dismissing the suit on a preliminary point and the appeal preferred by the plaintiff himself to the District Judge was filed not under O. 43, Civil P. C., but under S. 96 against the decree passed by the Subordinate Judge and therefore the appeal was competent. [P 768 C 1]

Durga Das—for Appellant.

I. C. Chopra and *Ram Ditta Mal Bhalla*—for Respondents.

Judgment.*—By two mortgage-deeds dated 8th May 1923, and 11th May 1920 Salig Ram and Sham Das mortgaged certain house property at Lahore with

[* Letters Patent Appeal against this Judgment was dismissed.]

Dittu Mal and his son Chhajju Mal who was a minor at that time. On 8th April 1922 Dittu Mal acting for himself and as the guardian of his minor son Chhajju Mal executed a deed transferring these mortgagee rights to Bhai Amar Singh, appellant. On 2nd January 1924 Bhai Amar Singh instituted a suit for recovery of the money due to him on foot of the deed, dated 8th April 1922 and impleaded as defendants the original mortgagors Salig Ram and Sham Das and their mortgagees Dittu Mal and Chhajju Mal. In these proceedings Dittu Mal was originally shown as the guardian ad litem of his minor son Chhajju Mal. He however, refused to act and later on the ahlmad of the Court was appointed as his guardian ad litem. On 28th August 1927 a preliminary decree was passed in favour of Bhai Amar Singh recoverable from the house property mortgaged. Against this preliminary decree an appeal was preferred to the District Judge by Dittu Mal and by his son Chhajju Mal through the ahlmad of the Court of Bawa Jhanda Singh who had been appointed as guardian ad litem in the Court below, and Mr. Jai Gopal Sethi, advocate, was engaged to argue this appeal on behalf of both appellants. Among the grounds urged before the learned District Judge was the non-liability of the minor Chhajju Mal on foot of the mortgage-deed which purported to have been executed by Dittu Mal for himself and his minor son Chhajju Mal. On 24th January 1925 the learned District Judge, Mr Rangi Lal, affirmed the preliminary decree passed by Bawa Jhanda Singh against all the defendants including Chhajju Mal minor with a slight modification which is not material for the dispute now before me.

Shortly afterwards, on 16th June 1925 Chhajju Mal who had by this time become a major instituted a suit for a declaration that the preliminary decree passed against him by Bawa Jhanda Singh on 28th August 1924 had been fraudulently obtained and was not binding on him. This suit was dismissed on 21st August 1925 on the ground that the preliminary decree passed by Bawa Jhanda Singh had merged in the decree passed by Mr. Rangi Lal and that, therefore, no suit was competent to have that decree set aside. An appeal against this decision filed by Chhajju Mal was also unsuccessful.

The decree-holder then took proceedings to have the preliminary decree made final. Chhajju Mal filed a number of objections against the decree being made final, pleading, inter alia, that the preliminary decree had been passed against him in proceedings in which he was not properly represented and that his father had been colluding with the decree-holder. These objections were heard and overruled by Mr. Muhammad Akbar, Subordinate Judge, on 12th November 1925 it being held that such objections could not be taken in proceedings to have the preliminary decree made final but that the remedy of Chhajju Mal (if any), was by way of a suit. A final decree was accordingly passed against all the judgment-debtors including Chhajju Mal on 12th November 1925. No appeal was filed by Chhajju Mal against this decree.

The decree-holder then started proceedings to execute his decree with a view to realize the amount that had been found due to him and prayed for sale of the mortgaged property. But before much progress could be made in those proceedings Chhajju Mal instituted another suit on 18th March 1926 giving the history of the previous litigation and praying that a

declaratory decree may be granted in his favour against the defendants holding that whatever proceedings have been taken on the application dated 1st January 1926 in execution, on the basis of preliminary and final decrees are null and void and ineffectual on the rights of the plaintiffs and the person and property of the minor are not liable for the payment of the decree in file No. 5/1924.

It will be seen that the prayer in the plaint did not ask for the setting aside either of the preliminary or the final decree on the ground that fraud had been committed by the decree-holder against the plaintiff in proceedings prior to and terminating with the final decree but all that was sought to be declared ineffectual against the plaintiff was the proceedings that had been taken in execution of the final decree above mentioned.

This suit was dismissed by the Subordinate Judge (Lala Pars Ram) on two grounds: firstly, that the preliminary decree could not be challenged in face of the dismissal of the plaintiff's previous suit on 21st August 1925; and, secondly, that the plaintiff having become a major at the time when proceedings for passing

the final decree were going on and having unsuccessfully filed objections to the decree being made final and having preferred no appeal therefrom the present suit was not maintainable. On appeal by the plaintiff the Additional District Judge, Lahore, held that the suit was maintainable and remanded the case under O. 41, R. 23, Civil P. C., for disposal on the merits.

Against this order of remand a miscellaneous appeal under O. 43, R. 1 (*u*) has been preferred by the defendant Bhai Amar Singh. A preliminary objection is taken by Mr. I. C. Chopra against the maintainability of this appeal on the ground that the order passed by the trial Court (Lala Pars Ram) was really one rejecting the plaint, that the appeal to the Additional District Judge, by the plaintiff must be considered to have been filed under O. 43 and no further appeal to this Court lies against the order of the District Judge as laid down in S. 104, Cl. (2), Civil P. C. In my opinion there is no force in this objection. The order of the trial Court was not one rejecting the plaint, under O. 7, R. 11, but was clearly one dismissing the suit on a preliminary point and the appeal preferred by the plaintiff himself to the Additional District Judge was filed not under O. 43, Civil P. C., but under S. 96 against the decree passed by the Subordinate Judge. I must, therefore, overrule the preliminary objection and hold that the appeal is competent.

On the merits both counsel have addressed me at length and after giving full consideration to their arguments I am of opinion that the decision of the learned District Judge cannot be sustained As already pointed out the present suit is not one by the plaintiff to have the preliminary or the final decree set aside on the ground of fraud but the prayer is to have the proceedings started on 1st January 1926 to execute the final decree declared null and void. It is obvious that no Court has jurisdiction to entertain a suit to declare proceedings in execution of a decree passed by a competent Court null and void so long as the decree itself is not set aside either on appeal or in a regular suit on the ground of frand under conditions under which the law allows such a decree to be so challenged. The plaintiff's suit must, therefore, fail on this short ground.

I do not, however, wish to rest my decision on a mere technicality. Mr. I. C. Chopra has contended that in the body of the plaint the plaintiff-respondent had stated that the proceedings terminating in the preliminary decree were tainted with fraud and that though the last paragraph of the plaint is not happily worded, it must be taken to mean that the plaintiff really wanted to have the decrees set aside on the ground of fraud perpetrated on him by his father during his minority in collusion with the decree-holder. But as already pointed out the plaintiff had become a major at the time when the proceedings to make the preliminary decree final were going on and had actually appeared in Court and raised the very same objections on which he now bases the present suit. Mr. Muhammad Akbar, Subordinate Judge, who was properly seized of the case, gave a decision on those objections on 12th November 1925. Whether that decision was right or wrong it is not for me now to decide. The plaintiff does not allege that any fraud was perpetrated in the proceedings pending before Mr. Mohammad Akbar. Even if we were to suppose that the order passed by him was wrong the remedy of the plaintiff was to have it set right in appeal. He certainly is not entitled to maintain a suit to have the decree set aside on the ground that it was wrong. If any authority were needed for this proposition, reference may be made to the judgments of Sir Lawrence Jenkins in *Nanda Kumar* v. *Ram Jiban* (1), and *Kusadhaj Bhakta* v. *Broja Mohan Bhakta* (2), in which the question has been discussed at length. I am, therefore, of opinion that the Subordinate Judge had come to a correct conclusion and had rightly dismissed the suit. Accordingly I accept the appeal, set aside the decision of the learned Additional District Judge and restore that of the trial Court dismissing the plaintiff's suit. The appellant will get his costs in all Courts.

A.L./R.K. *Appeal accepted.*

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(1) [1914] 41 Cal. 990=19 *C.* L. J. 457=23 I.C. 337=18 C. W. N. 681.

(2) [1916] 43 Cal. 217=31 I.C. 13=19 C.W.N. 1228.

A. I. R. 1928 Lahore 769

AGHA HAIDAR AND BROADWAY, JJ.

Narindar Singh and *others*—Defendants—Appellants.

v.

C. M. King—Plaintiff—Respondent.

First Appeal No. 780 of 1923, Decided on 18th June 1928, from decree of Sr. Sub-Judge, Lahore, D/- 2nd January 1923.

(a) Evidence Act, S. 18—Admission by one defendant in a suit is not evidence against the other.

An admission, or even a confession of judgment, by one of several defendants in a suit is no evidence against the other defendants: 2 *I. A.* 113, *Foll.* [P 771 C 1]

(b) Civil P. C., O. 8, R. 5—Defendant not putting in any written statement—R. 5 does not apply.

Order 8, R. 5, does not apply to a case where the defendant has not put in any written statement at all. Further the verification of the plaint is not evidence on which a suit can be decreed whether the adversary does or does not appear: 43 *Cal.* 1001, *Foll.* [P 771 C 1]

M. L. Puri, *S. L. Puri* and *Amar Nath Chona*—for Appellants.

Carden Noad and *Jagan Nath Bhandari*—for Respondent.

Agha Haidar, J.—This appeal arises out of a suit brought for damages for a libel published in the issue of a certain newspaper called the Akali, dated 6th April 1921. The defendants to the suit are Narindar Singh, the alleged publisher, Abdur Rahman, the alleged printer, and Pratap Singh, the alleged editor of the said newspaper. The rest of the defendants 4 to 15, were, according to the plaintiff, members of the Managing Committee and proprietors of the Akali Newspaper. Narindar Singh and Pratap Singh were confined in jail at the time of the institution of the suit and did not put in appearance in the case, nor filed any written statement, and the suit against them proceeded ex parte. Abdur Rahman the printer only put in a written statement, and as regards para. 2 of the plaint which contained the allegation that Narindar Singh, defendant 1, was the publisher, Abdur Rahman, defendant 2, was the printer and Pratap Singh defendant 3 was the editor, he pleaded that the said paragraph was correct in so far that on the date in question Narindar Singh was the publisher, Pratap Singh was the editor and he (Abdur Rahman) was the printer. As to the rest of his pleas we are not concerned in the present appeal.

About the time of the publication of the alleged libel there was a movement for reform among a certain section of the Sikhs in respect of the Gurdawaras. The Akalis represented the reform party and were trying to take possession of the Sikh Gurdawaras with a view to manage them according to their own ideas. Matters came to a head in the disturbances which took place on 20th February 1921, when a number of Sikhs lost their lives within the precincts of the Gurdawara at Nankana. The history of this unrest and its tragic end need not be recapitulated here, as it is given in full detail in the judgment of a criminal appeal, delivered by this Court aud printed in *Mahant Narain Das* v. *Emperor* (1). As already stated, the alleged libel, according to the plaintiff was published in the issue dated 6th April 1921, of the newspaper called the Akali. It made a number of charges of negligence and carelessness against the plaintiff in that it was stated that the plaintiff did not take sufficiently prompt and vigorous steps in order to prevent the bloodshed at the Nankana Gurdwara. The statement, however, with which we are concerned in the present appeal, is to be found at p. 5 of the printed paper book and is also embodied in Cl. 3 (b) of the plaint. It runs as follows:

> It is a general rumour that Mahant Narain Das made Mr. King his own by some secret means, and for this reason Mr. King used to back the Mahant and for this very reason gave the letter to faithless Kartar Singh Bedi, otherwise what need had Mr. King in becoming a legal adviser of the Mahant. There is no doubt that there is something wrong in the matter. It may be that we might fail to prove it, but we are convinced that Government officials had a hand in the Nankana Tragedy.

This extract, according to Mr. King, contained innuendoes suggesting that he (Mr. King) had accepted a bribe or illegal gratifications from Mahant Narain Das, and that as a consequence of this act he secretly helped the Mahant in breaking the law and thus aided and abetted the person who brought about the massacre of the Sikhs at Nankana. Mr. King, who was a senior distinguished member of the Civil Service and at the time occupied a high and responsible position of the Commissioner of Lahore Division

(1) A. I. R. 1922 Lah. 1=3 Lah. 144.

naturally resented this statement and brought the present suit, as already stated, on 12th July 1921. The trial Court held that Mr. King had been negligent in the performance of his duties, that this interference was neither unreasonable nor unfair, and that the defendants, therefore, did not exceed the bounds of fair comment in publishing a statement to this effect. It, however, held that the passage reproduced in para.3 (b) of the plaint was libellous. This point which was in fact conceded by counsel for the defendants in the Court below was not seriously urged by counsel for the appellants before us. The learned Subordinate Judge dismissed the plaintiff's suit as regards defendants 4 to 15. He, however, decreed the plaintiffs' claim and awarded him the substantial sum of Rs. 8,000 against defendants 1, 2 and 3 with proportionate costs. Mr. King has not filed any appeal as regards the dismissal of his claim against defendants 4 to 15, nor has he challeged by way of cross appeal or objections the amount of damages awarded to him by the Court below.

The appeal in this Court purports to have been filed on behalf of three persons namely, Narindar Singh, Partap Singh and Abdur Rahman, by Mr. Sant Singh, vakil for the appellants. The late Mr. M. S. Bhagat signed the memorandum of appeal for the said Vakil, Mr. Sant Singh. On a reference to this vakalatnama filed with the memorandum of appeal in this Court, we find that Mr. Sant Singh was engaged to appear only for and on behalf of Narindar Singh and Partap Singh. At the time of the argument Mr. Amar Nath Chona asked that he was appearing on behalf of Abdur Rahman, but as there was no proper presentation of the appeal on behalf of Abdur Rahman, Mr. Amar Nath Chona had no locus standi to represent him. Accordingly as no appeal on behalf of Abdur Rahman is legally before us, we have no alternative except to dismiss the appeal so far as he is concerned.

Mr. Mukand Lal Puri appeared for the other two appellants, namely, Narindar Singh and Partap Singh, the alleged publisher and editor respectively, of the newspaper Akali. He raised two points: (1) that there was no evidence that Narindar Singh was the publisher and Partap Singh was the editor of the newspaper in question on the date on which the alleged libel was supposed to have been published in the Akali newspaper; and (2) that the amount of damages was excessive.

As regards (1) it may be noted that in dealing with the liability of defendants 1 to 3 the learned Subordinate Judge has disposed of the matter in a somewhat perfunctory manner. He says that

> it is admitted by defendant 2 namely Abdur Rahman, that he is the printer and defendants 1 and 3 are the publisher and the editor respectively, and the liability of all these is indisputable.

This is a very unsatisfactory way of dealing with an important point in the case. Now, so far as defendant 1, namely Narindar Singh, is concerned, there is no satisfactory evidence on the record that he was the publisher of the newspaper Akali on 6th April 1921. A copy of a newspaper, which purports to be the Akali of 6th April 1921, is on the record, but neither is it exhibited, nor have the requirements of O. 13, R. 4, Civil P. C., been complied with in respect of the same. Beyond the fact that this particular document contains words indicating that its publisher was a person named Narindar Singh we know nothing. Reference has been made to the statement of one Lala Mehar Chand (P. W. 1) in order to show that defendant 1 was the publisher of the newspaper Akali dated 6th April 1921. This evidence, in our opinion, is wholly inadequate to prove that defendant 1 Naraindar Singh, was in reality and in fact the publisher of the newspaper, a copy of which containing the libel in question is on the record. We could not trace Ex. P. 1 to which reference is made in the evidence of this witness. The finding of the learned Subordinate Judge is entirely erroneous when he tries to prove the liability of defendants 1 and 3 from the plea contained in the written statement of Abdur Rahman. This statement may be evidence against Abdur Rahman, but it cannot in any way touch defendants 1 and 3. Abdur Rahaman has not appeared as a witness in the case at all and defendants 1 and 3 had no opportunity of .cross-examining him. In any case this admission in his pleadings is not tantamount to proof of the facts stated therein and is certainly no evidence against his co-defendants. If any authority were needed for this elementary proposition it is to be found in *Aumirto-*

lall Bose v. *Rajoneekant Mitter* (2) where at p. 219 it is laid down that an admission, or even a confession of judgment, by one of several defendants in a suit, is no evidence against another defendant. Mr. Noad, the learned Government Advocate who conducted the case on behalf of Mr. King, the plaintiff, in the trial Court and appeared for him in this Court as well, referred to O. 8, R. 5, Civil P. C, and boldly urged that the allegations contained in the plaint about defendant 1 being the publisher and defendant 3 being the editor, such allegations not being denied specifically or by necessary implication by the said defendants, may be taken to have been admitted by them. The whole of his argument on this part of the case is met by the case reported in *J. B. Ross & Co.* v. *C. R. Scriven* (3) where three learned and distinguished Judges laid down that O. 8, R 5, of the Code did not apply to a case where the defendant had not put in any written statement at all and further that the verification of the plaint was not evidence on which a suit could be decreed whether the adversary did or did not appear.

Mr. Noad also relied upon O. 9, R. 11, Civil P. C., and argued that, according to this rule, the suit had been rightly decreed against defendants 1 and 3. O. 9, R. 11, cannot possibly be invoked in support of the proposition urged by Mr. Noad and need not be discussed any further.

As regards Partap Singh, the alleged editor, there is no evidence whatsoever, on the record that he was the editor of the Akali on the date of the publication of the libel. Even the copy of the newspaper, which is placed on the file, unexhibited and unendorsed as it is, does not contain any reference to Partap Singh much less to his being the editor of the newspaper. Reliance was placed on the statement of D. W. 1 namely Sardar Buta Singh, which is to be found at p. 18 of the printed paper book in order to prove that Partap Singh was the editor of the Akali on 6th April 1921. This witness in cross-examination stated that Mangal Singh, the former editor of the Akali, and Partap Singh, his successor, stated to him that one Sundar Singh was the proprietor of a certain newspaper. We know nothing whatsoever about the period of which this witness is speaking. This witness, therefore, does not help the plaintiff in any way.

Thus there is no evidence on the record to establish the liability of defendants 1 and 3 who are not proved to have been the publisher and the editor respectively of the newspaper Akali on the date in question. In this connexion it would be useful to refer to the statement of Mr. King who gave evidence in the case on his own behalf. He stated that he did not know when the articles were published and as to who were at the time its proprietors and editor This is very clear and in conjunction with what has been stated above, completely destroys the plaintiff's case as against defendants 1 and 3.

It may be noted that at the time of argument Mr. Noad explained to this Court and pointed out that in the trial Court his attention was only concentrated upon defendants 4 to 15 whose liability he was trying to establish and that he did not take particular care to prove the allegations of the plaintiff as regards defendants 1, 2 and 3. In the end he asked this Court that the case should be remanded and further opportunity be given to establish the case against defendants 1 and 3 by proving that they were respectively the publisher and the editor of the offending newspaper on the date in question. With the conduct of the case by Mr. Noad in the trial Court we are not concerned, but certainly we are not prepared to give the plaintiff at this late stage a fresh opportunity of proving his case against defendants 1 and 3 and thus treat what had happened in the trial Court more than five years ago as something in the nature of a preliminary canter.

Having regard to the view taken by us on the first point raised by the learned counsel for the appellants, it is not necessary for us to go into the question as to whether the amount of damages awarded by the Court below is excessive or not.

The result is that there being no proper appeal on behalf of Abdur Rahman, the decree passed by the lower Court against him will stand and his appeal is dismissed. The appeal of Narindar Singh and Partap Singh is allowed and the decree of the trial Court passed against

(2) [1874] 2 I A. 113=15 B. L. R. 10=23 W. R. 214=3 Sar. 430 (P. C.).
(3) [1916] 43 Cal. 1001=31 I. C. 235=20 C.W. N. 1192.

them is set aside and the plaintiff's suit against them will stand dismissed. The parties will bear their own costs throughout.

N.K. *Appeal allowed.*

A. I. R. 1928 Lahore 772

BHIDE, J.

Hari Bakhsh—Plaintiff—Petitioner.

v.

Babu Lal and *another*—Defendants—Respondents.

Civil Misc. Petn. No. 313 of 1928, Decided on 23rd June 1928, in Civil Appeal No. 1963 of 1927.

(a) *Civil P. C., O. 38, R. 5 — Property already disposed of cannot be attached—Property to be attached should be specified with an estimated value thereof—Property of defendant is contemplated and not of the parties jointly.*

Rule 5 contemplates attachment of property which the defendant is about to dispose of or remove from the jurisdiction of the Court and not of the property already disposed of. It requires the applicant to specify the property to be attached and the estimated value thereof and security can only be taken for producing and placing at the disposal of the Court such property or the value of the same or such portion thereof as may be sufficient to satisfy the decree. The rule contemplates attachment of property belonging to defendant and not of property belonging jointly to parties.

[P 772 C 2, P 773 C 1]

(b) *Civil P. C., S. 151—Scope.*

Section 151 cannot be resorted to where there is another remedy open. [P 773 C 1]

D. C. Ralli—for Petitioner.

Sardha Ram—for Respondents.

Order.—This is an application under O. 38, Rr. 1, 2 and 5 and S. 151, Civil P. C., for security being taken from respondent for satisfaction of any decree that may be passed against him.

The application relates to a suit for accounts and partition of property, which was instituted as long ago as 1909. On 15th March 1914, a preliminary decree was passed by the trial Court, which was subsequently set aside by this Court, but eventually restored by the Privy Council on 2nd January 1924. The case having been sent to the trial Court once more for the passing of a final decree, the learned Senior Subordinate Judge held that the applicant was entitled to an account up to the date of the final decree and not merely up to 15th May 1914, the date of the preliminary decree. From this decision the respondent has filed an appeal which is pending in this Court and proceedings have been stayed with respect to the taking of accounts subsequent to 15th May 1914.

The present application is mainly based on the grounds that the respondent is deliberately delaying the proceedings, withholding account books, and that with the intention of delaying execution of any decree that may be passed against him, he has disposed of all the assets of the shops, converted them into cash, and removed the same along with the account-books to the Jaipur State. These allegations are supported by an affidavit. The respondent has filed a counter-affidavit in which he has denied the allegations, though he has admitted that the business was closed and the goods were sold. He, however, alleged that this was done as the business was being carried on at a loss and debts had to be paid. The respondent denies that any goods or money relating to the joint family partnership is now in his possession.

A preliminary objection has been raised that no application under O. 38, Rr. 1, 2 or 5 or under S. 151, Civil P. C., is maintainable on the grounds mentioned above. Arguments have been addressed at some length and after considering them, I am of opinion that this objection must prevail. Rr. 1 and 2, O. 38, Civil P. C., are clearly irrelevant and this was conceded. As regards R. 5 of the same order, it seems to me that the rule really contemplated attachment of property which the defendant is about to dispose of or remove from the jurisdiction of the Court. In the present instance, the allegation is that the respondent has already disposed of the property and removed it from the jurisdiction of the Court. The rule requires the applicant to "specify the property to be attached and the estimated value thereof"; and security can only be taken for producing and placing at the disposal of the Court such property or the value of the same or such portion thereof as may be sufficient to satisfy the decree. In the present instance, the applicant has not specified any property and has applied generally for security being taken for satisfaction of any decree that may be passed against the respondent. No such application seems to me to fall within the scope of O. 38, R. 5,

Civil P. C. It has also been held in *Damodar* v. *Panna Lal* (1), that the rule contemplated attachment of property belonging to the defendant and not of property belonging jointly to the parties. In the latter case, the proper remedy according to the above ruling is to apply for the appointment of a Receiver under O. 40. An application for appointment of a Receiver was a apparently made when an appeal was pending in this Court in 1917, and it was only by an agreement between the parties that the appointment of the Receiver was eventually kept in abeyance and security was taken from the respondent pending decision of appeal: vide order of Shah Din, C. J., dated 30th March 1917.

The learned counsel for the applicant urged that security should at any rate be taken under S. 151, Civil P. C., but was unable to cite any authority to support his contention. The Code provides for security for satisfaction of decree being taken in certain cases only. There was a remedy open to the applicant, viz., the appointment of a Receiver pending final decision of the suit, but the applicant did not avail himself of it at the proper time. In these circumstances, I do not think S. 151, Civil P. C., can be resorted to to support the present application.

I accordingly dismiss the application, but in view of all the circumstances make no order to costs.

A.L./R.K. *Application dismissed.*

(1) [1907] 9 Bom. L. R. 540.

A. I. R. 1928 Lahore 773

ADDISON, J.

Hardial Devi Ditta—Defendant—Appellant.

v.

Janki Das and *another*—Plaintiffs—Respondents.

Misc. Appeal No. 1947 of 1927, Decided on 12th January 1928, from order of Dist. Judge, Sialkot, D/- 22nd June 1927.

Provident Fund Act; S. 5—A nomination of a person to receive Provident Fund money from a Corporation is not a will, a gift or a trust in favour of the nominee—Fund forms part of his undisposed of estate.

A nomination of a person to receive Provident Fund money from a Corporation is not a will, a gift or a trust in favour of the nominee and on the subscriber's death the Fund forms part of his undisposed of estate : *A. I. R.* 1924 *Sind* 57, *Foll.* ; *A. I. R.* 1926 *Cal.* 1051, *Dist.* [P 774 C 1]

Jagan Nath for *Devi Das*—for Appellant.

Fakir Chand—for Respondents.

Judgment.—Mt. Raj Devi a Khatri widow, who was a teacher in the Municipal Girls School at Sialkot, died leaving some money in the Municipal Provident Fund. The plaintiff, the Dev Samaj, Lahore, through its Secretary, Lala Janki Das, applied to the Municipal Committee for payment of the amount to her credit in the Provident Fund on the ground that the Samaj in question was a nominee of the deceased. As there was no written nomination paper the Committee directed the plaintiff to produce a succession certificate. This was applied for, while at the same time the brother of Mt. Raj Devi's husband and her brother's son, defendants 1 and 2, also applied for succession certificates. The certificate was granted to defendant 1. Before he could draw the money from the Municipal Committee the plaintiff instituted the present suit for a declaration that the Samaj was entitled to recover the Provident Fund money in that it was the nominee and in that this nomination amounted to a will in favour of the Samaj. There was no plea taken that, apart from the nomination, there was an oral will, indicating clearly that the money was to go absolutely to the Samaj as a bequest. Defendant 1 pleaded that the plaintiff was not nominated by the deceased. He further pleaded that if she did nominate the plaintiff as an heir she had no right to do so. Another plea taken was a will set up by one of the defendants in his own favour.

The trial Judge held that there was evidence of nomination of the plaintiff by the deceased, but that such nomination could not be regarded as a will or as a gift or as a trust. Without deciding therefore, issues 2 and 3 he dismissed the plaintiff's suit with costs. On appeal the learned District Judge held that the nomination of the plaintiff amounted to a will and that the plaintiff was, therefore, entitled to the money subject to the decision of issues 2 and 3. The appeal was accordingly accepted and the suit remanded for decision on the remaining issues. Against this decision defendant 1 has appealed.

It has been clearly held in *A. I. R.* 1924 *Sindh*, *p.* 57 that a nomination, like the present, of a person to receive Provident Fund money from a Corporation was not a will, a gift or a trust in favour of the nominee and that on the subscriber's death the Fund formed part of his undisposed of estate. It is unnecessary to repeat the elaborate reasons given in the judgment in question with which I respectfully agree. The object of the nomination system is merely to designate some person to whom the Provident Fund money due to the subscriber may be paid on her death and who can give a valid acquittance. The Calcutta case reported in *Kalisadhan Mitra* v. *Prafulla Chandra* (1) does not help the plaintiff, for in that case the declaration filed purported to be a will and to dispose of the money absolutely in favour of a nominee. I have, therefore, no hesitation in accepting the appeal and in dismissing the plaintiff's suit with costs throughout. I might note that it was unnecessary for the trial Court to issue an injunction upon the Committee not to pay the money in this case till the decision of the suit ; for the plaintiff was amply protected by the security given in the succession certificate proceedings, while it is the right of the person holding a succession certificate to draw the money for which the certificate has been granted.

N.K. *Appeal accepted.*

(1) A. I. R. 1926 Cal. 1061.

A. I. R. 1928 Lahore 774

ADDISON AND BHIDE, JJ.

E. I. Ry. Co., Calcutta—Defendants—Appellants.

v.

Piyara Lal·Sohan Lal — Plaintiff — Respondent.

Misc. Second Appeal No. 1876 of 1927, Decided on 21st May 1928, from order of Addl. District Judge, Delhi, D/· 24th April 1927.

(*a*) *Civil P. C., O.* 41, *R.* 23 — *Suit for compensation for non-delivery against railway—Trial Court dismissing suit for want of "wilful neglect" leaving undecided question of damages—Lower appellate Court holding that "wilful neglect" was proved and remanding on question of damages—Remand is under O.* 41, *R.* 23, *and not under S.* 151.

A Railway Company was sued for compensation for non-delivery of consignment. The trial Court dismissed the suit on a preliminary point, on the finding that there was no "wilful neglect" on the part of the Railway Company and left undecided the issue as to the question of damages. On appeal the lower appellate Court held that "wilful neglect" was proved and remanded the case.

Held : that the remand was under O. 41, R. 23, and not under S. 151. [P 775 C 2]

(*b*) *Railways Act, S.* 72—"*Wilful neglect*" *is not a fact to be proved by direct evidence but is a matter of inference—Civil P. C., S.* 100.

"Wilful neglect" is not a concrete fact which can be proved by direct evidence but is a matter of inference. The finding in a case is based on certain facts and the question for determination is whether those facts are sufficient to establish "wilful negligence" in law. [P 775 C 2]

(*c*) *Civil P. C., S.* 100—*Proved fact—Effect of.*

The proper legal effect of proved facts is a question of law : *A. I. R.* 1918 *P. C.* 92, *Foll.* [P 775 C 2]

(*d*) *Contract Act, S.* 152 — *Word "loss" is used in the sense of something that happens to goods as distinct from injury to owner — Railways Act, S.* 72.

The word "loss" is used in the section in the sense of something that happens to the goods as distinct from any loss to the owner. It could not be the object of the section to lay down that provided the bailee takes as much care as a prudent man he will not be liable to bailor for loss sustained by him on account of non-delivery of goods. [P 776 C 2]

(*e*) *Railways Act, S.* 72 — *Suit for loss sustained by non-delivery — Railway Administration is not entitled by agreement embodied in a risk-note to limit liability under S.* 160, *Contract Act.*

Since S. 160, Contract Act, is not mentioned in S. 72, the Railway Administration is not entitled to limit its liability under S. 160, Contract Act, by any agreement embodied in a risk-note, where the railway is sued for loss sustained by nondelivery of goods. [P 777 C 1]

(*f*) *Railways Act, Ss.* 72 *and* 77— *Plaintiff suing railway on allegation of non-delivery without admitting loss of goods—Railway must prove loss of goods—On proof of loss onus will shift on plaintiff to prove wilful neglect on part of railway.*

Where a Railway Company is sued for compensation for non-delivery of goods and the plaintiff does not admit loss of goods, the railway must first prove loss of goods and on such proof the onus will shift to the plaintiff to prove wilful neglect on the part of the railway or its servants etc., according to the terms of the risk-note : *A. I. R.* 1924 *Cal.* 725 ; *A. I. R.* 1926 *Cal.* 612 ; *A. I. R.* 1928 *Cal.* 65 ; *A. I. R.* 1927 *Pat.* 193 and 234 (*F. B*) ; *A. I. R.* 1928 *Pat.* 95 ; *A. I. R.* 1923 *All.* 426 ; *A. I. R.* 1924 *All.* 7 and *A. I. R.* 1923 *All.* 605 ; *A. I. R.* 1925 *All.* 675 ; *A. I. R.* 1925 *Mad.* 745 ; *A. I. R.* 1923 *Nag.* 223 and *A. I. R.* 1927 *Lah.* 471, *Foll.* ; *Smith* v. *G. W. Ry. Co.*, (1922) 1 *A. C.* 178 ; *A. I. R.* 1926 *Lah.* 596 ; *A. I. R.* 1921 *Lah.* 1 (*F. B.*) ; and *A. I. R.* 1926 *Lah.* 40, *Dist.* [P 777 C 2]

C. H. Carden Noad—for Appellants.

Kishen Dyal—for Respondent.

Bhide, J. — This is a second appeal arising out of a suit for recovery of Rs. 1,300 as compensation for non-delivery of a consignment booked from Howrah to Delhi. The consignment was booked under risk-note B. The trial Court held that plaintiff has failed to prove that the goods were lost owing to "wilful neglect" on the part of the defendant Railway Company and on this finding dismissed the suit. On appeal the learned District Judge held that "wilful neglect" on the part of the Railway Company was established inasmuch as the goods were sent in a wagon which was sealed only with tin shackles but not locked. The appeal was accordingly accepted and the case remanded to the trial Court for disposal of issue relating to the question of damages, which had been left undecided by that Court. From this decision, defendant has filed an appeal.

On behalf of the respondent three preliminary objection: were raised firstly that the appeal was not properly instituted inasmuch as it was presented by the Government Advocate without any power of attorney from the Railway Administration; secondly, that the remand by the lower appellate Court was under S. 151, Civil P. C., and not under O. 41, R. 23, Civil P. C., and hence no appeal lay; and lastly that no second appeal was competent as the finding on the question of "wilful neglect," which is sought to be agitated in this appeal, was one of fact.

There is no force in any of these contentions. The East Indian Railway Company which was the original defendant has now come under State management. According to Cl. 6, S. 3, Railways Act, the expression "Railway Administration" in the case of a State managed railway includes the "Government." The present appeal has been preferred by the Government Advocate on behalf of the Government as the successor of the East Indian Railway Company. The Government Advocate is ex-officio Government Pleader for the whole of this province and under R. 2, O. 27, Civil P. C., all Government pleaders are authorized to act for Government as their "recognized agents" without any power of attorney : vide Notification 22963 dated 10th December 1917, in the Punjab Gazette dated 14th December 1917.

The second contention viz., that the order of remand was under S. 151, Civil P. C., does not appear to be correct. The suit had been dismissed by the trial Court on a preliminary point on the finding that there was no "wilful neglect" on the part of the Railway Administration and the issue as to the question of damages had been left undecided. The lower appellate Court held that "wilful neglect" was proved and remanded the case for disposal on the remaining issue on which no finding had been given by the trial Court The remand was obviously under O. 41, R. 23, Civil P. C, though the order and the rule have not been specifically mentioned.

The last preliminary objection was that the finding on the question of "wilful neglect" by the lower appellate Court was one of fact and hence no second appeal lay. This contention does not seem sound. "Wilful neglect" is not a concrete fact which can be proved by direct evidence, but is a matter of inference and the term has a special significance in law. The finding is based on certain facts and the question for determination is whether those facts are sufficient to establish "wilful negligence" in law. It is well established that the proper legal effect of proved facts is a question of law (cf. *Nafar Chandra* v. *Shukur Sheikh* (1).

Coming to the merits of the case : the learned Government Advocate has argued that the learned District Judge's view that the fact that the wagons were merely sealed and not locked amounts to "wilful neglect" is not correct and that the plaintiff has failed to prove that there was any "wilful neglect" on the part of the railway in the proper sense of that expression Mr. Kishen Dyal, on behalf of respondent, on the other hand, contended, that it was incumbent on the railway to prove in the first instance that the goods were lost, and, that until and unless such loss was established, the respondent could not be called upon to prove that the loss was due to wilful neglect on the part of the railway. It appears that the trial Court had first framed an issue on this point, viz : "'Were the goods lost in transit"—the burden of proof being laid on the defendant railway. Later on, however, the Court cancelled this issue in view of certain rulings, which were to the

(1) A.I.R. 1918 P C. 9x=46 Cal. 189=45 I.A. 183 (P.C.).

effect that it is not necessary for the railway to prove loss in such cases and that an allegation or admission of loss is sufficient. The learned District Judge also upheld this decision on the authority of *A. I. R.* 1926 *Lah.* 596.

It has been strenuously argued by Mr. Kishen Dyal, that the ruling *A. I. R.* 1926 *Lah.* 596 does not lay down correct law.

The interpretation of the word "loss" as used in Ch. 7, Railways Act, and the risk-notes has been the subject of considerable divergence of judicial opinion and the question is one of some difficulty. The judgment of the learned Judge who decided *A. I. R.* 1926 *Lah.* 596 purports to follow *Hill Sawyers and Co.* v. *Secy. of State* (2), a Full Bench decision of this Court. As regards certain other authorities to the contrary which were cited before him, he considered that they were no longer good law in view of the decision of the House of Lords in *Smith* v. *G. W. Ry. Co.* (3). He also cited *A. I. R.* 1926 *Lah.* 40, a ruling by the learned Chief Justice of this Court in support of his view.

As regards the case *Smith* v. *G. W. Ry. Co.* (3), it may be pointed out at once that it is easily distinguishable from the present case, inasmuch as the plaintiff himself in that case admitted the loss of the goods and the only question for consideration was whether the railway was bound to account for the loss in such circumstances : vide judgment of Lord Wrenbury at the end of that case. It was held that the railway was not bound to account for loss in the circumstances and that the onus lay on the plaintiff to prove wilful neglect on the part of the railway. The same appears to have been the position in *A. I. R.* 1926 *Lah.* 40, which follows *Smith* v. *G. W. Ry. Co.* (3).

The Full Bench ruling *Hill Sawyers and Co.* v. *Secy. of State* (2), in which it was held that the word "loss" as used in Ch. 52, Railways Act, includes loss to the owner is undoubtedly in favour of the appellants, but the case dealt with therein was one under S. 80, Railways Act, and related to "misdelivery" of goods. As pointed out by Fforde, J. in a recent Division Bench case *Haryana Cotton Mills Co.* v. *B. B. & C. I. Ry. Co.* (4) it cannot be taken to be binding so far as a case of "non-delivery" is concerned, the remarks therein relating to cases of wrongful detention being in the nature of obiter dicta. In *Haryana Cotton Mills Co.* v. *B. B. & C. I. Ry. Co.* (4) the plaintiff's claim was based on alleged "non-delivery," but it was held that this did not amount to an "allegation" of loss within the meaning of S. 77, Railways Act. The present case stands practically on the same footing. The plaintiff in the present case did not allege or admit that the goods were lost. No doubt there has been loss to the owner owing to non-delivery, but the question is whether this is the sense in which the word "loss" can be said to be used in risk-note B, under which the railway administration is seeking protection.

It seems scarcely possible that the word "loss" could have been used in this sense in the risk-note. The object of the risk-note is to limit the liability of the railway as a bailee as laid down in Ss. 151, 152 and 161, Contract Act : vide S. 72, Railways Act. The words "loss, destruction and deterioration" have been used in Ss. 152 and 161, Contract Act, and appear to have been taken therefrom in S. 72, Railways Act, and from the latter in the risk-notes issued under that section. Ss. 152 and 161 must therefore be looked to for guidance as to the correct interpretation of the word "loss" as used in the risk-note under consideration.

Section 152, Contract Act, is as follows :

> The bailee in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in S. 151.

The word "loss" appears to be clearly used here in the sense of something that happens to the goods, as distinct from any loss or injury sustained by the owner It certainly could not be the object of this section to lay down that provided the bailee takes as much care of the goods as laid down in S. 151, he will not be liable to the bailor for loss sustained by him on account of non-delivery of the goods.

Section 161 runs as follows :

> If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

This section speaks of "any loss, destruction or deterioration" of the goods

(2) A.I.R. 1921 Lah. 1=2 Lah. 133 (F.B.).
(3) [1922] 1 A.C. 178.
(4) A.I.R. 1927 Lah. 471=8 Lah. 555.

from the time that the goods are not returned, delivered, or tendered. This also seems to indicate clearly that the "loss" contemplated is something distinct from non-delivery and takes place subsequently.

The net result of S. 152 and S. 161 appears to be that up to the time for delivery, the bailee is protected against loss, destruction and deterioration of the goods, provided he takes as much care of them as a prudent man would of his goods in the same circumstances. But if delivery is not made at the proper time by any default of the bailee, then the bailee will be responsible for any loss, destruction or deterioration taking place thereafter, no matter whether he has or has not taken adequate care of the goods. Neither of these sections appears to deal with loss sustained by the owner by "non-delivery" as such. The duty of a bailee to return the goods at the proper time is laid down in S. 160, Contract Act, and a suit based on "non-delivery" is really based on a breach of the duty as laid down in that section. But S. 160 is not mentioned in S. 72, Contract Act, and it would, therefore, appear that a Railway Administration is not entitled to limit its liability under that section by any agreement embodied in a risk-note.

A suit based on "non-delivery" must therefore be distinguished from a suit based on "loss, destruction, or deterioration" of the goods. Incidentally it may be pointed out that in the Limitation Act also these are treated as distinct classes of suits and are included in separate articles : vide Art. 30 and Art. 31, Sch. 1, Lim Act. The word "loss" has a double significance as pointed out in *Haryana Cotton Mills Co.*, v. *B. B. & C. I. Ry. Co.* (4), and this appears to have led to some confusion. The word "loss" may mean

disappearance or passing out of control, or the injury resulting therefrom to the owner.

However, the juxtaposition of the words "loss, destruction, and deterioration" is significant and seems to indicate clearly that the word "loss" is used in the risk-note in the former sense. If the word "loss" were intended to include "loss to the owner," the words "destruction" and "deterioration" would be redundant, as "loss" in that sense would necessarily result from any destruction or deterioration of the goods.

For the above reasons, it seems to me that when the plaintiff sues on the allegation of the "non-delivery" only, and has not admitted loss of the goods, the Railway Administration, must first of all prove that there has been "loss" of the goods, so as to bring their case within the scope of the special contract embodied in the risk-note and when this is done the onus will shift to the plaintiff to prove that the loss was due to "wilful neglect" on the part of the railway or its servants, etc., according to the terms of the risk note. The burden as regards the proof of loss will, of course, usually be light and formal evidence on the point may be sufficient to shift the onus to the plaintiff. At the same time the matter is of some importance from the plaintiff's standpoint as he will be able to cross-examine the witnesses produced by the railway and may be able to elicit facts showing "wilful neglect" on the part of the railway or its servants.

The above view is amply supported by a number of recent decisions of most of the High Courts in India : see e. g., *E. I. Ry. Co.* v. *Jogpat Singh* (5), *Gopi Ram Behariram* v. *Agents E. I. Ry. & O.* and *R. Ry.* (6), *G. I. P Ry Co.* v. *Jesraj Patwari* (7), *Ganesh Das Bisheshwar Lall* v. *E. I. Ry. Co.* (8), *Puran Das* v. *E. I. Ry. Co.* (9), *A. I. R.* 1928 *Pat.* 95, *Secy. of State* v. *Jiwan* (10), *E. I. Ry. Co.* v. *Kishan Lal Tirkha Mal* (11), *E. I. Ry. Co.* v. *Makhan Lal Bindeshri Prasad* (12) *A. I. R.* 1925 *All.* 675, *A. I. R.* 1925 *Mad.* 745 ; *A. I. R.* 1923 *Nag.* 223.

In my judgment, the trial of the issue as to whether the goods were lost in transit, which was framed but subsequently cancelled by the trial Court, was necessary on the pleadings of the parties in this case. I would, therefore, accept this appeal, set aside the decree of both the Courts below and remand the whole case to the trial Court under O. 41, R. 23, Civil P. C., for being tried de novo in the light of the above remarks. Parties will be at liberty to produce any evidence they desire upon issues 3, 4 and 5, which alone now remain for decision. Stamp

(5) A. I. R. 1924 Cal. 725=51 Cal. 615.
(6) A. I. R. 1926 Cal. 612.
(7) A. I. R 1928 Cal. 65=55 Cal. 132.
(8) A. I. R. 1927 Pat. 193=6 Pat. 189.
(9) A. I. R. 1927 Pat. 234=5 Pat. 718 (F. B.).
(10) A. I. R. 1923 All. 426=45 All. 330.
(11) A. I. R. 1924 All. 7=45 All. 590.
(12) A. I. R. 1923 All. 605=45 All. 575.

on appeal to be refunded. Costs to follow final decision.

Addison, J.—I agree.

D.B./R.K. *Appeal accepted.*

A. I. R. 1928 Lahore 778

BROADWAY AND AGHA HAIDAR, JJ.

Khawaja Mahmud and *others*—Plaintiffs—Appellants.

v.

Khawaja Hamid—Defendant — Respondent.

Letters Patent Appeal No. 108 of 1928, Decided on 12th June 1928, from order of Dalip Singh., J. D/- 16th April 1928, in Civil Appeal No. 1701 of 1927.

Mahomedan Law—Wakf—Sajjadanashin must allow a devotee entrance to the shrine at reasonable hours.

A sajjadanashin is fully entitled to exercise his right and to perform his duties as such sajjadanashin without any let or hindrance. At the same time one of his duties is to give facilities to the devotees of the shrine to enter its precincts as well as the holy of holies at all reasonable hours, so that they may be able to perform their spiritual rites and other devotions in the customary manner: *A.I.R.* 1922 *P. C.*, 123 (*P. C.*), *Rel. on.* [P 779 C 1]

Ghulam Mohi-ud-Din—for Appellants.

Moti Sagar—for Respondent.

Agha Haidar, J.—The facts necessary for the decision of this appeal are given in the judgment of the learned Single Judge of this Court, dated 16th April 1828, and need not be recapitulated here at any length. The parties have been engaged in an unfortunate litigation which, after varying fortunes, terminated for the time being with the order of the Privy Council, dated 21st November 1922, Under this order the suit of Khawaja Hamid (plaintiff) was decreed and decree of the Chief Court of the Punjab, dated 2nd January 1917, with certain exceptions, which are not material for the purposes of the present appeal, was set aside and in lieu thereof it was declared that the plaintiff was the sajjadanashin and a decree was granted for delivery of possession to him of the wakf properties in suit and furthermore an injunction was granted restraining the respondent 1, namely, Khawaja Mahmud, from interfering with the management of the wakf properties by the appellant namely, Khawaja Hamid, or with the exercise by him of his rights and duties as sajjadanashin. There are certain other provisions in this decree, but we are not concerned with them. The successful plaintiff, namely, Khawaja Hamid, took out execution of his decree, and the litigation arising out of these execution proceedings was fought out up to the Letters Patent Bench of this High Court and ended in favour of the decree-holder. The last order of the High Court is dated 19th March 1925.

On 29th November 1926 the plaintiff Khawaja Mahmud and others instituted a suit out of which the present appeal has arisen. With the merits of this suit we are not concerned at this stage and any observations which we might make are not intended in any way to affect or influence the normal course of this suit. It is necessary, however, for the disposal of the present appeal to refer to the reliefs claimed by the plaintiffs in the present suit. Para. 9 of the plaint runs as follows:

> It is, therefore, prayed that a declaratory decree in favour of the plaintiffs against the defendant may be passed in the following manner:
>
> (a) That the plaintiffs have got a right to enter the khankah and its compound freely without any restriction and at all times in order to view the tombs of their holy ancestors, and while sitting there to derive spiritual benefits by means of darud, wazaif and prayers and giving away of alms,
>
> (b) that during the month of Holy Muharram they should perform the customary rights of using flowers and sandalwood ; and
>
> (c) that, after their death, they may be buried inside the mausoleum and in the precincts thereof close to the tombs of their ancestors, and that a temporary injunction may be granted restraining the defendant from preventing the plaintiffs from exercising the above rights at any time.

Soon after filing the plaint, the plaintiffs made an application for a temporary injunction in which, with the obvious exception of the general relief and the prayer for permanent injunction, the other reliefs in the plaint are copied out verbatim. But unfortunately the affidavit filed along with the application for temporary injunction is worthless and cannot be looked into. The application, however, unsupported as it is by a proper affidavit, is wholly insufficient to justify the Court in granting the extraordinary relief by way of temporary injunction in terms of the prayer asked for in the suit itself. The learned District Judge dismissed the application holding that

there was no material before him on which he could properly grant the injunction prayed for. The learned Judge of this Court, however, has accepted the plaintiffs' appeal and granted, with certain restrictions, the injunction prayed for. He has held that

in the circumstances a temporary injunction may be granted to the plaintiffs against the defendant restraining the latter from preventing the plaintiffs from entering the rouza at all times one hour before sunrise up to 11 p. m. except at such times as the present defendant may fix for praying his own customary devotions at the shrine aforesaid.

Both parties were dissatisfied with this decision, and the plaintiffs and the defendant both filed appeals against it under the Letters Patent. Counsel for the plaintiffs frankly admitted that the injunction granted by the learned Judge was "unworkable." This is our view also, as it seems extremely difficult to carry out the terms of the injunction with any degree of exactitude. During the course of his judgment the learned Judge has made the following observation:

There is no material on the record before me, and none has been pointed out by counsel for either side, as to what happened during the period from 1911 to the time when the present suit was lodged. But in all the circumstances of the case, I consider I am entitled to presume that the present plaintiff continued to claim this right and in all probability exercised it with occasional hindrance from the present defendant.

In our judgment, having regard to the absence of proper materials on the record an injunction should not have been granted on the basis of mere presumptions and probabilities. The position of a sajjadanashin is well understood and has been recently clearly defined by their Lordships of the Privy Council in *Sri Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (1), the relevant portion being printed at pp. 511 and 512 The defendant Khawaja Hamid has been declared the sajjadanashin of the shrine and there cannot be any manner of doubt that he is fully entitled to exercise his right and to perform his duties as such sajjadanashin without any let or hindrance At the same time one of his duties no doubt is to give facilities to the devotees of the shrine to enter its precincts as well as the holy of holies at all reasonable hours, so that they may be able to perform their spiritual rites and other devotions in the customary manner. We have no doubt whatsoever that at any rate in his own interest Khawaja Hamid would not deny to the plaintiffs their right as devotees of the shrine, so long as they do not in any way trespass upon his privileges and authority as sajjadanashin. We tried, during the course of the hearing of the appeal, to see if some amicable and mutually convenient arrangement could be arrived at while this fresh litigation was pending, but the parties were in an extremely unreasonable mood and offers on both sides were made only to be immediately withdrawn. The fact, however, remains that the defendant Khawaja Hamid has secured a decree from the highest tribunal in his favour appointing him the sajjadanashin of the shrine, and the plaintiffs have not been able to satisfy us that a temporary injunction should be granted to them in the terms set out in their application.

Under these circumstances we allow the Letters Patant Appeal No. 113 of 1928, set aside the order of the learned single Judge of this Court and restore that of the trial Court. Under all the circumstances of the case and having regard to the attitude adopted by the parties, we make no order as to costs.

The Letters Patent Appeal No. 108 of 1928 filed on behalf of Khawaja Mahmud was not pressed by his learned counsel and we dismiss it. The parties would bear their own costs.

A.L./R.K. *Appeal allowed.*

(1) A.I. R 1922 P. C. 123=48 I. A. 302=20 A. L. J. 497 (P.C.)

A. I. R. 1928 Lahore 779

BROADWAY AND AGHA HAIDAR, JJ.

Ghulam Sarwar Khan and *others*—Defendants—Appellants.

v.

Abdul Majid Khan and *another*—Plaintiffs—Respondents.

First Appeal No. 1280 of 1923, Decided on 28th May 1928, from decree of Sr. Sub-J. Mianwalli, D/- 6th March 1923.

(a) *Custom (Punjab) — Succession — Niazi Pathans of Isa-Khel, District Mianwali—Sonless proprietor is succeeded by brothers of full blood to the exclusion of half-brothers.*

In the tribe of Niazi Pathans of Isa Khel in the district of Mianwali, if a person dies sonless leaving him surviving several brothers, some of whom are of full blood and others are of half blood, then the brothers of full blood

succeed to his property to the exclusion of his half-brothers: *A. I. R.* 1916 *P. C.* 129 and 8 *P. R.* 1892, *Rel. on.* [P 784 C 2]

(b) *Evidence Act, S* 18—*Admission regarding a question of succession based upon custom is not an admission on a pure question of law and is therefore binding on a party.*

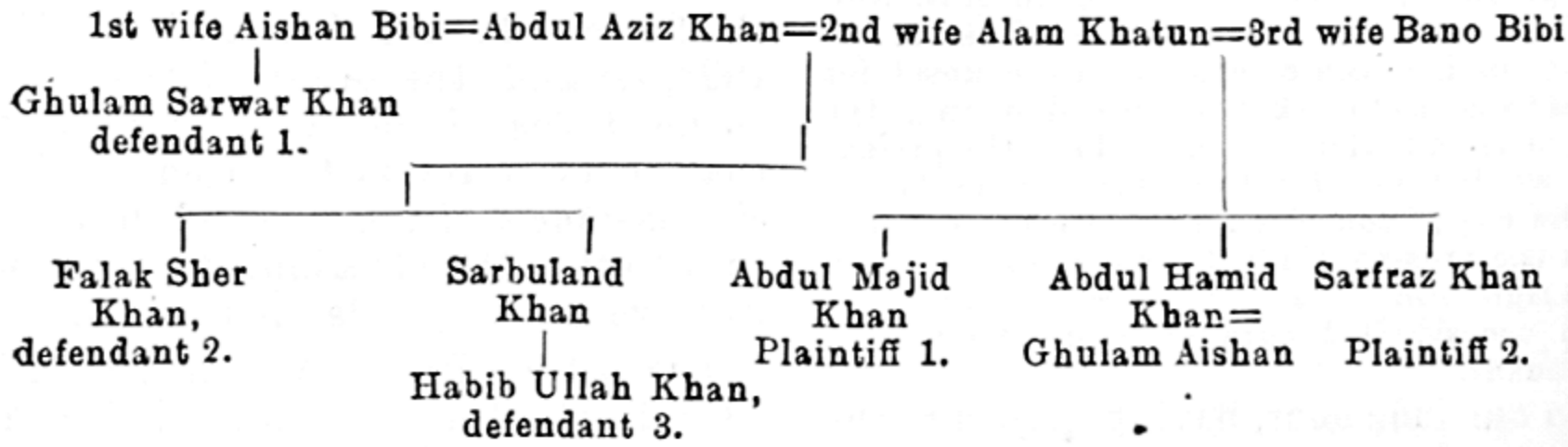
An admission on a pure question of law is not binding upon a party, but the question whether a particular custom does or does not prevail in any particular tribe is a matter on which the tribesmen themselves are in the best position to pronounce an opinion and a question of succession based upon custom does not stand on the same footing as the question of law. [P 784 C 1]

Jagan Nath Aggarwal and *Anant Ram* —for Appellants.

Shuja-ud-Din for *Muhammad Shafi*, and *Jiwan Lal Kapur*—for Respondents.

Agha Haidar, J.— I am indebted to the learned counsel for the parties for a full argument on the points which arose in this appeal.

The following pedigree table is important for understanding the facts of this case:



The parties are Niazi Pathans of Isa Khel in the district of Mianwali. Abdul Hamid Khan died childless some time in 1919, and his widow, Mt. Ghulam Aishan, died soon after. Abdul Hamid Khan left property in eleven villages. On his death mutation of names took place in favour of his full brothers, namely, Abdul Majid Khan, plaintiff 1, and Sarfraz Khan, plaintiff 2, in all the villages except Jalalpur in respect of which, on the objection of the defendants mutation was effected in favour of all the brothers of the deceased in equal share. The defendants also succeeded, on review, in obtaining mutation in respect of the villages Kalvanwala, Chhina Paura and Kas Umar Khan in the names of all the surviving brothers of the deceased in equal shares.

The plaintiffs thereupon instituted the present suit for a declaration to the effect that, according to the tribal custom, they, as full brothers, succeeded to the property of their deceased brother, Abdul Hamid Khan, and that the defendants, who were only the half-brother of the propositus, had no right to succeed. The suit relates to mauzas Jalalpur, Kalvanwala, Chhima Paura and Kas Umar Khan. The plaintiffs have produced a number of witnesses in support of the custom. Beyond the evidence of one or two witnesses, who quote some instances in support of the custom, the oral evidence on the whole is not of much value. But the plaintiffs mainly rely upon the Riwaj-i-am of 1878 and also upon instances supplied by certain mutations as well as decisions given by the civil Courts. They further rely upon admissions made from time to time by the various defendants, after the death of Abdul Hamid Khan, in various mutation proceedings. There is also an agreement, Ex. P. 4, dated 31st March 1921, in which Falak Sher Khan, defendant 2, has admitted the plaintiffs' claim on the basis of the family custom. The defendants, on the other hand, place reliance upon the Riwaj-i-am of 1908. They further pleaded that they had never made the admissions relied upon by the plaintiffs, and that in fact they were not even present when these admissions are supposed to have been made. They have also produced a number of witnesses in support of the custom upon which they (the defendants) rely. As regards the agreement P-4, dated 31st March 1921, they pleaded that it was obtained by the exercise of undue influence. It may be noted that no evidence has been led in support of the plea of undue influence. In fact beyond the bare statement of Falak Sher Khan given by him on 16th May 1922, that the agreement was got executed by the exercise of undue influence, there is no other evidence in support of this plea. This statement, I need hardly observe, is no evidence in the case against the plaintiffs, as they had no opportunity of cross-examining Falak Sher Khan when he made it. The trial Court decreed the plaintiffs' claim, holding that the custom

relied upon by the plaintiffs had been proved. The defendants have come up to this Court in appeal.

As already stated, the plaintiffs rely upon the Riwaj-i-am prepared at the first regular settlement of the year 1878. It is marked as Ex. P-9 and is printed at pp. 58-60 of the record. It recites the "old custom" that if a man dies leaving him surviving sons by different wives and one of these sons dies without any male issue, then the uterine brothers are entitled to inherit his property. Thus the brothers descended from the same father but from a different mother do not inherit. There is a rider added that

> if in a family half-brothers have greater influence and power than brothers born of the same mother, succession has taken place contrary to the above custom in that family.

But it is pointed out that these cases where all the brothers have succeeded in equal shares are exceptional. Then a number of instances are cited in support of the general custom, that the full blood excludes the half blood among brothers.

In the second settlement of the district in the year 1908 a Riwaj-i-am was prepared by Pandit Hari Kishan Kaul, Settlement Collector, Mianwali, which records that, among Isa Khel Pathans, full brothers and half brothers succeed equally. No instances are cited. It is further recorded that

> the Jats also state the same custom, but several instances have been quoted amongst them in which full brothers have succeeded to the exclusion of half brothers.

The net result is that the Riwaj-i-am of 1878 records a general custom in which the full blood, excluded the half-blood though there are certain indications in the document showing that there have been a few departures from the settled rule of succession incorporated therein. It should further be noted that the Riwaj-i-am of 1878 specially refers to the Niazi Khel tribe to which the parties belong. In the Riwaj-i-am for the year 1908, although it is mentioned that among the Isa Khel Pathans full brothers and half-brothers succeeded equally, signs are not wanting that in the neighbouring tribe of Baluchis Awans and Jats, this custom was not universally accepted, and these communities, according to the Riawaj-i-am, were equally divided on this question, successions having taken place both ways.

The Riwaj-i-am, according to the leading case on the subject reported in *Beg* v. *Allah Ditta* (1), is the most important document as it is a record of the customs prevailing among the particular communities with which it deals. It, however, raises only a presumption in favour of a particular custom, that presumption being subject to rebuttal.

In *Rahiman* v. *Bala* (2), it is laid down that the production of a later Record-of-Rights containing entries opposed to the earlier one would no doubt be some proof of a change, but there would then merely be a balance of evidence on either side, and it could not be said that the later record destroyed or abrogated the earlier one. Now, as already stated, the Riwaj-i-am of the year 1878 contains an old and well-established custom supported by a number of instances, though it refers to some unspecified aberrations from the general rule.

The Riwaj-i-am of 1908, though clear as regards the Isa Khel Khans, contains internal evidence that, so far as other communities similarly circumstanced, were concerned the custom was not by any means settled and was in fact in a state of flux.

We have now to see how far the plaintiffs have succeeded in rebutting the evidence, such, as it is, supplied by the Riwaj-i-am of the year 1908 in support of the custom on which the defendants rely. As stated above the whole controversy reduces itself to the question of rebuttal.

Now, besides the Riwaj-i-am of 1878, we have a number of instances supplied by mutations and judicial decisions.

The earliest of these is Ex P. 18 dated 9th June 1873. Its importance lies in the fact that it is of a date prior to that of the Riwaj-i-am of the first settlement of the year 1878. It is laid down in that judgment that the general custom prevailing in the tribes of Isa Khel, etc., branches of Niazi, is that if a man dies sonless after his marriage his heritage goes to his real brother only. This custom is in accordance with the Mahomedan law and worth being enforced. It is further laid down that when no particular custom is proved to be prevalent, the question should be decided with reference to the general custom govern-

(1) A. I. R. 1916 P. C. 129=44 Cal. 749=44 I. A. 89 (P. C.).
(2) [1892] 8 P. R. 1892.

ing the Niazi tribe and Mahomedan law according to which, after the death of a brother his real brother (as contradistinguished from a half-brother) succeeds to his property. There is no doubt that under the Mahomedan law uterine brothers exclude brothers of half-blood by the same father in succession to their deceased brother who dies childless. This being the personal law of the parties, it is not unnatural that it should influence the customary rule of succession among these Pathan tribesmen.

The next important decision is Ex. P. 15 dated 31st October 1914. The parties in this case were the Niazi Pathans of Isa Khel and the dispute was between the full blood and half blood, as in the present case. Issue 1 was :

> Are the defendants not entitled to inherit the land in dispute according to the rule of succession

and it was held that this issue must be decided in favour of the plaintiffs, in that the defendants being half-brothers could not get a share equal to that of the full brothers. The Riwaj-i-am of 1878 was referred to as suporting the plaintiffs' claim.

Then we come to an important decision, Ex. P. 14, dated 28th August 1920, in which there were cross pre-emption suits and Sarbuland Khan and Abdul Majid Khan were arrayed on opposite sides. The suit arose out of a sale effected by Sarfaraz Khan. Abdul Majid Khan, plaintiff in one of these suits, alleged that he being the full brother of the vendor succeeds to the exclusion of Sarbuland Khan who is only a half-brother. On the pleadings of the parties an issue was raised :

> *Issue No.* 3.—Whether the plaintiff in each case has got a right of pre-emption superior to the vendees and the rival pre-emptor.

The suit brought by Abdul Majid Khan failed on the question of waiver; but it is important to note that the Subordinate Judge in his judgment adverted to the admission made by Sarbuland Khan in the mutation proceedings to which a reference shall presently be made and held that "it goes against him to a very high degree." It was further held that the contention of Abdul Majid Khan that his right was superior as a brother of the whole blood was strong.

Copies of certain other mutation orders had been placed on the record by the plaintiffs; but they need not be discussed as they seem to be based upon a misapprehension of the terms of the Riwaj-i-am on which they ostensibly rely. In the same manner the two orders passed by Mr. Thevaskis, Collector of Mianwali, dated 11th March 1921, and the 21st March 1921, respectively, may be ignored since they are mutually destructive in that they lay down contradictory views and cannot, therefore, be treated as instances in favour of either party.

I may also refer to Ex. P. 11 which is a judgment delivered by a Bench of two learned Judges of this Court, and is dated 17th February 1922. The case came from Mianwali in second appeal. The parties were Jats, and, as already mentioned, half of these people dissented from the general rule of succession promulgated in the Riwaj-i-am of the second settlement of 1908. In that case, as in the present case, the plaintiffs claimed to inherit from their deceased uterine brother to the exclusion of their half-brothers by a different mother. Their Lordships observed :

> In view of the fact that in 1878 the custom by which the whole blood excluded the half blood was emphatically affirmed and that in 1908 the assertion that the custom had been reversed was found to be not in accordance with facts, have the defendants established that the old custom has become obsolete,

and the learned Judges answer the question by observing that

> no custom has the force of law unless it is ancient and certain and that the custom recited by the plaintiff was in full vogue in 1878 and has been observed since that date in several contested cases, and they were therefore unable to hold that the defendants have succeeded in establishing that the old custom is obsolete.

They, accordingly, upheld the custom relied upon by the plaintiffs and decreed their claim. This case has an important bearing upon the point before me and goes a long way to support the plaintiffs' contention in so far as it is based upon the Riwaj-i-am of 1878, reinforced by the instances mentioned above.

But the most important evidence of rebuttal on which the plaintiffs rely is supplied by at least five admissions made by the defendants on various occasions in which they unequivocally expressed their assent to the custom on which the plaintiffs based their claim.

(i) On the 9th December 1919, in the mutation proceedings of mauza Sarkia (Ex. P. 2) Falak Sher Khan stated:

The custom prevailing amongst us, the Khans, is that if there are brothers from one and the same mother and one of them dies sonless, his heritage goes to his own brothers from the same mother.

He further said:

Amongst us Ghulam Sarwar is from one mother and Muhammad, Sarbuland and I are from another mother, while Abdul Majid Khan, Abdul Hamid Khan and Sarfaraz Khan were from the third mother. On this statement it was ordered that entry as to the heritage be made in favour of Abdul Majid Khan and Sarfaraz Khan in equal shares.

(ii) A similar admission was made in the mutation proceedings of mauza Kacha Nur Zaman Shah (Ex. P-22) on the same date by Ghulam Sarwar Khan and Falak Sher Khan who stated:

The custom prevailing in our family is that if a son of a step-mother dies sonless, his heritage does not devolve upon the sons of his step-mother. Hence the estate in question may be entered in the names of Abdul Majid Khan and Sarfaraz Khan in equal shares.

Accordingly an entry was made in the names of Abdul Majid Khan and Sarfaraz Khan in equal shares.

(iii) Again, on the 27th February 1920, Ghulam Sarwar Khan, in the mutation proceeding relating to Mauza Chhina Paura (Ex. P-3), stated:

According to our custom and usage real brothers on mother's side have a right. Hence we, the other brothers, have no right.

It was ordered by the revenue Court that Abdul Majid Khan and Sarfaraz Khan be shown as reversioners in equal shares in place of Mt. Ghulam Aishan Bibi, the deceased widow of Abdul Hamid Khan.

(iv) On the 27th January 1920, Sarbuland Khan and Falak Sher Khan in mutation proceedings relating to mauza Isa Khel (Ex. P-1) made a similar statement, and the revenue officer accordingly made an order that the names of Abdul Majid Khan and Sarfaraz Khan may be entered in equal shares in respect of the property of the deceased Abdul Hamid Khan.

(v) There is an application by way of supplementary statement in certain partition proceedings relating to mauza Kas Umar Khan (Ex. P. 10) made by Falak Sher Khan and Ghulam Sarwar Khan on the 12th December 1919, the relevant portion of which runs as follows:

As to the land sought to be partitioned, Abdul Hamid Khan died sonless. Thereafter his widow, who succeeded to his property, died. Now, according to our custom, the share of Abdul Hamid Khan devolves upon Abdul Majid Khan and Sarfaraz Khan who are his real brothers from his mother. They are step-brothers of both of us. According to our custom step-brothers on the mother's side cannot get a share of their sonless brother by the same father.

It is important to note that two of these statements containing admissions by one or more of the defendants were made in connexion with two of the villages, namely, Kas Umar Khan and Chinna Paura, which are in dispute in the present suit, and all of them were made sometime either in 1919 or in 1920 after the death of Abdul Hamid Khan when the rights of his reversioners had materialized, so that whatever statements the defendants made, were against their own interest. In this connexion the agreement dated 31st March 1921, (Ex. P-4) may be adverted to in which Falak Sher Shan, defendant 2 reiterated the custom on which the plaintiffs rely in the following terms:

Mutation in respect .of lands have also been effected in their (the plaintiff's) favour. The reason is that the custom prevailing in our family is that the heritage of a deceased brother devolves upon his brothers from the same mother and that his stepbrothers do not get anything. I admit the said custom of my own accord and declare that it is correct. Mutation in respect of the land situate at mauza Jalalpur has been wrongly effected in my favour and in that of my other stepbrothers. I have no objection if the said mutation entry is rectified and my name is struck off. According to the principles of justice, I have no right in the said land.

No doubt an admission cannot be treated as an estoppel and it is always competent to the person who makes an admission against his own interest, to come forward and to explain to the Court the circumstances under which he had made the admission and to give his reasons why it is not binding upon him. But if an admission against his own interest is made in unequivocal terms by a party in respect of a matter in which he is directly conferred and he omits to give any explanation, then that admission can certainly be used against him, for, as has been laid down by the highest authority, a man's admission, if unexplained, is the best piece of evidence against him. Instead of offering any explanation of their admissions the defendants have not even ventured to enter into the witness box. All that they have done is that they have raised an extremely dishonest plea in para. 6 of their written statement wherein they state:

that the mutations of the aforesaid villages were not made in their presence, nor did they admit the rights of the plaintiffs.

This plea remains unsupported by any evidence whatsoever. On the other hand, we have the evidence of Chaudhri Khushi Muhammad, Naib Tahsildar, who very clearly states that all these statements were made in his presence and that he personally knew Sarbuland Khan who was a Sub-Registrar, Ghulam Sarwar Khan who was a Zaildar, and Falak Sher Khan who also held some such appointment. We have no reason whatsoever to doubt the veracity of this witness who is a Revenue Officer and occupies a responsible position. This plea itself sufficiently discredits the defence put forward by the defendants.

I may further note that it was strongly urged by counsel for the appellants that an admission on a question of law is not binding on a party, and that the question of succession in the present case although based upon custom, stands on the same footing as a question of law, and, therefore, the admission made by the defendants cannot be held binding upon them. I am prepared to concede that an admission on a pure question of law is not binding upon a party; but the question whether a particular custom does or does not prevail in any particular tribe is a matter on which the tribesmen themselves are in the best position to pronounce an opinion. When questions relating to tribal customs have to be determined, the parties try to secure the evidence of the members of that tribe and even of people living in its neighbourhood, as regards the existence or non-existence of the custom. The people of a particular community are the best and most trustworthy repositories of the traditions which go to constitute a particular custom prevailing in that community and their evidence, therefore, is of very great moment.

In the present case no one could have been in a better position to speak about the existence or non-existence of the custom relied upon by the plaintiffs than the persons belonging to the plaintiffs' family himself, namely the defendants. The defendants, who are not ignorant rustics but men of intelligence who occupy a certain position in their society, made these admissions deliberately when matters had come to a head on the death of Abdul Hamid Khan. The irresistible inference is that they spoke the truth while making those admissions and had no intention of contesting settled facts. Apparently some evil-disposed persons have induced them to put forward a false claim and they are now seeking to resile from what they had solemnly stated in the various proceedings before the revenue authorities.

The defendants produced a certain amount of oral evidence of the usual type. The witnesses do not quote any instances. The defendants have also relied upon para. 26, Rattingan's Digest of Customary Law, 10th edn.; but there is nothing in that paragraph which militates against the position taken up by the plaintiffs. As already stated, the Riwaj-i-am of 1908 raised a presumption, and in my opinion the plaintiffs have sufficiently rebutted the presumption thus raised against them.

On a consideration of the evidence on both sides I feel satisfied that the plaintiffs have succeeded in establishing the custom that in the tribe of Niazi Pathans of Isa Khel in the District of Mianwali, if a person dies sonless leaving him surviving several brothers, some of whom are of full blood and others are of half blood, then the brothers of the full blood succeed to his property to the exclusion of his half-brothers.

In this view I would affirm the decree of the Court below and dismiss the defendants' appeal with costs.

Broadway, J.—I concur.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 784

SHADI LAL, C. J., AND JOHNSTONE, J.

Tota Ram and *others* — Defendants — Respondents.

v.

Kundan and *others*—Vendees-Respondents.

First Appeal No. 807 of 1922, Decided on 30th April 1928, from decree of Sr. Sub-Judge, Hissar, D/- 4th January 1922.

(a) Pre-emption—Joint sale deed—No specification of shares to be taken by vendees nor a specification of the amount to be paid by them—Plots not of equal quality—Transaction was held to be indivisible—Association of strangers in the plot could not defeat the rights of plaintiffs to pre-empt them.

In case of sale of certain plots there was neither a specification of the shares to be taken

by the vendees in the property nor a specification of the amounts to be paid by them. The deed specified only the area sold to each of the vendees, but made no mention of the price to be paid by him. All these plots were not of the same quality; and some of the vendees were strangers.

Held: that the price to be paid by each of the vendees was not a matter of mere calculation and must not be deemed to be proportionate to the area to be taken by him. Therefore the proprietors having associated strangers with them in the purchase could not defeat the rights of the plaintiffs to pre-empt them.

[P 786 C 1]

(b) *Civil P. C., O. 22, R. 2—A decree passed after the death of a party is not absolute nullity—It is only erroneous and liable to be set aside—It can be rectified by setting aside proceedings taken after the death of the party and proceeding afresh in presence of his legal representative.*

A decree passed after the death of a party to the suit or appeal is not an absolute nullity. Such a decree is not void nor is it open to collateral attack but it is erroneous and liable to be set aside. The mistake can be rectified if the Court sets aside the proceedings taken after the death of the deceased party and directs that the case be retried in the presence of his legal representative from the stage which it had reached immediately before the date of the death. This procedure places all the parties to the litigation in the same position in which they would have been if the legal representative had been impleaded at the proper time. 33 *Mad.* 167, *Rel. on.* [P 786 C 2]

(c) *Civil P. C., O. 22, R. 2—Introduction of a new party at one stage is good for all stages.*

The introduction of a plaintiff or a defendant for one stage of suit is an introduction for all stages. Impleading of representatives of a deceased in the appellate Court is valid for all stages of the suit. *A. I. R.* 1917 *P. C.* 156, *Foll.*

[P 787 C 1]

Mehar Chand Mahajan and *J. N. Aggarwal*—for Appellants.

Moti Sagar, *Kishen Dayal* and *M. L. Puri*—for Respondents.

Shadi Lal, C. J.—On 11th June 1919, Mrs. Ruby Williams sold 2,801 bighas and 16 biswas of land, in the village Raman, the Hissar district, to 96 persons for Rs. 26,000. Four suits of pre-emption were brought in respect of the sale, three by certain proprietors in the village and the fourth by occupancy tenants. All these suits have been decreed by the trial Judge who has directed the property to be divided among three sets of proprietors in proportion to the areas owned by them in the village. In the event of their default, the occupancy tenants would be entitled to pre-empt the property on payment of the price mentioned the sale-deed.

The vendees have appealed to this Court, and Mr. Moti Sagar for the respondents raises the preliminary objection that Puran, one of the occupancy tenants in whose favour a joint decree for pre-emption was granted by the Subordinate Judge, died more than a year ago, and that his legal representatives have not been brought on the record. These facts are not contested by Mr. Mehr Chand for the appellants, and there can be no doubt that, as Puran was one of the joint decree-holders in the suit brought by the occupancy tenants, the appeal has abated in so far as it affects the decree passed in the suit brought by the occupancy tenants.

Coming now to the appeal against the proprietors : we are asked by the learned counsel for the appellants to hold that the sale sought to be pre-empted was a divisible transaction, and that the document embodying the sale should be treated as evidencing 96 sales in favour of 96 vendees. The learned counsel consequently argues that, as some of the vendees were themselves proprietors in the villages, they were entitled to defeat the suits for pre-emption in so far as the areas sold to them were concerned, and that they were not affected by the rule which lays down that a pre-emptor by associating with himself a stranger in the purchase reduces himself to the status of that stranger and loses his preferential right to purchase the property. Our attention has been invited to a large number of rulings bearing upon the vexed question of whether the mere specification in the sale-deed of the shares of the vendees in the property sold is sufficient to make the transaction a divisible one, or whether it is necessary that there should be a specification of not only the shares to be taken by the vendees, but also of the amounts to be respectively paid by them. The Allahabad High Court has taken the view that a specification of the share of each vendee in the property sold makes the transaction a divisible one, but this rule has not been adopted by the Punjab Chief Court. It is, however, unnecessary to choose between the rival views, because a perusal of the sale-deed in the present case shows that there is neither a specification of the shares to be taken by the vendees in the property nor a specification of the amounts to be paid by them. The deed specifies only the area sold to each of the vendees, but makes

no mention of the price to be paid by him. There can be no doubt that all these plots were not of the same quality, and it cannot, therefore, be said that the price to be paid by each of the vendees was a matter of mere calculation and must be deemed to be proportionate to the area to be taken by him. In these circumstances the transaction must be held to be an indivisible one, and the proprietors having associated strangers with them in the purchase cannot defeat the rights of the plaintiffs.

Nor do I think that the vendees have succeeded in establishing their plea of waiver. The witnesses produced by them seek to prove that, on 24th May 1919, the property was sold by a private auction, and that all the villagers including the plaintiffs, were present at the time of the auction, and that some of the plaintiffs actually took part in counting the money paid by the vendees to the vendor. The evidence relied upon in support of the plea of waiver is vague and inconclusive, and I do not think that it can be reasonably held that the defendants have succeeded in proving any act or omission on the part of the plaintiffs such as would amount to a complete waiver of their right of pre-emption.

Mr. Mehr Chand for the appellants also contends that Nathu, son of Ram Dial, one of the vendees, died before the institution of the suit, and that his representative was never brought on the record. This contention proceeds upon a misapprehension of facts. A perusal of the record shows that Nathu died after institution of the suit, and that an application to implead his son as his legal representative was duly made by the plaintiffs and granted by the Court.

It appears that another vendee, Chuni Lal by name, died on 8th July 1921, during the pendency of the suit in the trial Court; and that his legal representative was not brought on the record. The learned counsel for the appellants urges that the failure of the plaintiffs to implead the legal representative resulted in the abatement of the suit. It is, however, clear that the decrees granting pre-emption was made by the trial Judge on 4th January 1922, before the expiry of six months (which was the period applicable at that time to an application to implead the legal representative of a deceased defendant) from the date of the death of Chuni Lal and it cannot be said that the suit had abated as against the deceased. The decree was, no doubt, passed against the defendants, one of whom had died before the date of the decree, and the question for consideration is whether it should be treated as a nullity.

I do not think that the decree can be treated as a nullity in the sense that it can be ignored altogether. As pointed out in *Goda Coopooramier* v. *Soondarammall* (1), a decree passed after the death of a party to the suit or appeal is not an absolute nullity. Such a decree is not void nor is it open to collateral attack, but it is erroneous and liable to be set aside.

The mistake can be rectified if the Court sets aside the proceedings taken after the death of the deceased party and directs that the case be retried in the presence of his legal repesentative from the stage which it had reached immediately before the date of the death. This procedure places all the parties to the litigation in the same position in which they would have been if the legal representative had been impleaded at the proper time.

In the case before us we find that, on 21st June 1921, after the defendants had produced the whole of their evidence, Chuni Lal absented himself from the Court, with the result that the trial Judge passed an order that ex-parte proceedings be taken against him. As stated above he died on 8th July 1921, but neither the Court nor the plaintiffs were aware of his death, and the trial proceeded in ignorance of that fact. It is, however, admitted that the only evidence recorded after 8th July 1921 was that produced by the plaintiffs on the question of waiver; but neither party has placed any reliance upon that evidence. Indeed, the evidence adduced by both the parties on this question is wholly unsatisfactory, but the issue must be determined against the defendants on the short ground that it was their duty to establish the plea of waiver and, as they have failed to discharge the onus, it is unnecessary to refer to the evidence of the witnesses examined by the plaintiffs. It is obvious that the failure of the plaintiffs to implead the legal representative of the deceased in the trial

(1) [1910] 33 Mad. 167=3 I. C. 739=6 M.L.T. 271.

Court has not caused any prejudice to him.

It is to be observed that Chuni Lal's legal representative has since been brought on the record, and he is one of the appellants before us. In *Brij Indar Singh* v. *Kashi Ram* (2), the representatives of a deceased party were impleaded in the appellate Court, but their Lordships of the Privy Council held that

> the introduction of a plaiptiff or a defendant for one stage of a suit is an introduction for all stages.

It is, therefore, unnecessary to remand the case to the trial Court for impleading the legal representative of Chuni Lal who is already on the record, and it would be a useless formality to record in his presence the evidence of the plaintiffs' witnesses which evidence does not, in any way, affect the decision of the Court on the issue of waiver and has not been relied upon by the plaintiffs themselves.

The object of setting aside a judgment pronounced against the party who died before the verdict is to give his representative an opportunity to resist the claim of the opposite party. In this case, the deceased along with the other defendants had already produced his evidence, and it would be an act of supererogation to remit the case to the trial Court which would only prolong litigation, but could not affect the decision of the case in the slightest degree.

For the foregoing reasons I dismiss the appeal with costs.

Johnstone, J.—I concur.

N.K. *Appeal dismissed.*

(2) A. I. R. 1917 P. C. 156=45 Cal. 94=44 I. A. 218 (P. C.).

** A. I. R. 1928 Lahore 787

ADDISON AND DALIP SINGH, JJ.

Fakir Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 100 of 1928, Decided on 20th July 1928.

** *Criminal P. C., S. 476—No complaint by Court is necessary in respect of abettors of the offence.*

There is nothing to prevent the trial of an abettor of an offence committed by a party to a proceeding in Court, without a complaint by the Court under S. 476, 32 *All.* 74 ; 15 *C. W. N.* 565 ; and *A. I. R.* 1928 *Lah.* 510 ; *Rel. on* ; 12 *Bom. L. R.* 383, *Diss. from.* [P 791 C 2]

Mehar Chand Mahajan — for Petitioner.

Abdul Rashid and *Ahmad Hassan*—for the Crown.

Jai Lal, J.—This case has come before me on a petition under Ss. 491, 439 and 561-A, Criminal P. C., and S. 107, Government of India Act, made on behalf of Bewa Fakir Singh, an advocate of this Court, who is in custody of the police in connexion with a criminal case instituted against him under Ss 468 and 417, I. P. C., on a police challan.

The remedy provided by S. 491, i. e., the issue of a writ of habeas corpus, being of an exceptional nature, and as, on an examination of the application and the affidavit filed in support thereof, I considered that the petitioner could, if necessary, obtain adequate relief from this Court in exercise of its powers of revision under S. 439 Criminal P. C. I directed that notice of the application should issue to the Government Advocate. The case has now been fully argued before me on both sides and I have decided not to proceed under S. 491 but to take cognizance of the matter in exercise of the revisional jurisdiction of this Court under S. 439.

The petitioner is, as I have already stated, an advocate of this Court and in that capacity he was acting as counsel for one Devi Ditta, a judgment-debtor in a decree in favour of Mt. Massan granted by the Court of Small Causes at Lahore. Mt. Massan had Devi Ditta arrested and also had his property attached in execution of that decree. It is alleged by the prosecution that in order to deprive Mt. Massan of the benefit of her decree an application was filed in the Court of a Subordinate Judge on behalf of one Allah Ditta to file an award alleged to have been given on a reference made by Allah Ditta and Devi Ditta awarding about Rs. 5,900 to Allah Ditta against Devi Ditta. The petitioner acted as counsel for Allah Ditta in these proceedings and obtained a decree on the basis of the award against Devi Ditta. An application was then made by him on behalf of Allah Ditta for transfer of the proceedings relating to the execution of the decree of Mt. Massan and Allah Ditta to the same Court. It appears that finally the decree of Mt. Massan was purchased by Devi Ditta. It may be mentioned that the decree in favour

of Mt. Massan was against one Indar Singh and Devi Ditta as principal and surety respectively.

It is alleged on behalf of the prosecution that all these proceedings relating to the reference of the alleged dispute between Allah Ditta and Devi Ditta, the application to file the award and subsequently the proceedings relating to the execution of the decree were bogus and fraudulent. It is further alleged that Allah Ditta never engaged the petitioner; he had no dispute with Devi Ditta and did not refer any dispute to arbitration and that the whole affair was manipulated by Fakir Singh and Devi Ditta in consultation with each other; and that the signature of Allah Ditta was forged on the various documents.

An incomplete challan under S. 468/417, I. P. C. was presented by the police against Fakir Singh and Devi Ditta in the Court of the Additional District Magistrate, Lahore, and the accused were arrested thereon. An objection was raised on behalf of the accused that they could not be prosecuted without the complaint of the Subordinate Judge in whose Court proceedings were taken. The Additional District Magistrate has avoided giving any decision on this objection and has postponed the case several times. In the meantime on the application of the police the Subordinate Judge has directed the filing of a complaint against Devi Ditta.

I am not concerned at this stage with the truth or otherwise of the allegations made by the prosecution against the petitioner. The only point before me is whether having regard to Ss. 195 (1) (c) and 476, Criminal P. C., a criminal case could be instituted against the petitioner without a complaint of the Court in which the proceedings in connexion with which the alleged offences were committed were taken. The petitioner's counsel has strenuously urged that the entire criminal proceedings are mala fide and that the conduct of the Additional District Magistrate, in whose Court the case is pending, has been very unfair to his client, the petitioner. But I am not concerned with this matter at this stage as it does not relate to the jurisdiction of the Magistrate.

Section 195 (1) (c), Criminal P. C., provides that no Court shall take cognizance of any offence described in S. 463, or punishable under Ss. 471, 475 or S. 476, I. P. C., when such offence is alleged to have been committed by a party in any proceedings in any Court in respect of a document produced or given in evidence in such proceedings except on a complaint in writing of such Court or some other Court to whom such Court is subordinate.

The contention raised on behalf of the petitioner is twofold: (1) The section prohibits the trial not only of the parties but of the abettors and conspirators as well when the offence has been committed by a party to any proceeding in any Court and, therefore, that even if it be held that Allah Ditta did not instruct Fakir Singh to take any proceedings on his behalf it was Devi Ditta who did so and Devi Ditta being a party to the proceedings the petitioner who is alleged to have abetted or conspired with him was also protected from prosecution except on the complaint of the Court concerned; and (2) that in any case according to the allegations made by the prosecution Fakir Singh was in fact a party being the principal offender and not a mere abettor, and the other persons formally named in the proceedings were either merely his tools or their names were entered without their knowledge or consent. This second contention need not detain us long. It is quite clear that the parties mentioned in the proceedings were Allah Ditta and Devi Ditta and in the eye of the law the principal offender, if at all, was Devi Ditta and the petitioner merely abetted the commission of the offence. He was neither a party to the proceedings nor was he the principal offender in the strict legal sense.

The case for the Crown, on the first contention is that S. 195 (1) (c) affords protection against prosecution, except upon the complaint of the Court concerned, to the parties to the proceeding and not to others, i. e, not to the abettors or conspirators. Several authorities were cited before me on both sides. On behalf of the Crown reliance was placed on *Ghansham Singh* v. *Emperor* (1). In that case it was held that the offences in respect of which S. 195 (1) (c) requires sanction must be offences committed by the parties to the proceedings

(1) [1910] 32 All. 74=4 I. C. 105=6 A. L. J. 983.

in a Court and that there was no need of sanction to institute a criminal case against persons who were not parties to any proceedings. From the report of the case, however, it appears that there were no proceedings taken in any Court in respect of the document concerned in that case. The authority is not, therefore, directly in point.

In *Debi Lal* v. *Dhajdhari Goshami* (2), however, a Division Bench of the Calcutta High Court, following *Ghansham Singh* v. *Emperor* (1), held that sanction of Court for prosecution in respect of documents produced in Court is necessary only when the offence, whether the offender is the principal or is an abettor, is committed by the parties to the proceedings and that no sanction was necessary to prosecute an attesting witness to a document proved to be forged. The facts in that case were somewhat similar to the facts of this case. It was alleged that a forged will had been brought into Court and the question was whether the attesting witness who was held to have abetted such forgery by affixing his signature could not be prosecuted without the sanction of the Court. It was held that the sanction of the Court was not necessary under the circumstances.

On the other hand the petitioner's counsel strongly relied upon *Narayan Dhonddev, In re* (3) which is a judgment of a Division Bench of the Bombay High Court. That case also related to a will alleged to be forged which had been produced in Court, and the question arose whether sanction of the Court was necessary in order to prosecute the attesting witness. With regard to the contention that the protection afforded by S. 118. (1) (c), Criminal P. C,. is limited to the parties to the proceedings in Court the learned Judges remarked as follows :

> Now if this plea were to be allowed it is manifest that the only result would be to allow the opponents to go behind this Court's order revoking the sanction, and by this device to institute that very prosecution which this Court has already restrained from proceeding. It seems to us that we cannot lend ourselves to proceedings of this character and that we must give effect to the order already made by this Court and must hold that the revocation of the sanction carried with it as a necessary consequence the termination of the prosecution of the petitioners. We do not find that there is any serious difficulty in coming to this view which accords, we think, with the provisions of S. 195 (1) (c), Criminal P. C., for, as we read that section the word "offence" occurring as the third word in the clause is designedly used in a somewhat abstract manner. It is the "offence" in itself, not any particular offender's offence which the section aims at and that is in accordance with S. 40, I. P. C., where offence is defined as the thing made punishable by the Code. In other words, the clause deals with the case where there is a substantive offence committed by a party to a suit. If that condition is realized then the clause enacts that no Court can take cognizance of "such offence." In this case "such offence" would mean the offence generally of forgery, and it seems to us that if the criminal Court were to try Lakshmi Bai's abettors under S. 467, it would in fact be taking cognizance of the offence as those words are used in the clause and that is the action which is specially forbidden. This reading of the section appears to us to involve no undue-straining of the language and to give a more reasonable interpretation than is arrived at by the rival construction, for, upon that construction while the prosecution of the main offender could not be instituted without a sanction, any minor aiders or abettors or accessories of his could be prosecuted without a sanction. That, we think is hardly a result likely to have been contemplated, and we observe that sub-S. (5), S. 195 appears to lend countenance to the view which we have adopted.

In this connexion reference may also be made to the remark made by the learned Judges of the Bombay High Court in *Bhau Vyanktesh Chakorker, In re* (4) on p. 614 (of 49 *Bom.*) which is as follows :

> We think that S. 195 (c) is wide enough to include any document produced or given in evidence in the course of a proceeding whether produced or given in evidence by the party who is alleged to have committed the offence or by anyone else, and that the intention of the legislature in the framing of the section, as it stands now, was to give authority only to the Court in which a proceeding was pending to file a complaint in respect of documents which were produced or given in evidence before it. If there had been any intention to limit the provisions of the section to a document produced or given in evidence by a party to the proceeding, then it would have been a simple matter to insert words to make that intention clear.

The remarks also tend to support, though not directly, the view taken in *Narayan Dhonddev, In re* (3). At the same time the learned Judges quoted, apparently with approval, the contrary view of the Patna High Court taken in a

(2) [1911] 15 C. W. N. 565=9 I. C. 577=12 Cr. L. J. 101.
(3) [1910] 12 Bom. L. R. 383=6 I. C. 529=11 Cr. L. J. 368.
(4) A. I. R. 1925 Bom. 433=49 Bom. 608.

case cited by them. In *A. I. R.* 1927 *Nag.* 14, it was held that a Court has power to direct the prosecution of a person for forgery committed in respect of proceedings in Court whether that person is a party to these proceedings or not. A Division Bench of this Court has taken the same view in *Emperor* v. *Bal Mukand* (5). In this case there are some remarks in the body of the judgment which appear to be in conflict with *Narayan Dhonddev In re* (3), but the point was not directly before the learned Judges. It is not necessary for me to mention the other cases cited as in my opinion they do not directly bear on the question before me, which is whether the Court is prohibited to take cognizance of the "offence" or of "the offence as against the party to the proceedings."

It is conceded that this Court has jurisdiction to quash the proceedings at this stage if it is satisfied that it is necessary to do so in the interests of justice, but it is contended that this should be very rarely done It is true that the power should be very rarely exercised by the Court, but this is a case in which the question of the jurisdiction of the trial Magistrate is involved, and I consider that it is a fit case in which the revisional jurisdiction of this Court should be exercised by quashing the criminal proceedings started against the petitioner without the complaint of the Subordinate Judge if such complaint was necessary.

It will thus be observed that though I have not been able to discover any authority of this Court which fully covers the present case *Narayan Dhonddev, In re* (3) is directly in favour of the petitioner while in *Debi Lal* v. *Dhajdhari Goshami* (2) the opposite view has been taken The wording of S. 195 (1) (c) is capable of lending support to either interpretation. The question is whether the word "offence" used at the commencement of the section is qualified by the words "committed by a party to any proceeding" as used after the word "offence" used later in the same section. It may be argued with equal plausibility that a Magistrate is prohibited from taking cognizance of an offence irrespective of the parties by whom it is committed provided one of the offenders is a party to the proceedings. On the other hand it can be argued with equal force that the protection afforded by S. 195 (1) (c) was intended to be given only to the parties to the proceedings though it appears to me to be anomalous that in certain cases the Court may decline to file a complaint aginst the party i. e. the principal while a private individual may be able to prosecute the abettors of such a party.

I consider that having regard to the conflict that exists in the cases already mentioned and to the importance of the question involved the case should go to a Division Bench for decision of the point involved. I refer the case to a Division Bench accordingly. A very early date will be fixed. I may mention that the amendment made to Ss. 195 and 146, Criminal P. C., in 1923 has not altered the situation so far as the present question is involved, and though in the judgments quoted the expression "sanction" is used under the present law it would be substituted by a "complaint."

Dalip Singh, J.—The facts of this case are sufficiently given in the order of the learned Judge referring the point for decision by a Division Bench and need not, therefore, be recapitulated.

The question is whether S. 195 (1) (c), Criminal P. C., prohibits the trial not only of the parties but of the abettors and conspirators as well when the offence has been committed by a party to any proceeding in any Court without a complaint by the Court, and, therefore the learned Magistrate at present trying the case has no jurisdiction to take cognizance of the offence, if any, committed by the petitioner.

It may be mentioned here that the learned Judge referring the case decided that the present petitioner was not a party to the proceedings and that he had merely abetted the commission of the offence, if any. We, therefore, declined to allow counsel for the petitioner to argue that the petitioner was really a party in these proceedings, and the only question before the Division Bench is the question as stated above. Two views have been generally adopted in the various Courts. It is unnecessary to go through all the rulings on the point, more especially as they have been dealt with at length by the Division Bench which decided Criminal Appeal No. 1359 *of* 1927.

(5) A. I. R. 1928 Lah 510.

Emperor v. *Bal Mukand* (5). The chief ruling expressing one point of view may be taken to be in *Govinda Iyer* v. *Emperor* (6). In that ruling it was pointed out that S. 476, Criminal P. C., referred to and incorporated the conditions laid down in S 195 and that it was only with reference to the offences specified in S. 195 with all the qualifications mentioned in that section that the procedure prescribed by S. 476 applied. The view briefly then is that excepting cases covered by S. 195 the Court has no power to adopt the procedure prescribed in S. 476. The other view is most clearly stated in the Division Bench ruling of our Court already referred to namely, *Emperor* v. *Bal Mukand* (5) In that it is pointed out (and if I may say so with all respect I entirely agree) that S. 190 is a section conferring powers on Magistrates to take cognizance of all offences under certain conditions. These wide conditions are in the case of certain offences limited by certain other sections which lay down that cognizance shall not be taken of these offences except on a complaint by a particular person or possibly under a particular procedure.

It is therefore, clear that the general policy of the Code is that Magistrates should take cognizance of all offences by whatever means brought to their notice and it is only in certain cases that the power of the Magistrate to take cognizance of offences is limited. S. 195, therefore, in my opinion, is a section limiting the right of the Magistrate to take cognizance of an offence and must, therefore, contrary to the contention of the counsel for the petitioner, be strictly construed. *Emperor* v. *Bal Mukand* (5) lays down therefore that while in the case of a party to a proceeding S. 195 (1) (c) bars cognizance of the offence except on the complaint of the Court, there is nothing to prevent a Court or the presiding officer of the Court from bringing an offence to the cognizance of another Magistrate by making a complaint to him, and such Magistrate is not debarred from taking cognizance of the offence by reason of the fact that except for such complaint by the presiding officer of the Court, the offence has not been brought to his notice at all.

Counsel for the petitioner has contended that the words "by any party" in S. 195 (1) (c) should be construed as meaning anybody who has made an appearance in Court. He conceded that this would include witnesses. Now, there is plenty of authority both of this Court and of other Courts that a witness is not within the meaning of the words in S. 195 (1) (c) : see *Wazir Ali* v. *Mahbub Ali* (7) and *Debi Lal* v. *Dhajdhari Goshami* (2). Moreover. it seems to me that the construction contended for would make the words "by any party" without meaning altogether and they might just as well have been omitted from the section. This construction would, therefore, be contrary to the ordinary canons of construction and should not be adopted unless the Courts were otherwise compelled to adopt it.

Counsel contended that it would be extremely anomalous that an actual party should only be prosecuted on the complaint of a Court, whereas a person merely abetting the offence could be prosecuted on a complaint by a private individual. I do not see any great anomaly in the matter myself, but even supposing there is some anomaly that would not justify the Court in departing from a number of rulings laying down a certain construction, and if I may with all respect say so, a natural construction, and adopting a construction which would make the words of no meaning whatsoever. Counsel relied on *Narayan Dhonddev, In re* (3) for the proposition that at any rate abettors of a party committing an offence could not be tried except on a complaint by the Court concerned. No doubt that ruling supports him, but with all respect to the learned Judges who decided that case I am unable to agree with the reasoning given by their Lordships. It seems to me that the correct view is laid down in *Ghansham Singh* v. *Emperor* (1) and *Debi Lal* v. *Dhajdhari Goshami* (2) and in our own ruling *Emperor* v. *Bal Mukand* (5) and there is nothing to prevent the trial of an abettor of an offence committed by a party to a proceeding in Court without a complaint by the Court under S. 476, Criminal P. C.

(6) [1919] 42 Mad. 540=36 M. L. J. 448=9 M. L. W. 422=50 I. C. 824=(1919) M. W. N. 459.

(7) [1914] 10 P. R. 1917=101 P. W. R. 1914 22 I. C. 412=134 P. L. R. 1914.

I would, therefore, hold that this petition fails and the Magistrate is competent to take cognizance of the offence alleged against the petitioner.

Addison, J.—I agree.

D.D. *Revision dismissed.*

A. I. R. 1928 Lahore 792 (1)

BHIDE, J.

Gurdit Singh and *another*—Defendants—Appellants.

v.

Hari Singh and *others*—Plaintiffs—Respondents.

Second Appeal No. 2744 of 1927, Decided on 13th March 1928, from decree of the Addl. Dist. Judge, Hoshiarpur, D/- 18th July 1927.

Limitation Act. Arts. 120 *and* 32—*Suit for removing encroachment on a public road is governed by Art.* 120 *and not Art.* 32.

Suit for removing encroachment on a public road and not on the property of any particular person is governed by Art. 120 and not by Art. 32: 124 *P. R.* 1912; *A.I.R.* 1921 *Lah.* 242; and 2 *L. L.J.* 463; *Foll.*: *A.I.R.* 1925 *Lah.* 653, *Dist.* [P 792 C 2]

M. L. Puri and *S. L. Puri*—for Appellants.

Shamair Chand and *Qabul Chand*—for Respondents.

Judgment.—This was a suit for a mandatory injunction directing defendants to remove an encroachment alleged to have been made by them on a public road in a village abadi by erecting "tharas" thereon. The defendants resisted the suit, pleading inter alia limitation and absence of specific damage. The trial Court found the issues in favour of the plaintiffs and decreed the suit, and the decision was affirmed on appeal by the learned District Judge. Defendants have filed a second appeal.

The only two points argued in appeal were that the suit was not maintainable as there was no allegation in the plaint about special damage and that the suit was time barred. As regards the first point: it appears that there was an allegation of special damage in the amended plaint inasmuch as the plaintiffs alleged that the passage encroached upon was the only way to their houses and they were put to special inconvenience. The matter was put in issue (issue 2) and decided in favour of the plaintiffs and this finding of fact cannot be challenged. As regards limitation: the Courts below have applied Art. 120. Lim. Act, but it is contended on behalf of the appellants that the proper article applicable was Art. 32 of that Act. Reliance has been placed in this respect on *A. I. R.* 1925 *Lah.* 653. This ruling, no doubt, appears to be in favour of the appellants. On behalf of the respondents it is urged that this ruling does not lay down correct law. The present case is, however, distinguishable in so far as the encroachment is on public road; and not on the 'property' of any particular person or persons. If any member of the public having a right of way were to be held to be entitled to sue in such a case within two years of the encroachment coming to his knowledge, limitation will practically be reduced to a nullity. There are several authorities in which in the case of suits for injunction of this type Art. 120 has been held to be applicable: see e. g, *Achar Singh* v. *Badhawa Singh* (1), *Lal Singh* v. *Hira Singh* (2) and *Nur Mahomed* v. *Gauri Shankar* (3). Following these authorities I hold that Art. 120 was properly applied to the present suit.

I dismiss the appeal with costs.

D.B/R.K. *Appeal dismissed.*

(1) [1912] 124 P. R. 1912=132 P. W. R. 1912 =15 I. C. 285=2 P. L. R. 1913.
(2) A. I. R. 1921 Lah. 242.
(3) [1920] 2 L. L. J. 463=56 I. C. 1003.

A. I. R. 1928 Lahore 792 (2)

ADDISON, J.

Shib Ram and *another*—Defendants—Appellants.

v.

Abdul Ghani and *others* — Plaintiffs and Defendants—Respondents.

Misc. First Appeal No. 1943 of 1927, Decided on 31st January 1928, from order of Sr. Sub-Judge, Kangra, D/- 23rd May 1927.

(a) *Registration Act, S.* 17—*Suit to set aside a mortgage—Agreement to withdraw from the suit does not require registration.*

An agreement simply to withdraw from a suit to have mortgage, already in existence, set aside does not require registration under S. 17 : 40 *All.* 384 and *A. I. R.* 1922 *Lah* 95, *Rel. on.* [P 793 C 2]

(b) *Civil P. C. O.* 23, *R.* 3—*Though a compromise is invalid against some plaintiffs it can be enforced against others.*

A suit was brought by the plaintiff and his minor brothers for a declaration that a mort-

gage entered into by their mother was invalid as it was entered into during their minority and was not for their benefit. The suit was afterwards compromised by the plaintiff for himself and his minor brothers. It was held that the compromise was unenforceable against the minors. It was contended that as the compromise was invalid against the minors it could not be given effect to even against the plaintiff.

Held: that the compromise could be enforced against the plaintiff though it was invalid as against the two minor brothers : *A. I. R.* 1916 *P. C.* 2 ; *A. I. R.* 1924 *Lah.* 146; and *A. I. R.* 1925 *All.* 570; *Rel. on.* [P 794 C 2]

(c) *Transfer of Property Act, S.* 60—"*Indivisibility*"—*Mortgagor cannot plead.*

The proposition that a mortgage is indivisible is one for the benefit of the mortgagee and it may be waived by him. The mortgagor cannot take advantage of this principle. [P 794 C 2]

Jagan Aggarwal—for Appellants.

Arjan Das—for Respondents.

Judgment.—Plaintiff 1 is the half-brother of plaintiffs 2 and 3. Plaintiffs 2 and 3 are minors while plaintiff 1 is a major. On 30th September 1924 the two mothers of the plaintiffs executed a mortgage of the plaintiffs' land in favour of defendants 3 and 4. The amount was Rs. 6,250. The plaintiffs brought the present suit against their mothers and the mortgagees for a declaration that the mortgage in question, which was entered into during their minority on their behalf, was ineffectual and void as their mothers were not their legal guardians and the mortgage was not effected for their benefit. Issues were framed and the suit was adjourned for evidence. In the meantime, on 14th January 1927, a compromise was written in the village by which plaintiff 1 for himself and on behalf of his two half-brothers withdrew from the suit on the condition that parties should bear their own costs. On the next date of hearing, namely, 22nd February 1927, the defendants put this compromise into Court. Plaintiff 1, however, pleaded that he had signed a blank sheet of paper at the instance of one Kale Khan who said that a deed of lease was going to be executed. The trial Court framed two issues on this question :

(1) Whether Abdul Ghani agreed to withdraw the suit of his own free will.

(2) Whether the withdrawal is binding upon him and his minor brothers.

It held that the compromise was entered into by plaintiff 1 of his own accord and that there was no coercion, undue influence or fraud. It was conceded before the trial Court that the two minor plaintiffs were not bound by the compromise. The trial Court refused to record the compromise even as against plaintiff 1 on the ground that the contract of mortgage was indivisible and that a mortgage could not be set aside as against two persons when it remained valid as against one. Against this decision the mortgagees have appealed.

Two points were raised before me by counsel for the respondents, which were not taken in the Court below. The first was that the compromise was an agreement requiring a stamp of Re. 1. No objection having been taken on this ground in the trial Court it cannot now be raised before me under S. 36, Stamp Act. The second was that the compromise was a document requiring registration under S. 17, Registration Act, as it declared a right in immovable property of a value of more than Rs. 100 in favour of the mortgagees and that as the document was not registered it could not be proved under S. 49, Registration Act. There is no authority directly in point. It was held in *Bhana* v. *Guman Singh* (1) that an agreement by which reversioners agreed not to enforce their rights to sue for a declaration that a gift of property in the possession of a Hindu widow made by the widow was not binding upon them was not a document which was compulsorily registrable under S. 17, Registration Act. In *Gulab* v. *Mehndi* (2) it was held that an agreement given by the brother of an alienor not to contest any alienation which his brother might make in future as to one-half of his land did not require registration. These cases do not cover the present one, but it seems to me that all that plaintiff 1 agreed to in this document was not to sue for a declaration that the mortgage entered into on his behalf by his mother was not binding upon him. That seems to me not to be a document requiring registration under S. 17, Registration Act. The mortgage was already in existence and the agreement was simply one to withdraw from the suit to have it set aside I therefore overrule this objection of the respondents.

On the merits it is quite clear Abdul Ghani entered into the compromise of his own free will

(1) [1918] 40 All. 384=
J. 191.

(2) A. I.R. 1922 La

the writer of the document, and Thakar Singh, one of the witnesses, have given evidence that he understood what he was doing and that he signed it after it had been written. Kale Khan further stated that the intention was that plaintiff 1 should not appear on the date fixed for hearing and thus allow the suit to be dismissed in default. The story of plaintiff 1 that he signed a blank paper on which a lease was going to be written is most improbable. Plaintiff 1 is a lambardar and the document was written in his own village. Plaintiff 1 first stated that he could not read and could only sign his name but he had to admit that he could read and write to some extent. There is no evidence in his favour except his own statement and the decision of the trial Court that he entered into the agreement willingly is correct.

There remains the question whether the compromise can be enforced against plaintiff 1 though it is invalid as against his two minor brothers. Here also there is no direct authority, but some of the cases come very near to the present one. In *Jamabai* v. *Vasantrao* (3) a compromise had been made on behalf of a minor without compliance with the requirements of S. 462, Civil P. C., 1882, as to obtaining leave of the Court. In accordance with this compromise a joint bond was executed on behalf of the minor and another person. It was held that it could be executed against the other obligee though it was not enforceable against the minor as the compromise under which it was entered into was not enforceable against him. The plea advanced in that case amounted to this: that one of two promisors could plead the minority and consequent immunity of the other as a bar to the promisee's claim against him. This was held to be a plea which had to be rejected. This ruling was followed in *Sain Das* v. *Ram Chand* (4). The case most similar to the present is *Gulab Dai* v. *Vaish Motor Co* (5). In that case the plaintiffs were a lady suing for herself and as guardian of her minor son. The lady's father was acting as agent for both the plaintiffs. He entered into a compromise on their behalf and a decree passed in terms of it. The sanction of the Court to the compromise on behalf of the minor had not been previously obtained and it was not proved that the compromise was for the benefit of the minor. It was, therefore, held that as regards the minor plaintiff the compromise was totally ineffective. It was further held that as regards the adult plaintiff it still remained to be decided whether her father or the vakil engaged in the case had any authority to enter into a compromise on her behalf. The case was remanded for this purpose. This meant that a partial compromise involving one out of two plaintiffs was held to be possible, and in the present case I hold that a partial compromise is not illegal.

The proposition that a mortgage is indivisible is one enuring for the benefit of the mortgagee and it may be waived by him. The mortgagor cannot take advantage of this principle. No difficulty will arise if it is held that the mortgage is effective as against the interests of plaintiff 1 in the land though it may later be held not to affect the interest of plaintiffs 2 and 3 and their share of the land. Further, O. 23, R. 3, Civil P. C., allows for the recording of a compromise adjusting a suit in part by a lawful compromise.

I therefore accept this appeal and order the compromise to be recorded so far as the interests of plaintiff 1 are concerned and a decree to be passed in accordance therewith. This means that the suit is dismissed so far as plaintiff 1 and his share of the land are concerned. The suit, so far as plaintiffs 2 and 3 are concerned, will, however, proceed. The appellants will get their costs in this Court from plaintiff 1.

N.K. *Appeal accepted.*

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(3) 6 P. C. 2=39 Mad. 409=43 I. A. 146=4 Lah. 334.
(4) 30=47 All. 782.

A. I. R. 1928 Lahore 794

COLDSTREAM, J.

Mian Pirthi and *others* — Plaintiffs — Appellants.

v.

Hans Raj and *others* — Defendants — Respondents.

Second Appeal No. 17 of 1928, Decided on 8th June 1928, from decree of Addl. Dist. Judge, Hoshiarpur, D/- 31st October 1927.

Limitation Act, Art. 32—Art. 32 does not apply where the person proceeded against has no other right than a right in common with the general public to pass over it.

Article 32 can properly be applied only where the person proceeded against had, before the perversion in respect of which he is being sued took place, a right to "use the property for specific purposes" peculiar to himself. It is not intended to apply to a case in respect of land in which the person proceeded against had no other right than a right in common with the general public to pass over it: 124 *P. R.* 1912 and *A. I. R.* 1928 *Lah.* 792 (1), *Rel. on.*: *A. I. R.* 1922 *All.* 320, *held Diss. from by A. I. R.* 1924 *All.* 450. [P 795 C 2]

Niaz Muhammad—for Appellants.

Niamat Rai—for Respondents.

Judgment.—The appellants are proprietors of village Mansowal in Garhshankar tahsil of Hoshiarpur District. A certain area of land in the village, admittedly the property of the appellants, was recorded as a public thoroughfare. The respondents, who are occupancy tenants in the village, have appropriated parts of this thoroughfare by erecting huts, etc., upon it. The appellants sued for an order against the respondents to remove the erection or put the appellants in possession, alleging that the respondents had put up the huts, etc., four years previously. The respondents pleaded that they had acquired a prescriptive title in the site by adverse possession. The trial Court found that the respondents had taken possession of the site in 1921 and that the suit was not barred by limitation. The Subordinate Judge accordingly gave a decree in the plaintiffs' favour in the form of a perpetual injunction against the obstruction of the thoroughfare by the respondents. The respondents appealed. The District Judge confirmed the finding that the respondents had taken possession in 1921, but holding that the suit was barred by Art. 32, Lim. Act, he accepted the appeal and dismissed the suit.

Against this judgment the proprietors have appealed. Mr. Niaz Muhammad, who has argued the appeal, relies upon *Achar Singh* v. *Badhawa Singh* (1) and *Masharaf Ali* v. *Iftikhar Hussain* (2) in support of his contention that Art. 32 is not applicable to a suit of this kind. For the respondents Mr. Niamat Rai refers to *Bishambar Sahai* v. *Janki Das* (3) and *Ghulam Muhammad* v. *Abdul Satar* (4) in support of the view adopted by the lower appellate Court.

I have referred to these and other rulings on the subject of the application of Art. 32. It is not easy to derive from these authorities any clear principles on which the applicability of Art. 32 has been determined in cases resembling the one now before me. I note, however, that the view expressed in *Bishambar Sahai* v. *Janki Das* (3) was subsequently dissented from by a Division Bench of the Allahabad Court in *Mohan* v. *Bishambar Sahai* (5). There can be no doubt that Art. 32 can properly be applied only where the person proceeded against had, before the perversion in respect of which he is being sued took place, a right to "use the property for specific purposes." Can it be said that in this case the defendants had a right to use the site in suit for specific purposes? I think not. They could pass over the land, but as individuals or members of the community they had no specific right of any kind peculiar to themselves, nor had they any rights in the land under colour of which they could set up obstructions on the public thoroughfare. The case appears to resemble closely in its nature the case *Achar Singh* v. *Badhawa Singh* (1) in which Art. 32 was not held to govern limitation. This decision has recently been followed by a learned Judge of this Court in *Gurdit Singh* v. *Hari Singh* (6), a case apparently on all fours with the present case.

My present opinion is that Art. 32 was not intended to apply to a case in respect of land in which the person proceeded against had no other right than a right in common with the general public to pass over it. This view does not I think conflict with the existing decisions. My conclusion is that the article applicable in the present case was and that the suit was wrongly by the learned Additional Dist

On the merits the matter is the lower Court's findings favour of the plaintiffs-appe are entitled to the decree gi trial Court. The appeal is a accepted with costs throughout.

(1) [1912] 124 P. R. 1912=132 P. W. R. 1912 =15 I. C. 285=2 P L. R. 1913.
(2) [1888] 10 All. 634=(1888) A. W. N. 257.
(3) A. I. R. 1922 All. 320.
(4) A. I. R. 1925 Lah. 653.
(5) A. I. R. 1924 All. 450=46 All. 6
(6) A. I. R. 1928 Lah. 792 (1).

ment of the Additional District Judge is set aside and the decree of the first Court is restored.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 796

FFORDE AND AGHA HAIDAR, JJ.

Emperor—Appellant.

v.

Bahadur—Accused—Respondent.

Criminal Appeal No. 755 of 1927, Decided on 1st December 1927, from an order of Sess. Judge, Rawalpindi, D/- 23rd April 1927.

(a) *Penal Code, S. 84—Mere want of motive for the crime is not sufficient to base an inference of unsoundness of mind—Onus is on the accused to prove that he was incapable of knowing the nature of his act.*

In the absence of other evidence mere want of motive for the crime is not sufficient to base an inference of unsoundness of mind for the purposes of a defence under S. 84. The onus is upon the accused to prove that he was suffering from such disability as is indicated in S. 84. [P 798 C 1]

(b) *Criminal P. C., Ss. 464 and 465—Magistrate is not under duty to order a medical inquiry upon a defence of insanity—Unsoundness of the accused must first be inquired into if he appears to be incapable by reason of mental infirmity of taking his trial.*

There is no provision of law in India making it incumbent upon a Magistrate to order a medical enquiry upon mere defence of insanity. It is only in cases where the accused appears to be incapable, by reason of mental infirmity, of taking his trial that this issue of insanity must be tried before the trial for the offence is proceeded with. [P 798 C 2]

Abdul Rashid—for the Crown.

Nihal Singh—for Respondent.

Fforde, J.—Bahadur has been tried by the learned Sessions Judge of Rawalpindi for the murder of Mt. Amrit Kaur and Teja Singh, two children aged seven and four years respectively. The defence [illegible] that at the time the murders [illegible] acquitted Bahadur was insane. [illegible] Sessions Judge has accepted [illegible] and acquitted the accused. [illegible] now appeals against this [illegible] contending that Bahadur [illegible] been convicted of murder [illegible] sentenced to death. The sole question arises for determination in [illegible] is whether or not Bahadur [illegible] the time when he killed Mt. [illegible] Kaur and Teja Singh knew that [illegible] was doing was either wrong or contrary to law. The circumstances of the crime are not disputed and may be stated very shortly.

Mt. Maya Devi was living alone with her two children at Turkwal while her husband was carrying on a shop keeping business at Kohala. On the morning of 6th February 1927, while Mt. Maya Devi was absent from the house to answer a call of nature, Bahadur entered the room where the two children were, armed with a heavy stick, closed the door by a chain, and then proceeded to batter the small boy to death. The crying of the children brought neighbours upon the scene. The daughter in the meantime had managed to unhitch the chain and was attempting to open the door when Bahadur struck her. A man called Shahana, who had come on the scene on hearing a clamour finding that Bahadur was inside the room and was refusing to allow anyone to enter, procured a thorn bush, forced the door open and with the thorn bush in front of him proceeded to drive the accused back. The accused in the meantime struck blows with his stick at the thorn bush and, while being forced gradually back, tripped over a charpoy and fell to the ground. Shahana then snatched the stick from his hand and grappled with him. Other persons came into the room and helped in securing the culprit. By this time the boy was dead, but the little girl was still alive and died shortly afterwards of her injuries. The fact, as I have briefly narrated them, are not disputed.

Counsel for the accused urges that the circumstances of the murder, the fact that no motive for the crime has been proved, and the evidence of two witnesses of certain eccentric conduct on the part of the accused some months prior to the crime, and the further fact that the accused had at one time, not very remote, received some injuries to his head, all go to prove that the accused at the time he committed the act in question was incapable of knowing that he was doing wrong. This is the view which the learned Sessions Judge has adopted; but in my judgment it is a view which cannot reasonably be held on the facts of this case.

Where an accused person relies upon S. 84, I. P. C., to escape the legal consequences of his act, the onus is upon him to prove that he was, at the time

when the act was committed, by reason of unsoundness of mind, incapable of knowing its nature that what he was doing was either wrong or contrary to law. That onus may be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition, his family history., and so forth. If contemporaneous acts of his are proved to have been of such a nature as to indicate that he was quite incapable of forming rational views, that would be a strong element to show that at the time of the crime in question he was not capable of knowing that it was a wrongful act. In the present case, however, no evidence has been produced or any contemporaneous acts of the accused. Nothing has been told us of his behaviour during the days immediately preceding the crime, but some evidence has been produced by which it is sought to prove that he behaved with remarkable eccentricity some time prior to the event in question.

The two witnesses, who have been called to prove this matter, are Nazra and Jahana. Nazra states that the accused had received serious injuries in his head in a fight and had been laid up for several months as a result of these injuries, that, after he had risen from his sickness, he had a drum beaten in the courtyard of his house, a large number of people had collected and he went about carrying a tray with Rs. 100 in it stating that anyone who had beaten him could help himself to the money. According to this witness he also got a mirasi to stand on the roof of his house, beat a drum and give a challenge to all people who owned bullocks to bring their animals and have a fight with his cattle. This witness says that nobody accepted this challenge, because everyone knew that the accused was insane. This witness also says that a day prior to the present crime the accused went into mosque wearing cattle bells round his neck and that people kept him under control as he was mad. This witness gives the date of the first two incidents as five or six days before the murder and he states that the fight resulting in the injuries to his head occurred a year ago.

The next witness, Jahana, says that the fight took place in April of last year, (i. e. 1926), that the accused was ill for some months as a result of the injuries to his head and did not return to his work when he recovered. He says that a few days before the crime two maulvis had visited the village, which attracted a large crowd of people from the Jhelum, Rawalpindi and Attock Districts and that Bahadur went to the mosque wearing bullock bells round his neck and created a disturbance. This witness also refers to the incident of the drum beating and the challenge to the owners of cattle and says it took place five or six days before the murder.

In regard to this evidence I may say, first of all, that the first witness admits that he is a collateral of the accused and the second witness admits that the accused is his son-in-law. Although the circumstances, which these witnesses depose to as showing the insanity of the accused, are alleged to have been of widespread notoriety, not a single independent witness has been produced to corroborate these two persons in respect of the matters which they have alleged. It seems incredible that, if on the day prior to the crime, the accused had entered a public place of worship in a fantastic manner, as he is alleged to have done, causing a public disturbance not a single person should have been available to give evidence of this fact. According to Jahana also, the incident of the drum beating took place five or six days before the occurrence. In respect to this no person from the neighbourhood has been called to give evidence on this matter. In my judgment the evidence of these two witnesses is not worthy of any credit whatsoever, and I cannot help expressing some surprise that it should have been treated seriously by the learned Sessions Judge.

Another matter which the learned Sessions Judge has relied upon as evidence of insanity is that

> the accused behaved like a mad man when he was caught in the house of his victims as he rained a shower of blows on the thorn bush with which he was being pushed back.

It seems to me that the accused in striking at this thorn bush did what a normal person would do who was trying to resist capture and who was being assulted in such a manner. The learned Sessions Judge has also considered the evidence upon the head injuries to the accused. There is no doubt that there-

is a scar on the accused's head showing that some time back he had received a fracture of the skull. But, apart from the evidence of his two relatives, there is nothing to show that these injuries to the head had resulted in any untoward act on the part of the accused or had incapacitated him in any way whatsoever.

The fourth matter relied upon by the learned Sessions Judge as evidence of insanity is the absence of motive for this crime. I may say that the motive alleged by the prosecution, sought to be proved by the mother of the children and by one Gurdial Singh, is not very satisfactory, inasmuch as Gurdial Singh's account of a complaint made to him by Mt. Maya Devi does not tally with the story which she herself has given. It may be that the accused had been importuning Mt. Maya Devi to become his paramour, as she alleged, but I am not satisfied that she did complain of this matter to Gurdial Singh before the crime in question. It must be borne in mind that this kind of conduct towards a married woman, who was living apart from her husband, is not a circumstance which a woman is likely to talk about, and, although it is quite possible that she is speaking the truth that the accused did molest and importune her, I am not satisfied that she complained of these acts to Gurdial Singh. However, even accepting the learned Sessions Judge's view that no motive for the crime has been proved, that in itself—the mere absence of motive—is not a sufficient ground upon which mania may be inferred. There is no doubt that the fact that a murder has been committed in a particularly brutal and purposeless way for no motive whatsoever, is a circumstance which may be taken into consideration, together with other material, to enable a Court to decide whether or not the crime in question was committed at a time when the accused person was in such a state of mind that he was incapable of knowing the nature of his act. As I have said in the absence of other evidence mere want of motive for the crime is not sufficient to base an inference of unsoundness of mind for the purposes of a defence under S. 84, I. P. C.

Mr. Nihal Singh has argued that the learned committing Magistrate should have ordered an investigation into the state of the accused's mind as soon as the defence of insanity was raised. For this contention I can find no authority. S.469, Criminal P. C., provides that when an accused person appears to be of unsound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that he committed an act which, if he had been of sound mind, would have been an offence, and that at the time of the commission he was, by reason of unconsciousness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate must proceed with the case and commit the accused for trial to the Court of Session or High Court, as the case may be There is no provision of law in India making it incumbent upon a committing Magistrate to order a medical inquiry upon a defence of insanity. It is only in cases where the accused appears to be incapable by reason of mental infirmity, of taking his trial, that this issue of insanity must be tried before the trial for the offence is proceeded with. That is provided by Ss. 464 and 465, Criminal P. C.

In the present case it was not suggested that the accused was insane either at the time he came before the committing Magistrate, or before he took his trial before the Sessions Judge, or at any period in the interval. His whole case is that he was suffering from such a condition of mind at the time of the crime that he was not capable of knowing the nature of his act or that what he was doing was either wrong or contrary to law. The learned committing Magistrate refused an application by counsel for the defence to hold an inquiry as to the state of the mind of the accused person. The committing Magistrate in rejecting this application expressed his view that the accused was sane at that time, and upon that view the committing Magistrate had no alternative but to proceed in accordance with the provisions of S. 469, Criminal P. C. The learned Sessions Judge seems to think that there has been some dereliction of duty on the part of the committing Magistrate in not ordering a medical inquiry. This view of the learned Sessions Judge is, in my opinion, entirely contrary to the statutory provisions. The learned Sessions Judge also seems to

have been of opinion that it was for the Crown to establish the sanity of the accused; but he does not seem to have realized that the onus was upon the accused to prove that he was suffering from such disability as is indicated in S. 84, I. P. C. The learned Sessions Judge says that it may be argued that the fact that he was insane when he committed the murders has not been proved conclusively but still there remains the doubt that he may have been mad at the time. This is not a kind of doubt of which the accused may be given the benefit. In order to come within the provisions of S. 84, I. P. C., the accused must not leave the condition of his mind at the time of the commission of the offence in doubt, but must satisfy the Court that it was such that he was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law. This, in my judgment, he has wholly failed to establish.

I am satisfied from the admitted facts of this case from the fact that the accused selected a time when the mother was absent from the house to batter to death these two unfortunate children; the fact that before starting upon his crime he chained the door from inside to prevent anyone entering; the fact that he went to the scene having armed himself with a dang; and the fact that when he was interrupted in the course of its perpetration he resisted capture that he knew perfectly well—that he was doing a wrongful act. Under these circumstances I am satisfied that the decision of the learned Sessions Judge is clearly erroneous, and I would accordingly accept the appeal for the Crown, set aside the verdict of acquittal, convict the respondent under the provisions of S. 302, I. P. C., of the murders of Mt. Amrit Kaur and Teja Singh and sentence him to death.

If it may now be the case that before the sentence is executed it appears to the jail authorities that the accused is insane, I have no doubt that proper steps will be taken to inquire into his mental condition. This is a matter, however, for the Local Government and not for this Court.

Agha Haidar, J.—I agree.

N.K. *Appeal allowed.*

A. I. R. 1928 Lahore 799

DALIP SINGH, J.

Panju Ram—Defendant—Appellant.

v.

Uttum Chand and *another*—Plaintiff and Pro-forma Defendant—Respondents.

Misc. First Appeal No 3242 of 1927, Decided on 19th May 1928, from order of the Sr. Sub-Judge, Shahpur, D/-23rd August 1927.

Civil P. C., O. 9, R. 13—Substituted service—Nothing on record to show that provisions of O. 5, Rr. 19 and 20 were satisfied—Ex-parte decree should be set aside.

An ex-parte decree should be set aside when there is nothing on record to show that the provisions of O. 5, Rr. 19 and 20 were satisfied before ordering substituted service and there is much on the record which leads to suspect the contrary: *A. I. R. 1927 Mad. 507* and *A. I. R. 1925 Lah. 639, Dist.* [P 800 C 1]

Anant Ram Khosla—for Appellant.

Anant Ram for *Bishen Nath*—for Respondents.

Judgment.—The facts of this case are that in the suit which was brought on a mortgage on 8th October 1925, an order for issue of summons was passed on 9th October 1925. From the record it is difficult to ascertain on what date the summonses were issued, but the date of the return of the summons was 14th November 1925. On that date the Court ordered that dasti summons should be given to the plaintiff. On the same date the plaintiff put in an application stating that the defendant, who was alleged in the plaint to be residing at Chak No. 163, Montgomery District, was avoiding service of summons and could not be served except by substituted service. On that date the Court ordered substituted service by advertisement in the Tribune, and fixed 7th January 1926, as the date of the next hearing. On 7th January 1926 ex-parte proceedings were ordered and a preliminary decree was passed. On 8th July 1926, a final decree was passed, without notice to the defendant and without any written application, on an oral application by counsel for the plaintiff. On 30th November 1926, a written application was put in for the final decree. On 22nd December 1926, an application for execution was put in. A house situate in Bhalwal, district Sargodha, was sold on 11th February 1927. On 10th March 1927 an application was put in to set

aside the ex-parte decree. Notice issued to the parties, and the defendant produced three witnesses who show, and this is not contested before me, that the defendant resides in Chak No. 153 and not in Chak No. 163, that he left Bhalwal when he was five or ten years old, that he goes to Bhalwal where he still has some business occasionally and that his mother lives in the house at Bhalwal, that he does not know English and that the Tribune does not reach his chak and is read by nobody in his chak. The defendant went into the withess-box himself and stated that he had only come to know of the ex-parte decree on 4th or 5th March 1927, when he had come to Bhalwal.

The plaintiff produced two witnesses, One nawab and one himself, to prove that in the Jeth of the year previous the defendant had come to Bhalwal and had asked the plaintiff not to take out execution of his decree and had promised payment of the sum due. Now, Jeth would fall in June and as the final decree was not passed till 8th of July 1926, the story is obviously false, and I do not believe a word of it, though it seems to have appealed to the learned Judge who dealt with this application and dismissed it.

It is obvious that a wrong address was given concerning the defendant and that substituted service was ordered on what I can only describe as extremely insufficient material, certainly not complying with O. 5, Rr. 19 and 20, Civil P. C. The whole proceeding seems to me to be extremely suspicious and seems to have been a device of the plaintiffs to secure an ex-parte decree. Counsel for the plaintiff respondent cites *A. I. R.* 1927 *Mad.* 507 and *A. I. R.* 1925 *Lahore* 639. In this case the learned Judge who ordered ex-parte proceedings and who dismissed the application to set aside the ex-parte decree was the same. He has not found that he was satisfied that the provisions of O. 5, Rr. 19 and 20, had been satisfied before the issue of the order for substituted service. There is nothing on the record to show me that those provisions were satisfied and there is much on the record which leads me to suspect the contrary. I, therefore, do not think that these rulings apply to the present case.

I accept the appeal and set aside the ex-parte decree, both preliminary and final, and direct the Court to proceed with the suit afresh. The plaintiff will pay the costs of the defendant. In the circumstances I also refuse the prayer of the counsel for plaintiff-respondent that the defendant do deposit the principal sum due under the mortgage deed.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 800

JAI LAL, J.

Ganga Bishen and *another*— Plaintiffs —Petitioners.

v.

Muree Brewery Co. of Rawalpindi— Defendant—Respondent.

Civil Revn. Petn. No. 609 of 1927, Decided on 16th February 1928, from order of Small Cause Court Judge, Lahore.

(a) *Civil P. C., S.* 151—*Item wrongly included in costs payable by decree—It is open to the party aggrieved to point out mistake to Court and claim correction of decree. (Obiter).*

When a decree is framed by the Court in pursuance of a judgment and certain costs are included in that decree as payable by one party to the other, if any item is wrongly included in the costs so payable it is open to the party aggrieved to point out the mistake to the Court and to claim that the decree should be amended by making the necessary correction. [P 801 C 2]

(b) *Civil P. C., S.* 35—*Witnesses brought by a party at his expense from their place of residence and got served at the place of suit—Court satisfied that expenses were reasonable—Court is entitled to include expenses in costs.*

Defendant's witnesses who were residents of *R* were brought by him at *L*, the place of suit, and he got them served at *L* with a summons. The defendant satisfied the Court that he had brought the witnesses at *L* from *R* and had paid their expenses and that the expenses were reasonably incurred.

Held: that the Court was entitled to include these expenses in the costs. [P 801 C 2]

(c) *Civil P. C., S.* 35—*Charges incurred in procuring attendance of witnesses whether summoned through Court or not can be included.*

Section 35 confers ample powers on the Court to direct in what manner the costs are to be paid. The charges incurred in procuring the attendance of witnesses, whether such witnesses are summoned through the Court or not, are to be considered as included in the term "costs". [P 801 C 2]

(d) *Civil P. C., S.* 115—*Costs.*

A mistake committed by a Court on the point of costs is hardly a ground for revision. [P C 2]

Chandra Gupta for *Fakir Chand*—for Petitioners.

Anant Ram for *Edmunds*—for Respondent.

Judgment.—This is a petition for revision of an order of the Judge, Small Cause Court, wherein he rejected the application for amendment of decree presented by the petitioners.

It appears that a suit was instituted by the petitioner against the respondent which was fixed for hearing on the 22nd December. On 21st December, the defendant applied that three of his witnesses be summoned and paid the necessary process-fee for the service of the summons on them, but did not actually deposit in Court the expenses for the appearance of the witnesses. The Court directed the summonses to issue, but expressly laid down that it would be for the defendant to see that they were served and that the Court would not grant any further adjournment if the summonses be not served. The witnesses who were to be summoned were residents of Rawalpindi. They were actually served in Lahore on 22nd and their expenses from Rawalpindi to Lahore were paid by the defendants' counsel and receipts thereof by the witnesses are endorsed on the back of summonses served on them. When, however, the case came up for hearing only one of these witnesses was actually examined by the defendant as the plaint was returned for presentation to the proper Court, the Judge, Small Cause Court, not having considered necessary to record the statement of the remaining witnesses of the defendant. The Court, it may be mentioned, while returning the plaint has passed an order that the plaintiff should pay the costs of defendant. A petition for revision against the order returning the plaint made in this Court was dismissed in limine. In that petition no question as to the correctness or otherwise of the amount awarded against the plaintiff was raised. Then the plaintiff made an application to the Judge, Small Cause Court, praying that the decree prepared be amended by excluding the costs paid to the three witnesses who had been served for the 22nd in the manner already stated by me. This application, the Judge of the Court, below, dismissed mainly on the ground that such an application was not competent.

I do not propose to decide the point whether or not such an application is competent, for it seems to me that on the merits the petitioner has no case, though it seems to me that when a decree is framed by the Court in pursuance of a judgment and certain costs are included in that decree as payable by one party to the other if any item is wrongly included in the costs so payable it is open to the party aggrieved to point out the mistake to the Court and to claim that the decree should be amended by making the necessary correction, and, therefore, I am not disposed to agree with the conclusion of the Judge, Small Cause Court, that the application was not competent in his Court.

On the merits, however, the petitioner has no case. His only ground of objection is that the witnesses having been served actually in Lahore their expenses from Rawalpindi to Lahore could not be debited against him. But it was not necessary for the defendant to serve the witness in Lahore at all. If he satisfied the Court that he had brought the witnesses from Rawalpindi and has paid their expenses and the Court was further satisfied that such expenses were reasonably incurred, it was entitled to include such expenses in the costs of the party who has incurred them.

There is no force in the contention of the counsel for the petitioner that it is only the expenses of the witnesses who have been summoned through the Court first, that can be included in the costs of the party. S. 35, Civil P. C., confers ample powers on the Court to direct in what manner the costs are to be paid and to which of the parties, and the instructions of this Court (Vol. I) on p. 96 clearly provide that charges incurred in procuring the attendance of witnesses whether such witnesses were summoned through the Court or not, are to be considered as included in the term "costs".

I do not understand the case of the petitioner to be that those costs were not, as a matter of fact, actually incurred by the defendant or that the witnesses did not come from Rawalpindi. All that he says is that his client is not liable to pay them because the witnesses were served in Lahore and also because two of them were not actually examined by the Court. But I have already stated that these two witnesses were not examined in Court, because the Judge did not consider it necessary to record any further evidence of the defendant who had actu-

ally incurred expenses in procuring the attendance of these witnesses. In any case a mistake on this point by the trial Court is hardly a ground for revision. I, therefore, hold that there is no force in this petition on its merits and I dismiss it with costs.

D.B./R.K. *Petition dismissed.*

A. I. R. 1928 Lahore 802

DALIP SINGH, J.

Ram Singh—Surety—Appellant.

v.

Imperial Bank of India Ltd., Rawalpindi and *others*—Decree-holders and Judgment-debtors—Respondents.

Misc. First Appeal No. 2896 of 1927, Decided on 2nd June 1928, from order of Sr. Sub- Judge, Rawalpindi, D/- 26th October 1927.

(a) *Civil P. C., S. 145—Punjab Courts can in their inherent jurisdiction proceed against surety's property whether he is named or not in the bond.*

In the Punjab there is inherent jurisdiction in the Court to proceed against the property of a surety whether an obligee is or is not named in the surety bond: *A. I. R.* 1919 *P. C.* 55, *Rel. on.* [P 804 C 1]

(b) *Evidence Act, S. 115—Estoppel.*

There cannot be any estoppel on a point of law going to the jurisdiction of the Court. [P 803 C 1]

(c) *Civil P. C., S. 151—Inherent jurisdiction to proceed against the property of surety exercised—Surety has no right of appeal.*

Where inherent jurisdiction to proceed against the property of the surety has been exercised no right of appeal is given by the Code and there being no inherent right of appeal, the appeal by the surety is incompetent. [P 803 C 1]

Govind Das—for Appellant.

Mool Chand—for Respondent 1.

Judgment.—These two appeals can be conveniently disposed of in one judgment. The Imperial Bank obtained in the first case a decree against Bishen Singh .Budh Singh on 14th August 1925. They took out execution against the judgment-debtors and the bank agreed to give three months time to the judgment-debtors on Ram Singh standing surety. A translation of the security bond is given in the judgment of the trial Court. After three months the decree-holder took out execution of the decree on 14th November 1925 against the judgment-debtors and also against the surety Ram Singh. After various happenings, which are not necessary to go into, it was pleaded by Ram Singh that under the terms of the bond given by him the immovable property could not be attached in execution. The trial Court held that S. 145, Civil P. C., did not apply, but it held that it had inherent jurisdiction to proceed against the property of Ram Singh, and it gave no decision on issue 3 as to Ram Singh being estopped from taking the present plea.

In the second case the Imperial Bank had obtained a decree against Bishen Singh-Budh Singh and others, and having taken out execution, the execution was stayed on Ram Singh standing surety. A similar plea having been taken by Ram Singh, the Court held that S. 145, Civil P. C., did not apply and the decree-holder would, ordinarily speaking, have been obliged to bring a separate suit to enforce the mortgage created by the security bond, but that Ram Singh was estopped from taking the plea because of his silence and acquiescence in execution proceedings for nearly one and a half years which conduct had placed the bank at a disadvantage against the judgment-debtors. It, therefore, disallowed the objection in both cases.

In the view that I have now taken of the law, it is unnecessary to go into the various arguments that have been urged before me. It has been contended in the first case that the translation of the bond is incorrect and that it should read:

> My immovable property shall be liable to the decree-holder for the decretal amount and costs,

instead of as given in the judgment of the trial Court. It has been contended that where there is a named obligee in the bond, and the bond does not make the surety personally liable but only makes immovable property liable, then the remedy is by way of a separate suit and not either under S. 145 or under the inherent jurisdiction of the Court.

It has been contended in the second case that there is no question of estoppel in the matter at all. In reply on behalf of the respondents it has been contended firstly that the translation of the security bond in the first case is correct and that there is no named obligee in the bond, and therefore, though S. 145 does not apply, the Court had inherent jurisdiction to execute against the immovable

property. It has been contended in the second case that there was inherent jurisdiction in the case to proceed against the property and that there was an estoppel. It was not contended that the matter was res judicata. I can briefly dispose of the question of estoppel by stating that I fail to see how there can be any estoppel on a point of law going to the jurisdiction of the Court, and that I would uphold the appellant's contention on this point. It was contended on behalf of the respondent that if inherent jurisdiction had been exercised, no appeal lay because the appeal by the surety is only provided by S. 145 which does not apply. In reply to this it was contended that if no appeal lay, this Court should exercise revisional jurisdiction because the point involved was a question of jurisdiction and moreover the appellant had no other remedy, or if a remdy by way of a separate suit, it was a troublesome and expensive remedy. On this point too I hold that if inherent jurisdiction had been exercised no right of appeal seems to be given by the Code and there being no inherent right of appeal, the appeal would be incompetent. But I would certainly hold in such an event that this Court should interfere in revision on the point because of the reasons given by counsel for the appellant.

However, I am not deciding the case on this point, but on different point which I shall now proceed to state. The relevant ruling on the point is *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (1), a Privy Council ruling. In that case their Lordships of the Privy Council held that in a case where there was no named obligee in the bond, the Court had inherent jurisdiction to sell property hypothecated for the due performance of an appellate decree the appeal at the time of the security bond being pending. Now it has been contended by the counsel for the appellant that what their Lordships meant was that in case there is a personal liability, S. 145, Civil P. C. applies. If there is no personal liability and no named obligee, then the Court has inherent jurisdiction to sell the property. But if there is a named obligee, then the remedy is by way of separate suit and neither S. 145 applies nor is there any inherent jurisdiction to sell the property. On the other hand, it has been contended that the meaning of their Lordships was that where there is no personal liability, S. 145 does not apply and the Court will always have an inherent jurisdiction to sell property, were it not for the terms of S. 99, T. P. Act, which now corresponds to O. 34, R. 14, Civil P C. Therefore, in the provinces where the Transfer of Property Act applies, by virtue of O. 34, R, 14, a separate suit is necessary in the case of a named obligee ; but where, as in the Punjab, the Transfer of Property Act does not apply the Court has inherent jurisdiction to sell the property whether there is or is not a named obligee in the bond.

After considering the matter, I have come to the conclusion that the second view is the correct view. O. 34, R. 14, Civil P. C., expressly does not apply to the Punjab and in *Raj Raghubar Singh* v. *Jai Indra Bahadur* (1) the reference to S. 99 can only be made intelligible so far as I can see, with all due deference to their Lordships of the Privy Council, by reading it as a reference to S. 99, T. P. Act. This being so it would follow that their Lordships of the Privy Council were dealing with the difficulty created by that section. It is a well-known principle of law that the inherent jurisdiction of the Court cannot override a statutory provision. But where there is no statutory provisions to bar the inherent jurisdiction of the Court, I fail to see why the inherent jurisdiction of the Court should be limited to the case of of an obligee not being named in the bond. It is contended that the reason for invoking the inherent jurisdiction is the fact that otherwise there would be no remedy in the case where an obligee was not named in the bond; and there is force in this contention. It seems to me, however, anomalous to hold that a Court has inherent jurisdiction to sell property hypothecated where there is no named obligee, and no jurisdiction to sell it, where there is a named obligee. After all inherent jurisdiction must be based on some principle and not the mere absence of a remedy. It seems to me that the reason for the principle is that the Court has stayed its hands because of certain undertakings, and, ordinarily speaking, it must be for the Court itself to give the remedy that follows when the condition on which it

(1) A. I. R. 1919 P. C. 55=42 All. 159=22 C. 212=46 I. A. 228 (P. C.).

stayed its hands is not fulfilled. I would, therefore, hold in both of these cases that in the Punjab there is inherent jurisdiction in the Court to proceed against the property whether an obligee is or is not named in the bond and therefore both these appeals fail and are dismissed. As the appellant had good reasons for coming to this Court in appeal, I would make no order as to costs which will be borne by the parties themselves throughout.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 804

ADDISON AND BHIDE, JJ.

E. I. Ry. Co.—Defendant—Appellant.

v.

Babu Ram—Plaintiff—Respondent.

First Appeal No. 2094 of 1923, Decided on 19th June 1928, from decree of 1st Class Sub-Judge, Delhi, D/- 29th June 1923.

Railways Act, S. 72—Conversion.

Ordinarily a refusal to deliver goods amounts to a conversion though a qualified, reasonable and justifiable refusal may not : *A. I. R.* 1927 *Lah.* 471 and *A. I. R.* 1925 *All.* 656, *Rel. on.* [P 805 C 2]

62 bags out of 64 bags of sugar of plaintiff's consignment arrived but he was repeatedly refused delivery. As the market rate was falling, he served the railway company with a notice claiming the value of the consignment from the railway. But after the receipt of the notice the railway notified plaintiff that 62 bags of his were lying undelivered at his risk incurring demurrage charges and if they were not removed within ten days the consignment would be auctioned as unclaimed property. Bags were accordingly auctioned and the plaintiff sued the company for the value of sugar and interest.

Held : that plaintiff was entitled to the claim as the company had no right of any kind to refuse delivery to the plaintiff. [P 805 C 2]

Sardha Ram and *Bishan Narain*—for Appellant.

Kishan Dayal and *Shamair Chand*—for Respondent.

Addison, J.—A Calcutta firm consigned 128 bags of sugar from Kiddarpore Docks to Delhi-Shahdara railway station. As 64 bags were for Babu Ram and 64 for Banwari Lal there were separate risk-notes and railway receipts. The risk-notes for each lot were on forms A and B. The two lots were loaded in the same wagon and dispatched On 8th October 1920 Banwari Lal went to Delhi-Shahdara station and found that the goods had arrived. He paid Rs. 245-10-6 for the freight of his lot and commenced to load. Before he had finished it was discovered that only 111 bags out of the two lots had arrived, that is, there were 17 short. It was further discovered that Banwari Lal's lot had been loaded in the middle of the wagon and that there were only 49 bags out of his lot of 64, that is, there were 15 short. Babu Ram's lot had been loaded at each end of the wagon. 62 bags out of his 64 had arrived, that is, two short. Banwari Lal insisted that he was entitled to take away his complete number of 64 bags and, when this was refused the bags which he had already loaded were unloaded. Babu Ram came on 19th October 1920, that is, the next day, for his lot, and was prepared to take away the 62 bags of his consignment which had arrived, but apparently on account of the frivolous demand made by Banwari Lal he was not allowed to do so Finally the railway auctioned the sugar of both consignments on 17th May 1921, and on 6th June 1921 Babu Ram sued the railway company for Rs. 6,472, being Rs. 6,172, the purchase price and Rs. 300 interest. Later, he admitted that he had made a mistake of Rs. 30 in his calculations and reduced his claim to Rs. 6,442. The trial Court disallowed interest but decreed the sum of Rs. 6,142 with proportionate costs. Against this decree the railway company have appealed.

The trial Court held that 62 bags of Babu Ram's consignment arrived, that he was willing to accept delivery of this number, and that, when finally the railway company offered him this number on 30th November 1920 after the market had fallen very considerably, he was justified in refusing to take them. This amounted to a finding of conversion of the goods by the railway. It was further held that wilful neglect by the railway in respect of the two bags which were lost had been established. In this way the full purchase money was decreed.

On the evidence it is clearly established that 62 bags of Babu Ram's consignment arrived and that he was refused delivery on 9th October 1920 when he was willing to take the 62 bags which arrived. On the same day he at once telegraphed to the Traffic Manager asking him to order delivery to be made to him. Further, when a Traffic Inspector was sent to

settle matters, Babu Ram was still willing on 26th October to take the 62 bags of his consignment, though even then the market was falling. All this was admitted by the learned counsel whc appeared for the appellant. On 1st November 1920 Babu Ram served the railway company with a notice to the effect that he had repeatedly been refused delivery, that the market rate was falling and that he claimed the value of the consignment from the railway. It was, not, however, till 30th November 1920 that the railway notified Babu Ram that 62 bags of his were lying undelivered at his risk since 8th October 1920 incurring demurrage charges, and that if they were not removed within ten days the consignment would be auctioned as unclaimed property. This was certainly a curious letter to send, seeing that it was entirely the fault of the railway who refused to allow Babu Ram to remove his bags. The railway put all the blame on him and even indicated that demurrage would be charged. On this date the market rate had fallen by Rs. 8-8-0 a maund as admitted by the Traffic Inspector in his letter dated 30th November 1920

The correspondence continued in an attempt to settle the dispute and it is clear from the letters which passed that Babu Ram took the more moderate and proper attitude He telegraphed on 5th May 1921 that he was still willing to take the 62 bags if the railway did not charge demurrage. By this time, however, the railway appears to have taken up the untenable position, not now held by it, that each consignee was entitled to 55½ bags and on 12th May 1921 it wrote to Babu Ram, only offering him 55½ bags. It is impossible to understand how the railway came to take up this position as, in no circumstances could half of one bag belong to one consignment and half to the other. Besides the evidence is clear that 62 bags of one consignment and 49 of the other arrived, as found by the trial Court. This is, indeed, the position taken by the railway.

In spite of the above facts, it was strenuously contended on behalf of the railway that Babu Ram was bound to take delivery of the 62 bags on 30th November 1920 when the offer of 62 bags was made by the railway who, however, at the same time claimed demurrage, though delivery had been refused by them from 8th October to that date, during which interval the market had been steadily falling. As against this it was argued that the railway was guilty of conversion of 62 bags by refusing to give them to Babu Ram throughout October and that Babu Ram was justified in giving the railway notice on 1st November that he would sue it for the value of the goods if the sum claimed was not paid. It is the railway's case that 62 bags of his consignment did arrive. In these circumstances the railway had no right to refuse delivery in October to Babu Ram merely because Banwari Lal wrongly claimed 64 bags. The claim of Banwari Lal was frivolous and should have been ignored by the railway. *Haryana Cotton Mills Co., Ltd.* v. *B. B. & C. I. Ry. Co.* (1), is a somewhat similar case. In it the railway had failed to deliver machinery handed over to it for conveyance and was sued for the value of the goods. In reply the railway pleaded that the goods were now ready for delivery without alleging that they had ever gone astray. It was held that as the railway company had not lost the goods, but had been guilty of a detention coupled with neglect or refusal to deliver them up after demand made, that refusal or neglect amounted to conversion and that the plaintiffs were entitled to the full price of the goods as damages. Another somewhat similar case is *G. I. P. Ry.* v. *Radhe Mal-Manni Lal* (2). In it the consignment was for nine bags. Seven bags arrived along with two of another consignment. Delivery of seven bags of the consignment proper was twice refused by the station master but on two subsequent occasions the railway asked the plaintiffs to remove the seven bags which were theirs. The plaintiffs refused to do so and the bags were auctioned. It was held that the railway company after refusing to deliver the seven bags retained them at their own risk and the plaintiffs were entitled to recover the market value of the goods and not merely the price which they had realized at the auction.

Generally speaking, a refusal to deliver goods amounts to a conversion though a qualified, reasonable and justifiable refusal may not. On the railway's own case it had no right of any kind to refuse delivery to Babu Ram. Its refusal to

(1) A.I.R. 1927 Lah. 471=8 Lah 555.
(2) A.I.R. 1925 All. 656=47 All. 549.

deliver was neither reasonable nor justifiable. In my judgment this case is governed by the authorities already mentioned, with which I am, with respect, in full agreement. I would, therefore, dismiss the appeal in respect of the 62 bags of the consignment which arrived at Delhi-Shahdara, and delivery of which was refused by the railway.

As regards the two bags which were lost it was argued that there was no evidence of wilful neglect, and that the railway company was, therefore, not liable. It is correct that there is no evidence to establish wilful neglect on the part of the railway. As against this it was argued on behalf of Babu Ram that the risk-note B was invalid as it bore date 28th September 1920, whereas the railway receipt was dated 29th September 1920 and it thus could not afford immunity to the railway from its liability as bailee in case the goods were lost. In this respect reliance was placed on a decision of a learned Judge in Chambers: *E. I. Ry.* v. *Jot Ram-Chandra Bhan* (*A. I. R.* 1923 *Lah.* 162). The argument turns on the fact that the risk-note B commences as follows :

> Whereas the consignment of 64 bags white sugar . . . . for which I/we have received receipts No. of same date is charged at a special reduced rate . . . . I/we, the undersigned do, in consideration of such low charges agree etc.

The form has to be approved by the Governor-General-in-Council and the words "of same date" do occur in it. Whether these words are an essential part of the form : see *Ardeshir Lhikaji* v. *Agent, G. I. P. Ry. Co* (3), or merely descriptive and whether the plaintiff can be heard when he alleges that the risk-note is invalid when his cause of action is based on the railway receipt which clearly mentions that the goods were being carried on risk-notes A and B by reason of which a much reduced rate of freight was being charged [see *E. I. Ry. Co* v. *Ram Chabila Prasad* (4)] are questions which need not be discussed now. This point was not taken in the trial Court but was only raised before us in the appeal. If it had been taken at the trial it would have been possible for the railway to show that the risk-note was given to it on 29th September and that there was a clerical error as regards the date of the risk-note. I would decline, therefore, to allow this new case to be set up as it would be most inequitable to do so. The result is that the plaintiff is not entitled to anything for the two bags lost, and the appeal must succeed in this respect. The amount decreed must, therefore, be reduced by the sum of Rs. 192.

For these reasons I would accept the appeal to the extent of reducing the sum decreed to Rs. 5,950 with costs to the plaintiff on that amount in both Courts.

Bhide, J.—I concur.

N.E. *Appeal accepted.*

(3) A.I.R. 1928 P.C. 24=52 Bom. 169=55 I.A. 67 (P.C.).
(4) A.I.R. 1925 Cal. 915.

A. I. R. 1928 Lahore 806

JAI LAL, J.

Wazir Khan and *another*—Defendants—Appellants.

v.

Abdul Hamid Khan—Plaintiff — Respondents.

Misc. First Appeal No. 3191 of 1927, Decided on 22nd June 1928 from order of Sr. Sub-Judge, Sialkot, D/- 5th December 1927.

Guardians and Wards Act, S. 25—A natural and legal guardian cannot transfer guardianship and if transferred can revoke it unless debarred by his conduct which must be for minor's welfare.

A natural and a legal guardian is not ordinarily entitled to divest himself of the responsibility imposed upon him by law and to transfer it to another person, and if he has transferred such liability to another person, there is nothing to debar him to revoke such transfer unless the Court is satisfied that by his conduct he has debarred himself from revoking such authority and such conduct must have a direct effect for the welfare of the minor: *A.I.R.* 1926 *All.* 687, *Appl.* [P 807 C 2 ; P 808 C 1]

Zafrullah Khan and *M. L. Puri*—for Appellants.

Mool Chand—for Respondent.

Judgment.—This is an appeal from an order made by the Senior Subordinate Judge of Sialkot under S. 25, Guardians and Wards Act, directing that Mt. Akhtar Begam, a minor girl found by him to be

12 years of age, to be returned to her father Abdul Hamid Khan.

The facts found are that the girl is residing with Wazir Khan and his wife Mt. Hussain. She has been brought up by them since she was about four or five years of age. It appears that Wazir Khan and Abdul Hamid Khan were neighbours in Sialkot and an affection sprang up between Wazir Khan and Mt. Hussain and the girl Akhtar Begam. The result was that she began to live with these two persons in consequence of which her parents expressly agreed that she should reside with and be brought up by the appellants. The mother of the girl subsequently died and her father has married another wife. They had then to leave Sialkot owing to the exigencies of service and the girl was left with Wazir Khan and his wife at Sialkot. It thus appears that for at least seven or eight years the girl has remained with the appellants and the father has taken practically no interest in her welfare.

It has been found that during this time the father visited his daughter only three times and did not contribute a single pie towards her maintenance. It also appears that the appellants looked upon the girl as their own daughter and have brought her up in a manner which perhaps the father would not have been able to do. Both the parties are Pathans and follow the same faith. The application under S. 25, was made on the ground that the father apprehended that the appellants were likely to marry her against his wishes. This has been found by the learned Judge to be wrong. At the same time, it is a fact that the question of the girl's marriage is likely to arise very soon, and as she is nearing the age of puberty under her personal law.

The learned Senior Subordinate Judge considers that it is not desirable that she should reside with the appellants who admittedly are Namahrams, that is to say, they are outside the degree of relationship within which marriages between Mahomedans are prohibited. It is on this ground alone that the learned Judge below has passed the order appealed against.

An attempt was made to settle the matter amicably, as it was eminently a matter for settlement between the parties. But unfortunately after the terms of the compromise had been settled there was some hitch and the negotiations fell through. It becomes necessary, therefore, for me to give my own decision in the case. The matter has caused me considerable anxiety as whatever decision I may give is bound to cause pain to the party against whom the decision will be. On the one hand it is quite clear that if the girl has to leave the present custody and to go to live with her father especially with a stepmother, it will cause her great pain at any rate at the commencement. Similarly, it will be a great disappointment to the appellants who have for eight years brought her up as their own daughter and have relied upon the expectation created by the respondent in their mind that their custody of the girl will never be interfered with. On the other hand, the father is the natural and legal guardian of her daughter and very strong reasons must be found to deprive him of his undoubted right.

I do not propose to discuss the various cases that were cited at the Bar. It appears that where the father owing to a change of religion has allowed the children to remain with persons who profess a different religion and has allowed the children to be brought up in the faith of such persons, then the Courts have declined their custody to the father. These considerations do not apply in this case. It is probable that the girl will not receive the same care with the father as she has done while living with the appellants, who were in a position to devote undivided attention to her comfort and welfare, while the father and the stepmother of the girl have other children to look after. But then it cannot be held that the father will not look after the interest of the girl or that he has any other motive, the application for her custody except the welfare of the daughter according to his own judgment. The girl is not likely to be worse off than she would have been if she had originally remained with her father.

It has been held that a natural and a legal guardian is not ordinarily entitled to divest himself of the responsibility imposed upon him by law and to transfer it to another person, and that if he has transferred such liability to another person, there is nothing to debar him to revoke such transfer unless the Court is satisfied that by his conduct he has debarred himself from revoking such autho-

rity and such conduct must have a direct effect for the welfare of the minor: see as to this *A. I. R.* 1926 *All.* 687, a case which fully applies to the facts of the present case.

After a careful consideration of this case, I have arrived at the conclusion that no good reasons are shown to enable me to set aside the well-considered judgment of the learned Senior Subordinate Judge. I am constrained under the circumstances to dismiss this appeal, but leave the parties to bear their own costs. The minor will return to her father the respondent, forthwith.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 808

TEK CHAND AND BHIDE, JJ.

Ram Rattan and *others*—Decree-holders—Appellants.

v.

Datar Kaur—Judgment-debtor—Respondent.

Misc. Second Appeal No. 288 of 1927, Decided on 23rd June 1928, from order of the Addl. Judge, Amritsar, D/- 29th October 1926.

Civil P. C., S. 48—Execution application pending for a long time due to no fault of decree-holder—Another application filed to supplement list of properties to be attached 12 years after date of decree—Second application is in substance a fresh execution application and is barred by time.

A decree was passed on 13th June 1904. The last application for execution was presented on 16th April 1913 when the decree-holder applied for execution by attachment and sale of a garden and certain agricultural land. He tried to have the garden and the agricultural land sold, but on the judgment-debtor's representation that she was a member of an agricultural tribe it was held that these properties could not be sold. The decree-holder then tried to have a temporary alienation of the land effected but the executing Court refused the prayer. It was finally held by a Full Bench that civil Courts had the power to order a temporary alienation of the land of the judgment-debtor. In accordance with that decision steps were taken to effect a temporary alienation and on 2nd October 1923 the Collector sanctioned the temporary alienation of these lands. On 18th November 1925 the decree-holder presented an application in the executing Court stating that the lands of the judgment-debtor which he had attached had not been sold for no fault of his, that the amount which he is likely to get by the temporary alienation of the lands would not be sufficient to meet his demands and that certain other properties of judgment-debtor be attached and sold and the sale proceeds applied towards the satisfaction of his decree. It was argued that the application made on 18th November 1925 was not a fresh application for execution but was really a continuation of the application of 1913 which was still pending and which had kept the decree alive and that this application should be treated to be supplementary to the substantive application for execution filed in 1913.

Held: that the second application was in substance a fresh application to proceed against properties which had not been included in the former application and was barred by time, having been filed after 12 years from the decree: *A. I. R.* 1924 *Cal.* 131, *Rel. on*; 27 *C. L. J.* 398; *A. I. R.* 1923 *Pat.* 224; *A. I. R.* 1924 *Pat.* 20; and *A. I. R.* 1925 *Mad.* 781; *Dist.* [P 811 C 1]

H. C. Kumar—for Appellants.

Kahan Chand—for Respondent.

Order of Reference

Tek Chand, J.—This second appeal arises out of proceedings in execution of a decree, which was passed in favour of the appellant on 13th June 1904. The last application for execution was presented on 16th April 1913, when the decree-holder applied for execution by attachment and sale of a tawela, a garden and certain agricultural land. Of these properties the decree-holder was able to sell only the tawela from which he realized Rs 475 on 14th October 1925. He originally tried to have the garden and the agricultural land sold, but on the judgment-debtor's representation that she was a member of an agricultural tribe it was held that these properties could not be sold. The decree-holder then tried to have a temporary alienation of the land effected, but the executing Court refused the prayer. The matter ultimately came before a Full Bench of this Court, when it was held that civil Courts had the power to order a temporary alienation of the land of the judgment-debtor :-See *Sardarni Datar Kaur* v. *Ram Rattan* (1). In accordance with that decision steps were taken to effect a temporary alienation and on 2nd October 1923 the Collector sanctioned the temporary alienation of these lands for 15 years at the rate of Rs 500 per year to take effect from Kharif 1929.

On 18th November 1925 the decree-holder presented an application in the executing Court stating that the lands of the judgment-debtor, which he had attached, had not been sold for no fault of

(1) [1920] 1 Lah. 192=58 I. C. 608 (F. B.).

his, that the amount realised by the sale of the tawela and that which he is likely to get by the temporary alienation of the lands would not be sufficient to meet his demands, and that two houses belonging to the judgment-debtor in mauza Atari, be attached and sold and the sale proceeds applied towards the satisfaction of his decree. This application was not filed on the form prescribed in O. 21, R. 11 and did not purport to be a fresh application for execution. The houses were accordingly attached, but the judgment-debtor at once objected urging that the houses were not included in the list of the properties attached to the application filed on 16th April 1913, that the present was a fresh application for execution of the decree and having been filed more than 12 years after the date of the decree was time barred. The objection was upheld by the executing Court and the houses released from attachment. The decree-holder's appeal to the District Judge having been unsuccessful he has preferred a second appeal to this Court.

Mr. Harcharn Das Kumar argues that the application to attach the houses made on 18th November 1925 was not a fresh application for execution, but was really a continuation of the application of 1913, which was still pending and which had kept the decree alive. It was admitted that the two houses had not been included in that application, but it was urged that as execution could not be successfully taken against the properties sepcified in that application by reason of causes for which the decree-holder was in no way responsible, it was open to him to ask the Court to proceed against other properties and that this application should be treated to be supplementary to the substantive application for execution filed in 1913 In support of this contention a number of authorities have been cited. In *Gnanendra Kumar Rai* v. *Shayama Sunder Jen* (2) an application was originally made to proceed against certain properties, but on an objection taken by the judgment-debtor it was discovered that execution could not legally proceed against those properties. The decree-holder accordingly made an application requesting the Court to accept a further list of properties and prayed that execution should proceed by attachment and sale of these properties. It was held by a Division Bench of the Calcutta High Court that in such circumstances the decree-holder could not be confined to the properties he had originally specified, but that it was open to him to ask the Court to proceed against the properties specified in his further and supplementary list. The same view was taken by another Division Bench of the same Court in *Mohini Mohan Sirkar* v. *Navadwip Chandra Biswas* (3), where it was decided that where, in an application for execution of a decree made in accordance with law, execution cannot be successfully taken against the properties specified in the application by reason of causes for which the decree-holder was in no way responsible he should not be confined to the properties first specified but it is open to him to ask the Court to proceed against other properties specified in his further supplementary list. The former of these rulings has been followed in two cases by the Patna High Court in *Ram Sumran Prasad* v. *Ram Bahadur* (4) and *Ghanrasi Mahasarick* v. *Bhagan Sahu* (5). In each of them the decree-holder was allowed to file supplementary lists of properties to be attached. The Madras High Court, in *Mangamma Nayakuralu* v *B. M. Ramdasappi Nayanimavary* (*A. I. R* 1925 *Mad. p.* 981) has also taken the same view. For the respondent the only authority cited is a Single Bench decision, *Haru* v. *Gurcharn* (6). The facts of that case were, however, totally different and the point now urged was neither raised nor discussed in that judgment. The trend of judicial authority seems to be in favour of the view propounded on behalf of the appellant, but as no authoritative ruling of this Court has been brought to my notice and as the question is of considerable importance I think it necessary to refer this case to a larger Bench.

A further question to be considered is whether the rulings above cited (if they lay down sound law) would govern a case like the present in which a temporary alienation of the land of the judgment-debtor has been ordered, but where

(2) [1918] 22 C. W. N. 510=14 I. C. 553=27 C. L. J. 393.

(3) [1918] 47 I. C. 911.
(4) A. I. R. 1923 Pat. 224=2 Pat. 338.
(5) A. I. R. 1924 Pat. 20=3 Pat. 787.
(6) [1910] 17 P. R. 1910=20 P. L. R. 1910=5 I. C. 815=22 P. W. R. 1910.

the amount payable to the decree-holder therefrom has yet to be realized.

Accordingly I refer this case for decision to Division Bench. The office is directed to fix an actual date of hearing before a Division Bench within two months from this date. No paper book need be printed. Two typed copies of the judgments, and the grounds of appeal and the referring order should be prepared.

Judgment

Tek Chand, J.—The facts of this case are given in defail in my order dated 8th December 1927, and it is not necessary to recapitulate them here. Briefly it may be stated that on 13th June 1904, the appellant obtained a money decree against the respondent recoverable from the estate of her deceased husband. The last application for execution was made on 16th April 1913 and is still pending in the executing Court. The prayer made in this application was for realization of the decretal amount by sale of a tawela, a garden and certain agricultural land. After lengthy litigation a temporary alienation of the agricultural land for a period of 15 years beginning with the kharif of 1929 has been sanctioned and the tawela sold. Against the sale of the tawela objections have been filed by the judgment-debtor and are still pending.

While these proceedings in connexion with the application for execution dated 16th April 1913 were going on, the decree-holder applied on 18th November 1925, praying that as the land and garden which he had attached in 1913 could not be sold for no fault of his, and as the amount which is likely to be realized by the temporary alienation of the agricultural land and the sale of the tawela will be wholly insufficient to discharge the decree, he be allowed to attach and sell certain other house property belonging to the respondent's husband. This application was not made in the form prescribed for applications for executions in O. 21, R. 11, but purports to be an application merely asking for permission to file a supplementary list of properties against which execution proceedings, which had been started on 15th April 1913 and which were still pending before the Court, should be continued. The judgment-debtor objected that the application was in reality a fresh application for execution and having been made more than 12 years after the date of the decree was time barred. This objection has been upheld by both the Courts below and the decree-holder has preferred a second appeal to this Court.

The question for decision is whether the application of the 18th November 1925 is a fresh application for execution or is a continuation of the application of 1913, which is still pending and which has kept the decree alive. For the appellant reliance is placed on a decision of the Calcutta High Court reported as *Ghanendra Kumar Rai* v. *Shayama Sunder Jen* (2) which has been followed in several rulings of that and other High Courts and which at first sight supports his contention. On a closer examination of the facts of those cases it appears, however, that the rule laid down therein is not applicable to this case.

In *Ghanendra Kumar Rai* v. *Shayama Sunder Jen* (2) the decree was passed in November 1911, the last application for execution made on 23rd November 1914, and the application to file a supplementary list of properties was presented in January 1915. This last application was, therefore, made within 12 years of the decree and was not barred under S. 48, Civil P. C. There was thus no legal bar against its being treated as a continuation of the application for execution made on 23rd November 1914. This case was considered and distinguished in *Hayatunnessa* v. *Ajhia Khatun* (7), where it was held that the decree-holder cannot be allowed by an application, made after the expiry of the period of limitation for execution of the decree, to add other properties to the list given in his original application presented within the period of limitation. In that case the decree had been passed on 4th July 1908 and an application for execution had been presented on 20th June 1920. While proceedings started on this application were going on, the decree-holdder on 21st August 1920 applied for permission to be allowed to add certain other properties to the list given in his original application. It was held that the application could not be treated as a continuation of the application of 20th June 1920, and having been made more than 12 years after the date of the decree must be rejected as time barred. *Ohiduddin* v. *Emperor* (8)

(7) A. I. R. 1924 Cal. 131=50 Cal. 743,
(8) [1918] 19 Cr. L. J. 266=44 I. C. 122.

was distinguished on the ground that in that case the application to add to the list of the properties mentioned in the original application was made within 12 years of the decree. The other rulings cited by the appellant's learned counsel are *Mohini Mohan Sirkar* v. *Navadvip Chandra Biswas* (3), *Ram Sumran Prasad* v. *Ram Bahadur* (4), and *Chanrasi* v. *Bhagan Sahu* (5). and *A. I. R.* 1925 *Mad.* 981. The facts of all these cases were substantially similar to those of *Ganendra Kumar Rai* v. *Shayama Sunder Jen* (2) and in each of them the subsequent application had been made within 12 years of the passing of the decree. For this reason the rule laid down therein is inapplicable to the case before us.

In this case the decree was, as already stated, passed in 1904 and the last application for execution made in 1913. The present application asking for permission to file a supplementary list of the properties against which the decree-holder wanted to proceed was not made till the 18th November 1925, which is more than 21 years after the date of the decree. If the contention of the appellant in a case like this were accepted, the clear provisions of S. 48 will be rendered nugatory. The application in question was in substance a fresh application to proceed against properties which had not been included in any of the former applications, and is barred by time.

The appeal fails and must be dismissed, but the parties shall bear their own costs in this Court.

Bhide, J.—I agree.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 811 (1)

HARRISON AND DALIP SINGH, JJ.

Bulaki Mal and *Son* — Plaintiffs — Appellants.

v.

B. L. Pesricha—Defendant—Respondent.

First Appeal No. 1344 of 1923, Decided on 27th February 1928, from decree of Sr. Sub-Judge, Lahore, D/- 14th March 1923.

Civil P. C., S. 34— Scope.

Where the rate charged and decreed was 24 per cent. interest after decree was not allowed.
[P 811 C 2]

Jawahir Singh—for Appellants.

Judgment.—The only point raised in this appeal is whether interest after decree should have been allowed. The rate charged and decreed was 24 per cent., and, therefore, in our opinion there would have been no possible justification for allowing interest after decree. We dismiss the appeal.

A.L./R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 811 (2)

TEK CHAND, J.

Lahore Electric Supply Co. Ltd, Lahore—Decree-holder—Petitioner.

v.

Jagat Ram and *others*—Judgment-debtors—Respondents.

Civil Revn. Petn. No. 482 of 1928 in Civil Appeal No. 2663 of 1927, Decided on 14th June 1928, from order of 1st Cl. Sub Judge, Lahore, D/- 10th June 1928.

Civil P. C., S. 47—Application to set aside dismissal of previous execution application but without stating provisions of law under which it was made—Application dismissed as being "informal"—Order of dismissal is not appealable—Failure to treat such application amounts to failure to exercise jurisdiction under Civil P. C., S. 115.

Certain decree-holder made an application to the execution Court for setting aside an order dismissing a previous application for execution without stating under what provisions of the law such application was being made. The execution Court dismissed the application holding the same to be an "informal" application. The decree-holder appealed under S. 47, Civil P. C.

Held: that the order appealed against was not an appealable order and hence no appeal could lie. [P 812 C 2]

Held: further that in such cases Court should look to substance rather than to form and that the application ought to have been treated as one for review and that in not doing so the Court failed to exercise jurisdiction which was vested in it by law within S. 115.
[P 812 C 2 P 813 C 1]

Madan Lal—for Petitioner.

C. H. Carden Noad—for Respondent 1.

Judgment. — The Lahore Electric Supply Co. Ltd., obtained a decree against the respondent for a sum of over Rs. 16,000 from the Court of the Subordinate Judge, 1st Class, Lahore. The defendant preferred an appeal to this Court, but it was dismissed in default on 8th December 1924. An application was made to have the order of dismissal set aside. This application was also dismissed on 24th March 1925.

On 27th August 1926 the decree-holder filed an application to execute the decree in the Court of Lala Hardial, Subordinate Judge, 1st Class. In this application it was stated that an appeal had been preferred by the judgment-debtor to the High Court, but that it had been finally dismissed on 24th March 1925. The office reported that the decree of the trial Court was passed in 1920 and the application appeared to be time barred. The decree-holder's counsel was directed to show that the application was within time. On 11th January 1927, the application was dismissed as time barred, it being remarked that the counsel for the decree-holder had not "referred to any authority showing the case to be within time."

On 8th February 1927 the decree-holder made an application to have the previous order of 11th January 1927 set aside, it being stated that a copy of the judgment of the High Court dismissing the appeal was being filed which would show that the application for execution was not time barred. It was not stated under what provision of the law this application had been made. Along with the application a copy of the order of a Division Bench of this Court, dated 8th December 1924, dismissing the judgment-debtor's appeal with costs was filed. On this Lala Hardial recorded an order on 5th March 1927 stating that from the copy produced the application appeared to be within time and that notice should issue to the opposite party to show cause why the application for execution be not treated as having been filed within time. The judgment-debtors were not served and the case had to be adjourned on several occasions. In the meantime Lala Hardial was transferred and was succeeded by Lala Diwan Chand, before whom the case was laid on 10th June 1927, in the presence of the counsel for the decree-holder, the judgment-debtor being absent. The learned Judge dismissed the application, holding that the previous order of 11th January 1927, had neither been appealed against nor had an application for review thereof been filed. He considered that the application of 8th February 1927, was an "informal" application to have the previous order of 11th January set aside on which no action could be taken.

Against this order an appeal under S. 47, Civil P. C., has been preferred by the decree-holder to this Court. Mr. Carden Noad, on behalf of the respondent, raises a preliminary objection that the appeal is not competent. After hearing both counsel I am of opinion that the objection must be sustained. The order under appeal is not such an order as would be appealable to this Court against which an appeal would lie under S. 47. I, therefore, hold that the appeal is not competent.

In the memorandum of appeal the decree-holder's counsel had stated that in case no appeal lies, the memorandum may be treated as a petition for revision. This prayer is opposed by Mr. Carden Noad; but after hearing him at length I am of opinion that the learned Judge of the lower Court (Lala Diwan Chand) has not appreciated the real nature of the application of 8th February 1927, and has erroneously declined to exercise jurisdiction which was vested in him by law. I. therefore, treat the petition as one for revision and proceed to decide it as such.

It is no doubt true that the application of 8th February 1927 is not described as an application for review, but, as has been pointed out already, no provision of the law under which it was made was mentioned in it. If the learned Judge had any doubt as to the nature of the application the proper course for him to follow was to call upon the petitioner to state definitely under what order and rule of the Code it had been made He should not have dismissed it merely because it was an "informal application." The operative part of the application leaves no doubt as to its real nature. It is described as an application to set aside the order of 11th January 1927, which had held the petition for execution to be time barred. With the application the petitioner had filed a certified copy of the judgment of the High Court dated 8th December 1924 to show that the execution proceedings had been commenced within time. The application was in substance one for review of the previous order and ought to have been heard and disposed of as such. The learned Government Advocate is unable to argue that this is not so. As has been pointed out in *Abdul Rahman* v. *Shahana* (1), the Court in such cases should look to the sub-

(1) [1920] 1 Lah. 339=58 I. C. 743.

stance rather than the form of the applications. I, hold that the application of 8th February 1927 was one for review in which the Judge who had passed the previous order (Lala Hardial) had already issued notice to the opposite party to show cause why his previous order should not be set aside. His successor, Lala Diwan Chand, should have treated the application as one for review and disposed of it as such. In refusing to do so, he has clearly failed to exercise a jurisdiction which was vested in him by law.

Accordingly I accept the petition for revision, set aside the order of the lower Court and remit the case to him for disposal in accordance with law. It should be clearly understood that I am not expressing any opinion on the merits of the application. Whether or not the grounds disclosed in the application are sufficient to justify a review is a matter which will be decided and disposed of by the learned Subordinate Judge after hearing both parties. Court-fee on appeal shall be refunded; other costs shall be costs in the cause.

Appeal dismissed:

D.B./R.K. *Petition accepted.*

A. I. R. 1928 Lahore 813 (1)

BROADWAY, J.

Ganesh Das—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 568 of 1928, Decided on 8th June 1928, from order of Sess. Judge, Lahore, D/- 28th February 1928.

Penal Code, S. 160—Section postulates commission of definite assault or breach of peace.

Accused was quarrelling with a debtor. There was no evidence of exchange of blows. The lower Court convicted accused because the accused was quarrelling with his debtor in the public street and but for police intervention there was danger of breach of peace.

Held: that whatever offence the accused might have committed he was not within the purview of S. 160, as the section postulates the commission of a definite assault or breach of peace. [P 813 C 2]

Hakumat Rai—for Petitioner.

Judgment.—One Ganesh Das, son of Devi Ditta Mal Khatri of Lahore city, has been convicted, at a summary trial, of an offence under S. 160, I. P. C. and sentenced to a fine of Rs. 30. The record being summary is necessarily meagre but, in my judgment, such as it is, it does not warrant the conclusions arrived at. An "affray" is defined in S. 159, I. P. C., in the following terms:

> When two or more persons, by fighting in a public place disturb the public peace, they are said to commit an affray

and S. 160 prescribes the punishment for the commission of an affray. In my judgment the section postulates the the commission of a definite assault or breach of the peace. The record of the evidence in this case shows that Ganesh Das was having a "quarrel" with one of his debtors. No witness says that any blows were exchanged, and the finding of the Magistrate is that Ganesh Das and Karam Chand were quarrelling in the public street over money matters and that but for police intervention there was danger of breach of peace. Whatever offence Ganesh Das may have committed it is not one within the purview of S. 160, I. P. C.

I therefore accept this petition, set aside the conviction and sentence and direct that the fine, if paid be refunded.

D.B./R.K. *Petition accepted.*

A. I. R. 1928 Lahore 813 (2)

BHIDE, J.

Sohan Lal and *others*—Defendants—Appellants.

v.

Dhari Mal-Ishar Das and *another*—Plaintiffs—Respondents.

Misc. Second Appeal No. 2592 of 1927, Decided on 4th April 1928, from order of Addl. Dist. Judge, Ferozepore, D/- 25th July 1927.

Evidence Act, S. 115—Plaintiff allowed to amend plaint on payment of costs—Defendant accepting payment cannot challenge the order in appeal.

A party who has adopted an order of the Court and acted under it cannot after he has enjoyed a benefit under the order contend that it is valid for one purpose and invalid for another. [P 814 C 2]

Defendants resisted the suit for rendition of accounts filed by the plaintiffs, pleading inter alia that no suit for accounts was maintainable on the facts alleged. The trial Court upheld that plea and dismissed the suit. On appeal the Court agreed with the trial Court that a suit for accounts was not maintainable on the facts alleged, but allowed the plaintiffs to amend the plaint on payment of Rs. 150 as costs to

the defendants, and remanded the case for retrial. The defendants took the costs but filed a second appeal from the order of remand.

Held : that the appeal was not competent as the defendants acquiesced in the order passed by the trial Court by accepting the costs awarded to them : 12 *C. L. J.* 556 ; 21 *C. W. N.* 232 ; and *A. I. R.* 1927 *Mad.* 1009 ; *Rel. on.* : 31 *P. R.* 1907 (*F. B.*) and *A. I. R.* 1927 *Lah.* 771, *Dist.* [P 814 C 2]

J. N. Aggarwal—for Appellants.

Badri Das and *R. C. Manchanda*—for Respondents.

Judgment.—This was a suit for rendition of accounts. Plaintiffs alleged that they had been appointed treasurers for the Multan District by the defendants and that they had deposited Rs. 25,000 with the defendants as security. The appointment was subsequently cancelled and Rs. 20,000 were refunded. Plaintiffs claimed the balance with interest, but framed the suit as one for accounts on the ground that the defendants claimed certain deductions on account of payments made by them on behalf of the plaintiffs.

Defendants resisted the suit, pleading inter alia that no suit for accounts was maintainable on the facts alleged. The trial Court upheld that latter plea and dismissed the suit. On appeal the learned Additional District Judge agreed with the trial Court that a suit for accounts was not maintainable on the facts alleged, but allowed the plaintiffs to amend the plaint on payment of Rs. 150 as costs to the defendants and remanded the case for retrial.

The defendants have filed a second appeal from the order of remand. A preliminary objection is raised that the appeal is not competent, as the appellants have acquiesced in the order passed by the learned Additional Judge by accepting the costs awarded to them. The following authorities have been cited in support of this contention : *Mani Lal* v. *Harendra Lal Roy* (1), *Banku Chandra* v. *Marium Begam* (2), and *Ramaswami Chettiar* v. *Chidambaram Chettiar* (3).

It is not disputed that the costs were deposited by the plaintiffs and were paid to the appellants on their counsel's application before the filing of the present appeal. There was no protest of any kind on the part of the appellants in accepting the costs.

(1) [1910] 12 C. L. J. 556=3 I. C. 79.
(2) [1917] 21 C. W. N. 232=37 I. C. 804.
(3) A. I. R. 1927 Mad. 1009.

In *Mani Lal* v. *Harendra Lal Roy* (1) the learned Judges referred to *Tinkler* v. *Hilder* (4) and other English authorities and laid down that the principle to be deduced from the authorities was that a party who has adopted an order of the Court and acted under it cannot after he has enjoyed a benefit under the order contend that it is valid for one purpose and invalid for another. In the circumstances of that particular case, the learned Judges held the principle to be inapplicable as the appellants had practically been compelled to accept the costs. But it was observed that the case would have been different if the costs had been ordered to be deposited in Court and then the appellants had taken them of their own accord.

In the present case the appellants' counsel applied for payment of the costs which had been deposited and thus adopted and took benefit of one part of the order. The costs had been granted on account of the privilege of amendment given to the other side and not merely for an adjournment.

The principle laid down in *Mani Lal* v. *Harendra Lal Roy* (1), was followed in *Banku Chandra* v. *Maniram* (2) and also *Ramaswami Chettiar* v *Chidambaram Chettiar* (3). The facts of the latter case were practically on all fours with the present case.

The learned counsel for the appellants relied on *Raghu Mal* v. *Bandu* (5), in which it was held that an appellant who has obtained and executed a decree in respect of a part of his claim is not precluded from prosecuting an appeal with respect to the rest of his claim. This ruling is clearly distinguishable as the appellants in executing such a decree are only reaping a benefit which they would be entitled to in any case. There is therefore no reason in equity in such circumstances why they should not be allowed to prosecute their appeal with respect to the rest of their claim : cf. *Jogesh Chandra* v. *Fazar Ali* (6).

The learned counsel for the appellants referred me to *Ghulam Mahomed* v. *Mehta Chandra* (7), but this point was not discussed therein.

(4) [1849] 4 Ex. 187=18 L. J. Ex. 429=13 Jur. 634=7 D. & L. 61.
(5) [1907] 31 P. R. 1907=64 P. W. R. 1907=1 P. L. R. 1908.
(6) A. I. R. 1926 Cal. 960.
(7) A. I. R. 1927 Lah. 771.

I am of opinion that the preliminary objection is sound and should be upheld. I therefore reject the appeal but in view of all the circumstances leave the parties to bear their costs.

N.K. *Appeal rejected.*

A. I. R. 1928 Lahore 815

SHADI LAL, C. J., AND DALIP SINGH, J.

Krishna Kishore — Defendant — Appellant.

v.

Hem Raj and *others* — Plaintiffs and Defendants — Respondents.

Second Appeal No. 2757 of 1927, Decided on 22nd June 1928, from decree of Addl. Dist. Judge, Lahore, D/- 22nd August 1927.

Hindu Law—Joint family—Father—Money decree against father is binding on son unless debt is immoral or illegal.

A money decree against the father of a joint family in satisfaction of debt not incurred for an illegal or immoral purpose is binding on the son : *A. I. R.* 1924 *Oudh* 394 and *A. I. R.* 1925 *All.* 180, *Ref.* [P 815 C 2]

Where a mortgage decree provides for the recovery of the balance due from the mortgagors if the mortgaged property was found insufficient to discharge the decretal amount there is a declaration in the decree that a debt is due from the mortgagor to the mortgagee for which mortgagor's son can be made liable. [P 816 C 1]

Fakir Chand and *Parkash Chandra*—for Appellant.

Durga Das—for Respondents.

Dalip Singh, J.—In this case Thakar Das and Nathu Mal, sons of Badri Mal, mortgaged a house and agricultural land to defendant 3, Diwan Krishan Kishore, on 10th June 1921, for a sum of Rs. 7,000. Defendant 3 obtained a preliminary decree on 7th March 1924 for sale of the mortgage properties and for recovery of any balance due from the mortgagors personally if the sale proceeds were insufficient to satisfy the mortgage amount. It may be observed here that the mortgage contained a clause for personal liability of the mortgagors and the plaint also contained a prayer for a personal decree against the mortgagors. The decree was in the usual form under O. 34 for sale. The decree was made final on 23rd December 1924, though it seems that no formal decree-sheet was drawn up.

The plaintiffs are the minor sons of Thakar Das and Nathu Mal, who are impleaded as defendants 1 and 2. The plaintiffs sue for a declaration that the mortgage was not for any family benefit, or for any antecedent debt, and that the decree obtained by defendant 3 for sale of the mortgaged property is not binding on them, and they ask for a perpetual injunction restraining defendant 3 from executing his decree against the properties. The plaintiffs claim to be members of a joint Hindu family with defendants 1 and 2, and allege that the properties mortgaged belong to the joint Hindu family. Various defences were raised by defendant 3 which are all concluded by findings of facts and which are not contested before us. It was held by the trial Court that the plaintiffs are members of a joint Hindu family along with defendants 1 and 2, that the land in suit was the property of the joint Hindu family and that the mortgage in suit was not executed for valid necessity or to pay any antecedent debt, or for the family benefit, but that the debt was not incurred for any illegal or immoral purpose. Upon these findings the trial Court held that the properties were liable to be sold in execution on the authority of *A. I. R.* 1924 *Oudh* 394 and *Gajadhar Pande* v. *Jadubir Pande* (1).

On appeal the learned Additional District Judge held that the plaintiffs were entitled to challenge the mortgage decree obtained by defendant 3 against defendants 1 and 2, and that on the findings of facts the mortgage did not bind the plaintiffs, and he, therefore, gave the plaintiffs a decree against defendant 3 for the declaration and the injunction sought for. Defendant 3 has come in second appeal.

Now it is settled law that an alienation made without valid necessity is not binding on the members of the joint Hindu family. It is also settled law that the sons of a Hindu father are bound to discharge their father's debts and that the whole of the joint family property may be sold in execution of a decree obtained against the father. The point is perfectly clear as regards a money decree. The only point, therefore, that arises in this case is whether any distinction can be drawn between a mortgage decree and a money decree. It is conceded that if a money decree had been obtained the suit of the plaintiffs would

(1) A. I. R. 1925 All. 180=47 All. 122.

have failed. Now in the circumstances of this case, as has been pointed out, the decree does provide for the recovery of the balance of the money due from the mortgagors if the mortgaged property is insufficient to discharge the decretal amount. It seems to me, therefore, that in a mortgage decree of this kind there is a declaration that a debt is due from the defendants to the mortgagee. In Hindu law all that is necessary is that there should be a debt due from the father, and the fact that a debt is due is explicit in the mortgage decree obtained. I would, therefore, dismiss the plaintiffs' suit with costs throughout.

Shadi Lal, C. J.—I concur. The appeal is accepted and the suit brought by the plaintiffs is dismissed with costs

D.B./R.K. *Appeal accepted.*

A. I. R. 1928 Lahore 816

SHADI LAL, C. J. AND BROADWAY, J.

Bihari Lal and *others*—Decree-holders —Appellants.

v,

Wali Shaha and *others*—Judgment-debtors—Respondents.

Letters Patent Appeal No. 347 of 1925, Decided on 28th March 1928, from judgment of Dilip Singh, J., reported as *A. I. R.* 1926 *Lah.* 641.

Civil P. C., O. 21, R. 2 (3)—Consent decree—Judgment-debtor leasing his land in lieu of amount due to decree-holder and agreeing to be personally liable in case of failure to execute lease—Decree-holder applying for recovery of money alleging failure by judgment-debtor to execute lease—Court can adjudicate that judgment-debtor had complied with the condition in the decree.

A consent decree was passed between the plaintiff and the defendant, by which the defendant agreed to grant, and the plaintiff agreed to take, in lieu of the amount found to be due to the latter from the former, and the costs of the suit, a lease of the defendants' land for a term of 20 years. In the event of non-compliance with this clause of the decree within one year, the decree-holder was entitled to recover the money from the judgment-debtor. Decree-holder applied for the recovery of the money from the judgment-debtor alleging that the judgment-debtor failed to execute the lease. This allegation was controverted by the judgment-debtor.

Held: that O. 21. R. 2, sub-R. (3), Civil P. C., did not preclude the Court from adjudicating upon the contention that the judgment-debtor had complied with the condition mentioned in the decree as the rule had no application to such a decree. [P 816 C 2]

Nand Lal—for Appellants.

Durga Das—for Respondents.

Judgment.—On 16th February 1923 a decree was passed in favour of the appellants in accordance with the terms of a compromise arrived at between the parties. The relevant portion of the decree may be shortly stated: The defendants agreed to grant, and the plaintiffs agreed to take, in lieu of Rs. 5,218 the amount found to be due to the latter from the former, and the costs of the suit, a lease of the defendants' land for a term of 20 years. In the event of non-compliance with this clause of the decree within one year, the decree-holders were entitled to recover the money from the judgment-debtors.

On 11th February 1925 the decree-holders made an application asking for the recovery of the money from the judgment-debtors, and in that application they stated that the latter had not complied with the clause of the decree requiring them to execute a lease in favour of the former and to deliver possession of the property to them. This allegation was controverted by the judgment-debtors, and the question for consideration is whether O 21, R. 2, sub-R. (3), Civil P. C., precludes the Court from adjudicating upon the contention that the judgment-debtors had complied with the condition mentioned in the decree.

Now, the terms of the decree make it clear that the personal liability of the judgment-debtors does not arise unless they fail to execute the lease in favour of the decree-holders and to give possession to them of the land covered by the lease. In other words, there is only a conditional liability to pay the money, and the decree-holders are not entitled to rely upon Cl. 1 of the decree unless it is shown that the judgment-debtors have failed to perform the obligation imposed upon them by Cl. 1. To such a decree O. 21, R 2 (3), Civil P. C., has absolutely no application.

The judgment of the single Judge is accordingly affirmed and the appeal is dismissed with costs.

N.K. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 817

HARRISON AND TEK CHAND, JJ.

Narain Das Jaini Mal—Defendants—Appellants.

v.

Kidar Nath Gonika—Plaintiff—Respondent.

First Appeal No. 2804 of 1923, Decided on 1st November 1927, from decree of Sr. Sub-Judge, Delhi, D/- 12th November 1923.

* *Contract Act, S. 73—Sale of goods—Contract providing penalty for failure to accept draft or making payment at maturity—Failure to take delivery of goods on intimation of arrival—Seller can claim difference between contract price and that on date of default.*

In a contract for purchase of goods it was provided that in the event of the purchaser failing to accept the draft on presentation or failing to pay at maturity the seller could sell the goods on the account of the purchaser who was liable for any deficiency and that in case of need, seller's invoice could be taken in lieu of draft. The contract did not provide any special penalty for failure to take delivery after intimation of arrival. The invoice was sent. This was followed by an intimation of arrival and on receipt of this intimation a breach took place.

Held: that under S. 73 the vendor was entitled to damages as represented by the difference between the two prices, the contract price and the price on the date of default.

[P 818 C 1]

Sardha Ram and *Jagan Nath Bhandari*—for Appellants.

Kishen Dayal and *Shamair Chand*—for Respondent.

Harrison, J.—Plaintiff in this case, one Kidar Nath of the firm of Ram Chand Kanyaya Lal brought this suit against the firm of Narinjan Das Naini Mal claiming damages for non-acceptance of certain goods. The main fact that the defendant had refused to take delivery of the goods was admitted. The plaintiff contended that, in the first place, he was entitled to damages on the basis of a resale under S. 107, Contract Act. If this were decided against him he claimed to be entitled to the same damages in virtue of the terms of the contract, and, as a last resort, that he was entitled to the difference between the contract price and the price on the date of default.

It was found that he was entitled to no damages under the first head as there had been no appropriation, that there was no difference, on which damage could be assessed under the third head, and that under the second head he was entitled to his relief on the strength of the terms of the contract. A decree was given for Rs. 6,523-1-9 instead of Rs. 6,548 the amount claimed.

On appeal only two points were pressed: it was contended that the condition that the terms of the office of Gordhan Das Ram Gopal were binding upon both parties did not include the addition to the printed form which was made by Messrs. Gordhan Das Ram Gopal, because of the difficulties experienced during the war in shipment and delivery of goods and which extended the period of grace from ten days to two months.

We have no hesitation in finding that this clause, which was deliberately added, is as much part of the terms of the firm of Messrs. Gordhan Das Ram Gopal as any other, and we agree with the reasoning of the lower Court on which it has come to this conclusion.

The second point was that the wording of the contract does not provide for nor authorizes resale of the goods under any circumstances. The words are as follows:

3, should I (we) fail to accept the draft on presentation and (or) fail to pay at maturity, I (we) hereby authorize you or your agents to sell the goods by public auction or private sale when and where you like after having given me (us) ten days' notice of your intention to do so and I (we) bind myself (ourselves) to make good to you any loss or deficiency sustained through my (our) draft including all charges and interest at 6 per cent per annum. I (we) waiving all claims to profit should there be any. In case of public auction printed notices of sale to be distributed in the Delhi market at least ten days before sale.

This clause is to be read with Cl. 1 which runs as follows:

1. I (we) hereby agree to purchase from you the undermentioned goods at the limits and terms stated below and for reimbursement I (we) authorize you or your correspondents to draw upon me (us) at 30 days' sight with all relative shipping documents attached for payment. In case of need sellers' invoice to be taken in lieu of draft which drafts I (we) engage and bind myself (ourselves) to accept on presentation and pay at maturity notwithstanding any objection, I (we) may have regarding or on account of any variations whatever from terms of the indent, such objection to be settled by arbitration as provided for below. If draft is paid before maturity a rebate of interest is to be granted at the rate of 6 per cent per annum. Draft to be made payable at.

Clause 3 deals with the consequences of default. In the event of the purchaser

failing to accept the draft on presentation or failing to pay at maturity the seller is authorized to sell the goods on the account of the purchaser who is liable for any deficiency.

The question is what interpretation is to be placed on the word "to accept the draft on presentation and fail to pay at maturity." The trial Court has found and counsel for the respondents supports the finding that these words are to be read as covering the subsequent failure to take delivery on the goods being offered. He relies on the passage in the first clause. "In case of need, sellers' invoice to be taken in lieu of draft," and he argues that the presentation of the invoice is merely an alternative for the presentation of the draft and that the same result must be taken to flow from the failure of the purchaser to take delivery in accordance with such invoice. He would have us read the words "fail to pay at maturity" as covering and including such failure. In interpreting a document of this nature we are precluded from going beyond the clear wording of the terms and conditions entered therein. It is not open to us to put an equitable interpretation on the agreement or to say that it is only right the purchaser should be penalized for refusing delivery even more than for refusing to accept the draft. In this case, owing to the fact that neither of the parties was the shipper nor the first purchaser, there is no question of presenting a draft. The invoice was sent. This was followed by an intimation of arrival and it was on receipt of this intimation that a breach took place in accordance with the terms of the contract. Ex P-1, the written contract, does not provide any special penalty for a breach under these circumstances and the only consequences, which can flow are those provided in the Contract Act. Under S. 107, if there had been appropriation, the seller is entitled to dispose of the goods. As there was no appropriation he was not entitled to do so. Under S. 73, he was entitled to damages as represented by the difference between the two prices and he has not shown that there was any such difference. He is, therefore, entitled to no damages at all and we must accept the appeal and dismiss the plaintiff's suit. As defendant put forward a large numer of pleas which he has been unable to prove, we order that the parties shall bear their own costs throughout.

D.D. *Appeal allowed.*

A. I. R. 1928 Lahore 818

ADDISON, J.

Wali Muhammad and *others*—Petitioners.

v.

Rahmat Ali—Respondent.

Criminal Revn. Petn. No. 1228 of 1928, Decided on 14th July 1928, from order of 1st Class Magistrate, Sheikhupura, D/- 23rd May 1928.

(a) *Criminal P. C., S. 145—Applicability.*

Section 145 applies only to disputes about actual physical possession and not to disputes about joint possession. [P 819 C 2]

(b) *Criminal P. C., S. 145—Civil Court giving joint possession to petitioners and opposite party—Appeal to Privy Council pending—Opposite party applying for partition—Revenue officer effecting partition—Partition proceedings quashed by Financial Commissioner directing status quo ante to be restored—Order not obeyed—Magistrate attaching whole property under S. 145—Proceedings of Magistrate are without jurisdiction and must be quashed.*

The civil Court decreed joint possession to the petitioners and the opposite party, an appeal against which decree was pending before the Privy Council. The opposite party applied for partition which was made by a revenue officer and possession of portion of the land was given to the opposite party. The partition proceedings were subsequently quashed by the Financial Commissioner who directed that the statu: quo ante be restored. The Collector, however, did not wish to do so and at his instance the Magistrate attached the whole of the land and appointed a receiver under S. 145, holding that there was a dispute about the whole area :

Held : that the proceedings taken by the Magistrate were without jurisdiction and must be quashed. [P 820 C 2]

D. C. Ralli and *Hazara Singh*—for Petitioners.

B. R. Puri, Nanak Chand for *Rahmat Ali* and *Ram Lal*—for the Crown.

Order.—Let notice issue to the other party. The Government Advocate has been told that Crown representation is necessary. Let a very early date be given, say in the second week of the vacation. All the records should be sent for.

In the meantime I have been moved to suspend at once the order attaching 15,173 kanals and 14 marlas of the peti-

tioners' land, the crops thereon, etc., under S. 145 (4), Criminal P. C., and appointing a manager thereof. The order appears to be uncalled for and illegal. No emergency seems to have arisen, as litigation has been going on for eight years. The opposite party have succeeded in getting a decree for 200 ghumaons out of the total area and this decree is under appeal to the Privy Council. The opposite party applied to the revenue authorities to be put in possession of this area in certain so-called partition proceedings. It is alleged that it was held that the old field numbers could not be identified with the present ones and an area of 288 ghumaons, (i. e., 88 ghumaons in excess) was given instead, at a place alleged to be nowhere near the proper place.

These partition proceedings have been completely quashed by the revenue Courts of the Commissioner and Financial Commissioner and the Collector was directed to restore matters to the status quo ante. He has purported to do so, but held that the opposite party was in joint possession with the petitioners by reason of their being cosharers, and a Magistrate, 1st Class, has taken proceedings under S. 145, Criminal P. C., against the petitioners. The Magistrate first held that he could not appoint a receiver under S. 146 (2), Criminal P. C., as Rahmat Ali of the opposite party had been given possession and was in possession of the 288 ghumaons, while the petitioners were in possession of the rest of the land. Proceedings there ended, but only for a short time. The same Magistrate passed a fresh order under S. 145, Criminal P. C , on 23rd May 1928, stating that there was an immediate danger of a breach of the peace due to disputed possession of land, and he ordered it to be attached under S. 145 (4), Criminal P. C., and later he appointed a manager. This time he attached all the land of the petitioners amounting to about 2,000 ghumaons out of which, of course, the opposite party will be entitled, on a proper partition effected by the revenue authorities, to possession of 200 ghumaons somewhere in the area, subject to the appeal to the Privy Council. Admittedly the petitioners were in possession of all of it till the opposite party was put in possession of 288 ghumaons in 1927 by the Collector whose proceedings have, however, been completely and finally quashed by the Financial Commissioner. Even now it is clear that, when the Magistrate passed his order, the petitioners were in physical and legal possession of the whole area except the 288 ghumaons, wrongly given by the Collector to the opposite party, and which he was directed to return to the petitioners, though this had not actually been done, Rahmat Ali still asserting that he was in possession of the 288 ghumaons. As he has been lawfully ordered to surrender that possession and does not wish to do so, it is he and he alone who appears to be in the wrong and no question apparently arises under S. 145, Criminal P. C. Further, the opposite party are actually suing for mesne profits, thus showing that they never had possession till wrongly given possession of 288 ghumaons by the Collector.

Lastly, S. 145 is concerned solely with the fact of actual physical possession and any question as to whether possession is on behalf of others or in one's own right is quite irrelevant. In these very exceptional circumstances, and as there appears to have been a very grave miscarriage of justice, the criminal law apparently being set in motion to help the opposite party and to overawe the petitioners, I think that this is a proper case for me to take action immediately especially as it is stated that the cattle of the petitioners are now unable to get food. The manager is said even to be selling the petitioners' old stacks of bhusa (fodder), while the petitioners have to buy fodder for their cattle. I accordingly suspend for the time being the appointment of a manager or receiver as regards all the land except the 288 ghumaons wrongly given by the Collector to the opposite party in the so-called partition proceedings, as they retained that area to the end in spite of the orders of the Financial Commissioner and Commissioner and I direct the Magistrate to see that, with the exception of that area, the manager, do forthwith and without fail surrender all the rest of the land to the petitioners. At the hearing the opposite party will be given an opportunity to urge that the manager should be re-appointed, but this concession must not be treated as allow-

ing the trial Magistrate to keep the manager on till the hearing. The manager must at once hand over all the land except the 288 ghumaons demarcated and defined in the partition proceedings, to the partitioners. Any questions as to his remuneration can be settled later and if there is any dispute as to the 288 ghumaons, I direct that the whole area be handed over.

The district authorities have an easy remedy in their hands, if they do as a fact apprehend a breach of the peace. The only persons, who apparently contemplate such a breach, are the original petitioners, who do not wish to lose the 288 ghumaons which have been ordered in due course of law to be taken back from them, and action can be taken against them, if necessary, under S. 107, Criminal P. C., and against any others who are proved to be contemplating a breach of the peace. This order must be comunicated at once to the Magistrate concerned.

Judgment.—My order dated 23rd June 1928, will be read as part of this order. That order has been carried out, and the Magistrate has removed the manager from possession of 15,173 kanals 14 marlas of land, except the 288 ghumaons which for the time being were allowed in my last order to remain with the manager.

I have now heard counsel and am clear that the proceedings of the Magistrate are without jurisdiction and must be quashed. The civil Court gave the opposite party joint possession of 15,173 kanals 14 marlas the opposite party's share of which amounted only to 288 ghumaons. It would appear that, having done this, the executing Court did all it could. It was then for the opposite party to apply to the revenue officials for the partition of their share of the land and they did so. They were successful at first in getting a specific area of 288 ghumaons separated off by the revenue officials, and possession of this area was given to them. The head of the Revenue Department, however, namely, the Financial Commissioner, revised these orders and completely quashed the partition proceedings, directing that the status quo ante should be restored. This meant that the petitioners before me should have been restored to their previous physical possession of the 288 ghumaons by the Collector in obedience to the order of the head of the department, which order could be passed under the provisions of the Punjab Revenue Act. The Collector does not appear to have wished to do so, and it was at his instance that the Magistrate took action under S. 145, Criminal P. C. In the course of the proceedings the Magistrate not only attached the 288 ghumaons, which had been separated from the rest of the area in the abortive partition proceedings, but the whole area of 15,173 kanals 14 marlas, holding that there was a dispute about the whole area. There is ample authority for the proposition that S. 145 applies only to disputes about actual physical possession and not to disputes about joint possession. The actual physical possession of the whole area was with the petitioners up to the time that 288 ghumaons were given by the Collector to the opposite party and all the land except the 288 ghumaons was in the actual physical possession of the petitioners at the time the order was passed. No question, therefore, can arise about any portion of the land except possibly the 288 ghumaons. Even this latter area has been ordered to be restored by competent authority to the petitioners, so that there is no dispute as to who is entitled to its possession. The proceedings, therefore, regarding the whole area were without jurisdiction. I accept the petition, set aside all the proceedings and orders of the Magistrate, 1st Class, and direct that they should end. The manager should now be directed to give up possession of the 288 ghumaons as his appointment automatically comes to an end. I have already indicated at the end of my first order the remedy in the hands of the district authorities if they do, as a fact, apprehand a breach of the peace.

D.B./R.K. *Petition accepted.*

A. I. R. 1928 Lahore 820

SHADI LAL, C. J. AND AGHA HAIDAR, J.

Emperor—Appellant.

v.

Ram Rang—Accused—Respondent.

Criminal Appeal No. 1062 of 1927, Decided on 18th February 1928, from order of 1st Class Magistrate, Jhang, D/- 30th June 1927.

Criminal P. C., Ss. 162 and 172 — Police proceedings cannot be used by a Magistrate in order to test the correctness of the statements made by witnesses on oath before the Court— Police diaries can be used only for contradicting evidence of prosecution witnesses.

Standing by themselves the police proceedings are not substantive evidence in the case and cannot be used in order to test the corrreotness of the statements made by witnesses on oath before the Court. Under S. 162, the entries made in the police diaries can be used only for the limited purpose of contradicting the evidence of the witnesses for the prosecution and only when such entries have been duly proved. References by a Magistrate to police proceedings cannot be justified even under S. 172 : *A. I. R.* 1917 *P. C.* 25, *Rel. on,* [P 823 C 1, 2]

Abdul Rashid—for the Crown.

Rattan Lal for *B. R. Puri* and *Nanak Chand*—for Respondent.

Agha Haidar, J.—This is an appeal by the Local Government under S. 417, Criminal P. C., against the order passed by a Magistrate, 1st Class, acquitting the respondent, Ram Rang, of an offence under S. 420, I. P. C.

Ram Rang carries on the business of a Sahukar at Maghiana. According to the prosecution, Mehr Nur Muhammad, a Zamindar of Mauza Qaim Bharwana, met the accused Ram Rang on 27th January, 1927 corresponding to 15th Magh, Sambat 1983 in Maghiana bazar, and asked him if he could advance a loan of Rs. 1000 to him. Ram Rang agreed to advance the money and told Mehr Nur Muhammad to come to his shop the next morning. Mehr Nur Muhammad accompanied by Abdulla, a servant of his father and one Ahmad, tailor, went to Ram Rang's shop and asked for the loan. Ram Rang said that he was not prepared to advance a sum of Rs. 1,000 only, but that he would like to lend a sum of Rs. 2,000. He put forward the further condition that Mehr Nur Muhammad should accept liability for a sum of Rs. 2,500, and write out and sign an entry to this effect. This extra sum of Rs. 500 was to be made up in this way : Rs. 480 on account of interest for one year at the rate of Rs. 2% per mensem; and Rs. 20 as chilkana, total Rs. 500; Mehr NurMuhammad fell in with the proposal and agreed to take Rs. 2,000 in cash and to write a nawan in Ram Rang's bahi for Rs. 2,500 as detailed above. These terms being settled, one Wazir Chand Khatri, who was staying with Ram Rang at his shop, was asked to write out the entry embodying the terms of the contract entered into between the parties. This Wazir Chand is a native of village Chela which is at a distance of ten *kos* from Maghiana and had come to give evidence in Court on behalf of Ram Rang on 27th January 1927, and had stayed for the night. When Wazir Chand made the requisite entry and was about to put down 16th Magh, Sambat 1983, at the end of the entry, Ram Rang told him to antedate it by putting the date 15th Magh, Sambat 1983 Mehr Nur Muhammad at first demurred at this, but Ram Rang said that, as he had put the money aside for Mehr Nur Muhammad the day before, he was entitled to calculate interest from that date. Mehr Nur Muhammad accepted this position and agreed to the date 15th Magh, Sambat 1983, being entered in the nawan. This entry was followed by a short memorandum in Urdu in the handwriting of Mehr Nur Muhammad himself in which he accepted liability for Rs. 2,500, and put down 15th Magh Sambat 1983, as the date of the memorandum. After these preliminaries had been gone through Mehr Nur Muhammad naturally demanded the money from Ram Rang. Ram Rang said that he would go to the town in order to fetch the money. Mehr Nur Muhammad, however, insisted upon the money being paid before Ram Rang left the shop and in the alternative he asked Ram Rang to give the bahi to him until the money was actually paid.

Upon this Ram Rang refused to give the money to Mehr Nur Muhammad and stated that he had already paid the money on the 15th Magh as entered in the nawan. This gave rise to a serious altercation between Mehr Nur Muhammad and Ram Rang, with the result some slight violence was used by Ram Rang in trying to turn Mehr Nur Muhammad out of his shop. Mehr Nur Muhammad held his ground and dispatched Abdullah, his father's servant, to make a report to the Superintendent of Police. All this took place somewhere between 9 and 10 a. m. on 28th January 1927. Abdullah went to the office of the Superintendent of Police and in his absence the Deputy Superintendent of Police issued orders to his subordinate police officers with the result that Ladha Ram, head constable (P. W. 8) went to Ram Rang's shop along with

Abhulla at about 12 a. m. or a little later. In the meantime a number of people had assembled at the shop of Ram Rang and Ladha Ram took possession of the bahi and went along with Ram Rang, Mehr Nur Muhammad and some of the witnesses to the Sadr police station. There Mehr Nur Muhammad lodged the First Information Report, Ex P. B. The police, after investigation, challaned the case, which, as already stated, resulted in the acquittal of Ram Rang.

A number of witnesses have been examined on behalf of the prosecution and the complainant Mehr Nur Muhammad, has himself gone into the witness box and submitted himself to a very lengthy and searching cross-examination. The case, in our opinion, depends mainly upon the evidence of Wazir Chand, the scribe of the entry. The presence of this witness at the time of making the entry is admitted by both the parties and the sole question is whether he wrote out the entry in question on 15th or 16th Magh, Sambat 1983. In our opinion, the learned Magistrate was in error in adversely criticizing the evidence of this witness. In the first place, he makes out Wazir Chand as being on inimical terms with Ram Rang, having regard to certain alleged disputes between Ram Rang's family and the ancestors of Wazir Chand. Most of these disputes are stale, as they relate to the time of Wazir Chand's grandfather. Wazir Chand is a young man of 24. and cannot be expected to know much about the hostilities, which according to Ram Rang, existed between his family and that of Wazir Chand. The fact, however, remains that Wazir Chand had admittedly given evidence on behalf of Ram Rang in a civil case on 27th January 1927, and had been staying with him. At that time of the year the weather would be bitterly cold and after the Court hours not much of the daylight would be left. Wazir Chand's house is at a distance of ten kos (roughly speaking about 15 miles) from Maghiana, though the Magistrate wrongly put it at a distance of about eight miles only. It does not seem probable that he would march off to his home late in the afternoon of the short and cold wintry day at the end of January. It seems more probable that he stayed for the night at Maghiana as he himself states, intending to start for his home the following morning. This being our view, we do not see any force in the Magistrate's observation that Wazir Chand "gives no reason whatsoever for his staying a day over at Maghiana."

The Magistrate further observes that, if the story for the prosecution were true and a document with a wrong date had been executed and contrary to its terms no money had in fact passed, then it was the civic duty of Wazir Chand to inform the police or some other authorities of what had taken place, and that, as he himself was involved in the affair, he should have done this to clear himself. According to the evidence for the prosecution, no crime had been committed. The principal contracting parties, namely Ram Rang and Mehr Nur Muhammad, were present and the date had been entered with their knowledge and consent and no duty was cast upon Wazir Chand to approach the police or any other authorities about the matter. It is further stated that Wazir Chand was not eaxmined by the police till after five or six days of the occurrence, and, therefore, some sinister influences were brought to bear upon him by the prosecution. Wazir Chand was not cross-examined as regards this delay, and the Sub-Inspector who conducted the investigation, was not asked to explain the delay.

In any event, having regard to the circumstances of the case, we do not see any good reason for disbelieving the evidence of Wazir Chand who was apparently on friendly terms with Ram Rang, seeing that he had given evidence on his behalf and was admittedly staying at his house. The probabilities are that Wazir Chand was an unwilling witness and required a certain amount of persuasion before he could be induced to give evidence in support of the prosecution.

The learned Magistrate refers to a Full Bench decision of the Lahore High Court *Ram Chand* v. *Chhun-un-Mal* (1), where the rule as to the burden of proof is laid down as regards the consideration for a document which bears the signature of the executant. That case undoubtedly is an authority for the legal proposition which it enunciates ; but it has nowhere been laid down that the mere signing of a particular entry raises an irrebuttable presumption of law against which no evidence can be adduced by the maker of

(1) A.I.R. 1925 Lah. 471=6 Lah. 470 (F.B.).

the signature. In the present case there is ample evidence on the record to show that the entry in the bahi was, as a matter of fact, made on 16th Magh, and that by the consent of the parties the document was antedated by a day. We may observe that the entry, Ex. P. A, is written on a stray paper which purports to be p. 45 of a bahi, but the bahi itself from which it is supposed to have been detached is not before us. It would have been much more satisfactory, from the point of view of the defence, if a rokar bahi had been forthcoming showing that on 15th March, Sambat 1983, a sum of Rs. 2,000 had been paid to Mehr Nur Muhammad by Ram Rang.

The trying Magistrate, while referring to Ex. P C., the application made by Abdullah to the Superintendent of Police, Ex. P B., the first information Report made by Mehr Nur Muhammad, and the statement of Mehr Nur Muhammad in Court, characterizes them as three different versions of the prosecution story. This is a mistake. There are no three versions at all. The broad features of the story for the prosecution are the same with slight variations of an unimportant character in these documents, and the statement made in Court by Mehr Nur Muhammad while he was being examined and cross-examined by counsel is necessarily fuller and more detailed. It is, therefore, misleading to call the statements embodied in Exs. P B., P C. and the statement of Mehr Nur Muhammad as a witness as so many different versions of the prosecution story.

The Magistrate has made a serious mistake which to a very great extent vitiates his judgment. While criticizing the evidence which Ladha Ram constable gave in Court, he rejects it by making a reference to the "*karrawai* police." This procedure is wholly illegal, and the Magistrate ought to have known that standing by themselves the police proceedings are not substantive evidence in the case and cannot be used in order to test the correctness of the statements made by witnesses on oath before the Court. Under S. 162, Criminal P. C., the entries made in the police diaries can be used only for the limited purpose of contradicting the evidence of the witnesses for the prosecution and only when such entries have been duly proved.

In the same way the statement of Ram Ditta Mal, P. W. 3, is held by the Magistrate as "not worthy of credit," simply because the Magistrate on a reference to the police diaries detected some discrepancies between the statement which he had made before the police and his evidence before the Court. Even the provisions of S. 145, Evidence Act, have not been complied with in the case of this witness, in that he was never confronted with his previous statement.

Hussain Din (P. W. 6) and Hakim Nur Din (P. W. 7) have been similarly discredited by the Magistrate, although in none of these cases the entries in the police diaries have been duly proved.

These illegalities must have influenced to a considerable extent the mind of the Magistrate in arriving at the decision.

The learned counsel for the defence tried to justify the procedure adopted by the Magistrate by a reference to S. 172, Criminal P. C. That section has nothing whatever to do with the objection which has been taken to the proceedings of the Magistrate, and *Dal Singh* v. *Emperor* (2) is a clear authority against this contention.

A number of witnesses have been examined by the accused in his defence. They may be divided into three groups. Group No. 1 consists of witnesses who give a good character to the respondent and depose to his fair dealings by saying he had never cheated them. This kind of evidence is from its nature worthless because every wrongdoer had a good character until he forfeited it by committing an offence.

The second group consists of witnesses who depose that the accused paid the money to Mehr Nur Muhammad on the 15th Magh Sambat 1983. Among these witnesses Kesar Das (D. W. 1) is a tenant of the brother of the accused and does not even remember when the police came to the spot. Fateh Chand (D. W. 6) is an unsatisfactory witness. In his examination-in-chief he says that there was a row in Ram Rang's baithak but in his cross-examination he says there was no row in the baithak of the accused. He finishes his evidence by saying that his son is a copartner in a shop with the accused's own brother. He says that he came to know after eight or ten days that the police had come. He denies all

(2) A.I.R. 1917 P.C. 25=44 Cal. 876=44 I.A. 137 (P.C.).

knowledge of the chalan. No reliance can be placed upon the evidence of such a witness. The evidence of Kishen Chand (D. W. 3) definitely goes against the defence put forward by the accused. To begin with, the accused is the son of this witness's aunt. He says that, on 27th January 1927, at 9 a. m., he went to his house from the post office where he is employed and saw Kesar Das, Fateh Chand, Wadhawa Ram and Mehr Nur Muhammad at the house of the accused which adjoins his own house and that money was lying there, and that Ram Rang, accused, asked Mehr Nur Muhammad to take Rs. 2,422. He says that when he went to his house in the evening he learnt that trouble had arisen between Ram Rang and Mehr Nur Muhammad and that the matter had been made over to the police. Now, this last observation could only refer to the happenings on 28th January 1927, and the witness had unwittingly told the truth while under cross-examination. He is an intelligent young man, 31 years old and is employed as a clerk in the post office at Maghiana. There is no suggestion that he was a hostile witness or had been won over by Mehr Nur Muhammad and thus made to give false evidence against his own cousin, the respondent. We may observe that counsel for the accused realized that the witness had fallen into the trap and tried in re-examination to retrieve the situation. But the Court disallowed the question which was sought to be put to the witness in the hope that he would correct himself. The evidence of this group of witnesses does not carry any conviction to our minds, and we refuse to accept it.

The third group of witnesses have attempted to prove that Wazir Chand was not at Maghiana on the 16th of Magh, Sambat 1983 but had left in the afternoon of the 15th and that on the 16th he was at his home at Chela. We have examined this evidence and, without discussing it in detail, we are satisfied that it is worthless.

We have given this case our careful consideration and are satisfied that the trying Magistrate has committed illegalities in testing the veracity or otherwise of some of the witnesses for the prosecution who have been discredited by references to documents which were not legal evidence. The Magistrate has also refused to accept the evidence of Wazir Chand on insufficient grounds and has on the whole, approached the case from a wrong point of view. We are satisfied that the main story put forward on behalf of the prosecution is suffiiently established by the evidence on the record, and that the guilt of the accused has been established beyond reasonable doubt.

We, therefore, accept the appeal, set aside the order of acquittal passed by the trying Magistrate and, convicting the respondent Ram Rang of an offence under S. 420, I. P. C., sentence him to rigorous imprisonment for six months.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 824

DALIP SINGH, J.

Mohan Lal and *others*—Plaintiffs—Appellants.

v.

Mt. Tulsan and *others*—Defendants—Respondents.

Second Appeal No. 1944 of 1926, Decided on 21st October 1927, from decree of Dist. Judge, Karnal, D/- 31st March 1926.

(a) *Evidence Act, S. 50—Mere hearsay evidence about relationship of parties is not admissible.*

Where the witnesses gave no pedigree table but stated vaguely that they were related to the parties and, therefore, knew that the parties were related in the fifth degree, and as regards their personal knowledge they referred to their previous conduct in attending certain ceremonies described as *oos moos* where the attendance of persons other than relatives is possible, and further stated that they heard there the bhats reciting the pedigree table:

Held : that the statements were not admissible for proving agnate relationship : 32 *Cal.* 84 (*P. C.*); *A. I. R.* 1922 *P. C.* 139 ; 39 *Cal.* 492 (*P.C.*); 26 *I. C.* 110; and 26 *All.* 581; *Ref. to.* [P 825 C 2]

(b) *Evidence—Court should lean in favour of admissibility.*

It is a principle of law that if it is doubtful whether evidence is admissible or inadmissible then the benefit must be given in favour of the evidence. [P 825 C 1]

Mehr Chand Mahajan—for Appellants.

Shamair Chand—for Respondent No. 3.

Judgment.—In this case the plaintiffs sued to set aside an alleged adoption claiming that they were reversioners in the fifth degree and setting out a pedigree table. The trial Court held that the plaintiffs had failed to prove that they were related to the defendants and therefore they had no locus standi to sue. The learned District Judge also came to the

same conclusion on appeal. The District Judge, however, rejected the evidence of seven witnesses on the ground that it was inadmissible as hearsay. This rejection forms the main ground for the second appeal.

Counsel for the appellants, in his opening argument contended that these statements were admissible under S. 32 (5), Evidence Act. He did not press his plea that they were also admissible under S. 32 (6), and obviously they are not within the latter clause. They also are not admissible under S. 32 (5) because the conditions necessary for the applicability of S. 32 (5) have not been proved and under S. 104 it lay on the appellants to prove those conditions. Counsel for the appellants, however, subsequently contended that the statements were relevant under S. 50, Evidence Act. He relied on the following rulings: *Debi Pershad* v. *Radha Chowdhrain* (1), *Sabz Ali* v. *Khair Muhammad* (2) and *Mi Me* v. *Me Shwe Ma* (3), all Privy Council cases also; on *Ram Krishna Iyer* v. *C. Vengammal* (4), a Division Bench ruling of the Madras High Court. In reply counsel for the respondents relied on *Shafiqunnissa* v. *Sabban Ali Khan* (5) with respect to S. 32 (5). As regards S. 50, he contended that it had never been urged in the Courts below and that, at any rate, even under S. 50 the matter was doubtful, and, therefore, this Court should not interfere in second appeal. Had it been any question other than a question under the Evidence Act, and I had found myself in doubt as to whether the law propounded by the learned District Judge was right or wrong, I would have accepted this argument of the counsel. But I am unable to do so on a question of evidence because it is a principle of law that if it is doubtful whether evidence is admissible or inadmissible, then the benefit must be given in favour of the admissibility of the evidence. However, on reading through these statements I find that S. 50 cannot be said to apply in the circumstances of this case. The witnesses give no pedigree table, but state vaguely that they are related to the parties and, therefore, know that the parties are related in the fifth degree. As regards their personal knowledge they refer to their previous conduct in attending certain ceremonies described as *oos moos*. What *oos moos* is, is not clear, but the evidence to my mind itself shows that the attendance of persons other than relatives is possible at these ceremonies, and, therefore, the conduct of these persons in attending these ceremonies does not show that they are relatives of the parties, or that they had any special means of knowledge. When asked how they knew the relationship of the parties they all relied on the fact that bhats at these ceremonies used to recite the pedigree table of the parties and hence they knew the relationship. At best this evidence would only prove some kind of relationship between the parties and would not prove agnatic relationship. I, therefore, consider that the statements are not admissible even under S. 50, Evidence Act for the only purpose for which they would be of any use to the present appellants, namely, in proving agnatic relationship. Even if I am wrong on this point I have read the whole of the evidence given both by the plaintiffs and by the defendants and I agree with the trial Court in holding that the plaintiffs have failed to prove the pedigree table propounded by them or their agnatic connexion with the defendants.

The appeal, therefore, fails and is dismissed with costs.

N.K. *Appeal dismissed.*

(1) [1905] 32 Cal. 84=31 I.A. 160=9 C. W. N. 161=8 Sar. 708 (P. C.).
(2) A. I. R. 1922 P. C. 139=3 Lah. 48=49 I.A. 74 (P. C.).
(3) [1912] 39 Cal. 492=14 I. C. 475=39 I. A. 57 (P. C.).
(4) [1915] 26 I. C. 110.
(5) [1904] 26 All. 581=31 I. A. 217=7 O. C. 290=8 Sar. 674 (P. C.).

A. I. R. 1928 Lahore 825

BROADWAY AND AGHA HAIDAR, JJ.

Budha Mal—Defendant—Appellant.

v.

Rallia Ram and *others* — Plaintiffs — Respondents.

First Appeal No. 180 of 1923, Decided on 26th October 1927, from decree of Sr. Sub-Judge, Gurdaspur, D/- 13th November 1922.

Suits Valuation Act, S. 11 — *Objection to jurisdiction.*

The defect of jurisdiction on territorial or pecuniary ground should not render proceedings in a case abortive if such objection was not taken at the earliest opportunity and there has

been no consequent failure of justice: *A. I. R.* 1925 *Lah.* 290 (*F. B.*), *Foll.* [P 827 C 2]

Badri Das and *Kidar Nath Chopra* — for Appellant.

Moti Sagar and *Mehr Chand Mahajan* —for Respondents.

Agha Haidar, J.—This appeal arises out of a suit for dissolution of partnership and rendition of accounts. A preliminary decree was passed as long ago as 5th July 1920, and the present appeal is from the final decree.

It appears that on 28th October 1916, three persons, namely, Ganga Ram, now represented by plaintiffs 1 and 2, Fakir Chand, plaintiff 3, and Budha Mal, defendant, entered into a partnership for dealing in building materials, etc. The present suit with a valuation of Rs. 1,100, was brought on 1st August 1919 by the plaintiffs, and, as already stated, a preliminary decree was passed which declared the shares of the parties to be one-third each. It was further decided that the partnership included a certain liquor business as well. The suit seems to have been instituted originally in the Court of the Senior Subordinate Judge, Gurdaspur. On 2nd August 1919 the Senior Subordinate Judge made an order to the effect that

the plaint be made over to the Court of Maulvi Barkat Ali, Subordinate Judge.

Ultimately the trial of the case was held by Mr. Ram Kanwar, Subordinate Judge, 2nd Class, who passed the preliminary decree on 5th July 1920. An appeal was lodged by the defendant in the Court of the District Judge against that decree. This appeal was dismissed. In the meantime, on 7th July 1920, the learned Subordinate Judge of the Second Class, Mr. Ram Kanwar made an order appointing Pandit Bishambar Nath, Pleader, as a commissioner for examining the accounts. On 3rd May 1921 the commissioner submitted his report; therein he arrived at a sum of Rs. 14,369-15-9 which was to be distributed as net profits between the three partners.

It appears that on receipt of this report Mr. Ram Kanwar, Subordinate Judge, submitted the case to the District Judge for transfer to the proper Court having jurisdiction, because he considered that he could not grant a decree for a sum which was beyond his pecuniary jurisdiction. The case was accordingly transferred to the Court of the Senior Subordinate Judge on 22nd June 1921.

Objections were filed against this report by the defendant Budha Mal on 25th August 1921, in which, among other things, it was urged that the case was not triable by the Court of the Second Class Subordinate Judge and that all the proceedings taken in the Court of Lala Ram Kanwar were null and void and that the case should be tried de novo. On 19th October 1921 this objection was again repeated under the heading of "preliminary objections" where we find the plea of jurisdiction taken in a more crystallized form. It runs as follows:

The late presiding officer of the Court had no jurisdiction to hear the case. For this reason this case has been made over to this Court.

2 All the previous proceedings are null and void according to law, proceedings should be taken de novo.

The learned Senior Subordinate Judge overruled these objections by an order dated 30th November 1921. He ultimately came to the conclusion that the total amount of profits of the partnership amounted to Rs. 15,619-12-9 which was distributable among the parties in certain specified sums according to their respective shares.

The defendant has come up in appeal to this Court, and his learned counsel has repeated with considerable earnestness the plea of jurisdiction. He also urges that the defendant was entitled to more interest on his outlay. He further pleaded that the total figure arrived at by the learned Subordinate Judge should be reduced by a sum of Rs. 6,263-9-6, which, according to the defendant, represented the expenses which had been incurred in the partnership but which had not been taken into account by the commissioner.

As to the plea of jurisdiction, as already stated, the suit was valued at Rs. 1,110. No objection whatsoever was taken by the defendant to this figure, with the result that the parties proceeded to trial and ultimately a preliminary decree was passed. In appeal against the preliminary decree no such objection was taken. In the course of argument it was faintly suggested by the learned counsel for the appellant that, as a result of the commissioner's report, the preliminary decree had also become a nullity. Ultimately, however, he seems to have dropped this contention and concentrated

his attack upon what took place in the Court of the Subordinate Judge, 2nd Class, immediately after the preliminary decree was passed. He pleaded that the appointment of the commissioner was without jurisdiction and consequently the whole of the proceedings, including the commissioner's report, should be discarded. He relied upon a ruling reported as *Radha Kishan* v. *Kidar Nath* (1). That case, however, is quite different from the present case and does not support the contention of the appellant. In that case a suit was instituted in the Court of the Munsif for dissolution of partnership and accounts. The Munsif, in order to ascertain whether the suit was within his pecuniary jurisdiction, issued a commission for the examination of account books. As a result of this commission the Munsif came to the conclusion that he had no jurisdiction to try the suit. The Subordinate Judge, 1st Class, before whom the case ultimately came for disposal, refused to treat as evidence in the case the proceedings taken by the Munsif with the object of ascertaining whether the subject-matter of the suit was cognizable by him.

On the facts the learned Chief Judge held that the findings of the Munsif could not be treated as a finding on the merits. He further held that the proceedings before the Munsif were coram non judice so far as the eventual decision of the liability of the parties was concerned and that under the circumstances the order of the Subordinate Judge was correct. It may be noted that this case purports to follow *Prabhakarbhat* v. *Vishwambhar Pandit* (2), a ruling which was delivered at a time when the Suits Valuation Act (7 of 1887) had not been placed upon the Statute Book. Mr. Moti Sagar, on behalf of the respondents, relied upon S. 11, Suits Valuation Act, and quoted the Full Bench decision reported as *Sardar Khan* v. *Mt. Aisha Bibi* (3). The provisions of S. 11, Suits Valuation Act, are clear and provide a complete answer to the appellant's contention. As already stated no objection was taken as regards pecuniary jurisdiction as required by S. 11 (a), Suits Valuation Act. And if the argument were open to the appellant that after the passing of the preliminary decree and the receipt of the commissioner's report such objection was raised, the answer is supplied by S. 11 (b) and (2), Suits Valuation Act, for it has not been even suggested that the undervaluation has prejudicially affected the disposal of the suit on its merits. I may quote here the following sentence from the Full Bench judgment and report as *Sardar Khan* v. *Mt. Aisha Bibi* (3):

> The object of the legislature in both cases is the same namely that the defect of jurisdiction on territorial or pecuniary ground should not render proceedings in a case abortive if such objection was not taken at the earliest opportunity and there has been no consequent failure of justice.

I may also refer to *Khudaijatul Kubra* v. *Amina Khatun* (4) and the observations at p. 125 of the report. The inanity of the objections raised by the defendant would further appear from the fact that the commissioner, Pandit Bishambar Nath, had been appointed by the Court with the consent of parties, and even in the objection (dated 25th August 1921) to the commissioner's report the defendant himself asked for the retention of the commissioner, Pandit Bishambar Nath.

I accordingly overrule the plea of jurisdiction raised by the appellant. (The judgment then dealt with the details of accounts and interest and the appeal was partly allowed.)

Broadway, J. agreed in the order proposed.

D.D. *Appeal partly allowed.*

(1) [1912] 96 P. R. 1912=15 I. C. 773=221 P. W. R. 1912.
(2) [1884] 8 Bom. 313 (F. B.).
(3) A. I. R. 1925 Lah. 290=6 Lah. 105 (F. B.).
(4) A. I. R. 1924 All. 388=46 All. 250.

A. I. R. 1928 Lahore 827

SHADI LAL, C. J.

Mt. Darkan—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No 215 of 1928, Decided on 9th March 1928, reported by Sess. Judge, Hissar.

(a) *Penal Code, S.* 186—*Report of a process-server that he was beaten by* A *in execution of warrant of attachment—Civil Court reporting matter to police and* A *challaned under Ss.* 332 *and* 394—*Magistrate convicting* A *under S.* 186—*Conviction under S.* 186 *is bad as neither report nor police challan constitutes a complaint—Criminal P. C., Ss.* 4 (*b*) *and* 195 (*a*).

A process-server presented a report on the back of a warrant to the civil Court that he

was beaten by *A* when he was attaching property in its execution. Thereupon, the civil Court reported the matter to the police who challaned *A* under Ss. 332 and 394, I. P. C. The Magistrate found these offences not proved, but he convicted *A* under S. 186.

Held: that the Magistrate had no jurisdiction to convict the accused under S. 186, as neither the report nor the police challan constituted a complaint. [P 928 C 2]

(*b*) *Penal Code, S.* 186—"*Obstruction*" *implies the use of criminal force—Mere threatening language is not sufficient.*

The word "obstruction" as used in S. 186 means "physical obstruction," i. e., actual resistance or obstacle put in the way of a public servant. The word implies the use of criminal force, and mere threats or threatening language is insufficient: 7 *A. L. J.* 1174 and 38 *All.* 506; *Ref.* [P 828 C 2]

(*c*) *Criminal Trial—Ground for conviction—Plea of guilty.*

The plea of guilty does not avail, when the offence in question has not been committed in the eye of the law. [P 828 C 2]

Nanwan Mal—for Petitioner.

Report. — The Senior Subordinate Judge, Hissar, wrote a robkar to the Superintendent of Police, Hissar, on 7th June 1927, Ex. (P E) intimating that it had been brought to his notice by Zahid Hussain, process-server, that he attached some property of Sheoji, judgment-debtor in execution of a warrant at village Kharar on 5th June 1927, but that Sheoji, his wife Mt. Darkan and his daughter Mt. Manbhari forcibly snatched the property from him and gave him a beating with shoes and lathis. The Senior Subordinate Judge requested the Superintendent of Police to enquire into the matter through the Sub-Inspector and take proper action.

As a result of the police enquiry, Shoeji, his wife and daughter were challaned, under Ss. 332 and 394, I.P.C., but the Magistrate held that no attachment of any property had in reality been effected, that Sheoji and his daughter were not even present at the time of the alleged occurrence, and that all what happened was that Mt. Darkan abused the process-server and said that she would not allow him to attach the cattle. He, therefore, discharged Sheoji and his daughter Mt. Manbhari, but convicted his wife Mt. Darkhan under S.186, I.P.C., and sentenced her to pay a fine of Rs. 20, noting also in his judgment that she pleaded guilty to the charge.

It is clear that no prosecution in respect of an offence under S. 186, I. P. C., can be instituted except on the complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate, vide S. 195 (1) (*a*), Criminal P. C. Now, there was no complaint in this case as defined in S. 4 (h), Criminal P. C., by either the process-server or the Senior Subordinate Judge. The former presented a report of the occurrence on the back of the warrant to the civil Court, and did not make any allegation either orally or in writing to a Magistrate and the Senior Subordinate Judge merely reported the matter to the police. Neither this, nor the police challan did, of course, constitute a complaint. The result thus is that the Court took cognizance of the case without jurisdiction and the conviction cannot stand.

All what the Magistrate finds is that Mt. Darkan abused the process-server and said that she would not let him attach the cattle. Now the word "obstruction" as used in S. 186 means "physical obstruction," i. e., actual resistance or obstacle put in the way of a public servant. The word implies the use of criminal force, and it appears that mere threats or threatening language would seem to be insufficient: vide *Emperor* v. *Gajadhar* (1) and *Aijaz Husain* v. *Emperor* (2). No offence had thus been committed and the conviction was improper on this ground as well. It is said that the accused pleaded guilty, but a reference to her statement before the framing of the charge shows that all what she admitted was that she told the process-server that she would not let him attach cattle till the arrival of her husband. Besides, the plea of guilty does not avail, when the offence in question had not been committed in the eye of the law.

For the above reasons, I forward the proceedings to the High Court with the recommendation, that the conviction may be set aside. The fine has already been paid and an order for its refund may kindly be passed.

Order.—For the reasons recorded by the learned Sessions Judge I set aside the conviction and the sentence, and direct that the fine, if realized, be refunded to the petitioner.

N.K. *Conviction set aside.*

(1) [1910] 7 A. L. J. 1174=8 I. C. 823=11 Cr. L. J. 721.
(2) [1916] 38 All. 506=35 I.C. 973=14 A.L.J. 731.

A. I. R. 1928 Lahore 829

DALIP SINGH, J.

Roop Narain—Plaintiff—Appellant.

v.

Hukam Chand Jagadhar Mal and *another*—Defendants—Respondents.

Misc. First Appeal No. 2550 of 1927, Decided on 2nd June 1928, from order of Sr. Sub-Judge, Delhi, D/- 8th August 1927.

Execution — Decree binding — Executing Court can decide whether Court passing decree had jurisdiction.

No doubt executing Court cannot question the validity or legality of a decree if there is a decree in existence. But it must be able to decide whether a decree exists at all and therefore where the Court has no inherent jurisdiction to pass the so-called decree, the decree has no real existence in law and the executing Court within those narrow limits can decide whether the decree was passed by a Court which, for lack of inherent jurisdiction, could not pass such a decree; for that point settles the question as to whether there is an existing decree upon which the executing Court can take action: *A. I. R.* 1925 *Cal.* 907 (*F. B.*), *Rel. on.* [P 830 C 2]

A prior mortgagee brought suit on his mortgage. He impleaded, besides the mortgagors, the puisne mortgagees. By means of a compromise, certain property belonging to the mortgagors was to be considered as sold to the plaintiff for a certain sum. Out of this sum, plaintiff was to pay the amount due to puisne mortgagees. It was stipulated that the puisne mortgagees were to recover the same from the plaintiff by execution or by a fresh suit. Until payment, the property of the plaintiff was to remain charged with the sum fixed for payment to him. A decree was accordingly passed in terms of the compromise. Plaintiff did not pay. Thereupon the puisne mortgagees put in an application for a final decree. It was contended that the Court had no jurisdiction to pass the final decree in their favour because it had passed a decree originally embodying the terms of the compromise against them.

Held: that it would be placing altogether too narrow a construction on the decree to hold that it was only passed against the mortgagors and the fact that it was stipulated that the puisne mortgagees could take out execution of this decree or bring a new suit tended to support the view that the decree was meant to be in their favour against the plaintiff. [P 831 C 1]

Sardha Ram—for Appellant.
Shamair Chand—for Respondents.

Judgment.—Rup Narain and Shiba Mal brought two suits on mortgages. They impleaded besides the mortgagors, Hukam Chand and Jagadhar Mal in both suits as puisne mortgagees. The total amount due on the two mortgages was about Rs. 3,44,000. The amount due to Hukam Chand and Jagadhar Mal was about Rs. 60,000. By means of a compromise, certain property belonging to the mortgagors was to be considered as sold to the plaintiff, and others for Rs. 4,04,000. Out of this sum the vendees were to pay Rs 60,000 due to Hukam Chand and Jagadhar Mal. It is stipulated in the compromise that the various vendees were to pay certain sums according to their shares to the puisne mortgagees. 8 annas per cent per mensem was fixed as interest if the sum was paid within one year and Re. 1 per cent per mensem was fixed as interest if the sum was not so paid. It was also stipulated that the puisne mortgagees were to recover the same from the vendees by execution or by fresh suit. Until payment the share of each vendee was to remain charged with the sum fixed for payment by him. Rup Narain did not pay his ¼th share. On 12th May 1927, the puisne mortgagees put in an application for a final decree. On 9th June 1927, the final decree was ordered to be passed and on the same date the puisne mortgagees applied for execution of the decree. The executing Court thereupon directed the property falling to the share of Rup Narain to be sold and from that order Rup Narain has appealed.

It has been contended that S. 47, Civil P. C, does not apply and therefore no appeal lies, because the appellant never appeared in the lower Court at all. But I do not see that the absence of the appellant in the lower Court takes away his right to appeal, and the order presumably does fall within S. 47 because it relates to the discharge of the decree by the sale of the property. I, therefore, overrule the preliminary objection that no appeal lies.

It has been contended in appeal that the Court had no jurisdiction to pass the decree at all, because it had passed a decree originally embodying the terms of the compromise against the defendants The present respondents were defendants in the previous suit and therefore no decree was passed in their favour. This being so, it is contended that the Court was functus officio and could not pass a final decree in their favour. In fact, there was no room or scope for a final

decree at all, the suit having been finally concluded by the decree passed on the compromise.

On the other hand, for the respondents it is contended that the executing Court had no jurisdiction to go into the question at all as to whether the decree which was finally passed was rightly passed or not passed. It has been contended that the preliminary decree embodies the terms of the compromise and therefore is a decree against the present appellant. It has also been contended that rightly or wrongly the Court passed a final decree against the present appellant and therefore the executing Court cannot question the validity of that decree. On the other hand, it has been contended for the appellant that *Gorachand* v. *Prafulla Kumar* (1) and *Mir Mahomed Khan* v. *Surjan Mal & Co.* (2), show that the executing Court can question the jurisdiction of the Court which passed the original decree where there is a lack of inherent jurisdiction. On the other hand, counsel for the respondents contends, firstly, that *Gorachand* v. *Prafulla Kumar* (1) lays down wrong law and that *Mir Mahomed Khan* v. *Surjan Mal & Co.* (2), is only obiter dictum, and that the rulings *Labh Singh* v. *Ram Lal* (3), *Zamindar of Ettiyapuram* v. *Chidambaram Chettiar* (4), *Hari Govind* v. *Narsingh Rao* (5), *Sheo Pat Rai* v. *Warakchand* (6), *Ratnaswami Chetti* v. *Ratnamal* (7), *Kali Pada* v. *Hari Mohan* (8), and *Budha Mal* v. *Rallia Ram* (9), show that the executing Court cannot question the jurisdiction of the Court which passed the original decree.

In my opinion, the executing Court has jurisdiction to question the jurisdiction of the Court which passed the original decree, where there is a question of lack of inherent jurisdiction to pass the decree. The reasoning to me seems quite apparent. It is clear that the executing Court would have to decide the question of fact whether a decree existed or did not exist. Now, a decree may not exist because in fact there is no decree or the decree may not exist because in law there is no decree. It is clear, so far as I can see, that there is no difference in principle between the non-existence of a decree as a question of fact and the non-existence of a decree as a question of law. Of course the executing Court cannot question the validity or legality of a decree if there is a decree in existence. But it must be able to decide whether a decree exists at all and therefore where the Court has no inherent jurisdiction to pass the so called decree, the decree has no real existence in law, and the executing Court within those narrow limits can decide whether the decree was passed by a Court which for lack of inherent jurisdiction could not pass such a decree; for that point settles the question as to whether there is an existing decree upon which the executing Court can take action. I would, therefore, hold that *Gorachand* v. *Prafulla Kumar* (1), (Full Bench) was rightly decided so far as its principle is concerned without necessarily holding that all the illustrations that it gives are correct or complete.

It has been contended by Mr. Shamair Chand, secondly, that even if *Gorachand* v. *Prafulla Numar* (1), is correct in law the inherent jurisdiction is limited to territory, value, person or subject-matter as regards lack of jurisdiction. In my opinion there are only illustrations of lack of inherent jurisdiction and are not complete and exhaustive. For instance, if the Court had heard an appeal where there was no right of appeal, the Court would have lack of inherent jurisdiction to hear the appeal. I do not mean, of course to hold that, where the Court had wrongly decided that it had jurisdiction to hear the appeal or that an appeal lay, such a case would be a case of lack of inherent jurisdiction but where the matter had escaped notice, this would be an instance of lack of inherent jurisdiction. At the same time, this question must be confined to the competency of the executing Court to decide the existence of the decree and not its legality or validity.

It remains therefore to decide whether in the present case there was inherent lack of jurisdiction to pass either the

(1) A. I. R. 1925 Cal. 907=53 Cal. 166 (F.B.).
(2) A. I. R. 1927 Lah. 651.
(3) A. I. R. 1924 Lah. 448=5 Lah. 54.
(4) [1920] 43 Mad. 675=39 M. L. J. 203=12 M.L.W, 217=58 I.C. 871=(1920) M.W.N. 400 (F.B.).
(5) [1914] 38 Bom. 194=23 I.C. 123=16 Bom. L. R. 26.
(6) [1918] 22 P. R. 1919=42 P.L. R. 1918=46 I. C. 419=93 P.W.R. 1918.
(7) [1914] 27 M. L. J. 388=24 I. C. 135=1 M. L. W. 446.
(8) [1917] 44 Cal. 627=24 C.L.J. 375=35 I.C. 856=21 C. W. N. 1104.
(9) A. I. R. 1928 Lah. 825

original decree or the final decree by the Court or whether this is a case where there may have been material irregularity or illegality in the exercise of jurisdiction but not a case of lack of inherent jurisdiction.

I am of opinion that the first decree passed by the Court was in essence intended to be against the present appellant. Although the decree on its face is against the defendants in that suit and the present appellant was not a defendant yet the decree embodies the terms of the compromise in it, and the present appellant, by virtue of the sale to him of the mortgagor's rights, stood in the position of the mortgagor as well as in the position of the plaintiff, and therefore the decree against the defendants bound him as a legal representative of those defendants. It will be placing altogether too narrow a construction on the decree to hold that it was only passed against the mortgagors and the fact that it was stipulated that the present respondents, the puisne mortgagees, could take out execution of this decree or bring a new suit tends to support the view that the decree was meant to be in their favour against the present appellant.

It has been contended that had there been such a decree, there could not be a fresh suit, but I think that these words are mere words of surplusage to provide for the case if the Court refused to pass a decree in terms of the compromise because the subject-matter of the compromise was not within the scope of the suit. However, be this as it may, I further consider that the Court which passed the decree rightly or wrongly construed the decree as a preliminary decree and having so construed it proceeded to pass a final decree. It has been contended firstly that this decree was passed without notice to the present appellants. The record has not come and I am unable to determine whether the present appellants did or did not have notice. It seems to me to make no difference for this would only make it a case of irregularity or illegality in the exercise of jurisdiction. Secondly it has been contended that the Court was functus officio after passing the first decree and therefore had no inherent jurisdiction to pass the final decree. The question whether the decree passed was a final decree disposing of the suit or was only a preliminary decree was for the Court to decide and if rightly or wrongly it decided that it was a preliminary decree that would be only illegality or irregularity in exercise of jurisdiction but not lack of inherent jurisdiction. Therefore the executing Court could not question the validity of the decree passed.

I must therefore hold that this appeal must fail. As the point is by no means free from difficulty I, leave the parties to bear their own costs.

A.L./R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 831

TEK CHAND AND BHIDE, JJ.

Mt. Sharifan Bibi—Plaintiff—Appellant.

v.

Mt. Aishan Bibi and *others*—Defendants—Respondents.

First Appeal No. 1149 of 1924, Decided on 8th February 1928, from decree of Senior Sub Judge, Lyallpur, D/- 12th January 1924.

Specific Relief Act, S. 42—Spes successionis.

A declaratory suit with respect to a spes succesionis is not maintainable : 4 *Lah.* 106, *Foll.* : 39 *Mad.* 634 (*P. C.*), *Rel. on.* [P 832 C 1]

Niaz Muhammad—for Appellant.

Ghulam Mohy-ud-Din—for Respondents.

Bhide, J.—The facts alleged by the plaintiff in the plaint were briefly as follows : Wali Dad, father of the plaintiff, and his two brothers, named Khera and Faujdar, were granted one square of land each in the Lyallpur colony in the early days of the settlement. Shortly afterwards, Khera and Faujdar died and the squares allotted to them were granted by Government to Wali Dad. Wali Dad subsequently acquired occupancy rights in respect of the three squares. About 11 or 12 years before the suit Wali Dad died and the land left by him was mutated in the name of his widow Mt. Aishan Bibi, defendant 1. Mt. Aishan Bibi subsequently wanted to make a gift of the whole land in favour of her daughter, the plaintiff, and applied for sanction, but the application was resisted by defendants 2 to 4, who are collaterals of Wali Dad, on the ground that they were entitled to succeed to the property of Wali Dad on the death of Mt. Aishan

Bibi. Sanction was accordingly refused and thereafter the plaintiff instituted the present suit for a declaration that she and not the defendants were entitled to succeed to the property left by Wali Dad on the death of defendant 1. Defendants 2 to 4 resisted the suit on various grounds, pleading inter alia that two out of the squares belonged to Khera and Faujdar and were inherited by Wali Dad. The learned Senior Subordinate Judge held that the plaintiff was not entitled to succeed to the squares inherited by Wali Dad from his brothers and granted the declaration prayed for in respect of the remaining land only. From this decision the plaintiff has appealed.

It seems to us that the present appeal must fail, both on account of the form in which the relief was asked for as also on the merits. The plaintiff merely sued for a declaration that she was entitled to succeed to the property in suit after the death of defendant 1. This was in effect a suit for a declaration, not with respect to an existing right, but with respect to spes successionis. It is well settled that a suit of this kind is not maintainable vide: *I. L.R. 4 Lah.* 106 and *I. L. R. 39 Mad.* 634 (637) (*P. C.*) The learned counsel for the appellant himself conceded this point, but wanted permission to amend the plaint. He was, however, unable to state definitely in what form relief could be asked on the allegations as stated in the plaint. It seems to us that the suit is bound to fail on those allegations. According to the plaint it was Wali Dad, who acquired occupancy rights in the whole of the land in suit. It is vaguely stated in the plaint that Wali Dad died 11 or 12 years before the suit. The suit was instituted on 14th November 1923. It would thus appear that Wali Dad must have died some time about 1911 or 1912. It was stated by counsel for the appellant that Wali Dad actually died after Act 5 of 1912 came into force. Assuming this to be correct, succession would be governed by S. 20 of that Act. Under that section the plaintiff, who is married, does not appear to have any right of succession at all. It was suggested by the learned counsel for the appellant that the plaintiff could be nominated as the successor of Wali Dad by the Collector under Cl. (e) of S. 20; but it is obvious that the plaintiff cannot claim any declaration at present on the mere possibility of such nomination being made in the future.

There is neither an appeal nor cross-objections on behalf of the respondents and in the circumstances the decree of the lower Court cannot be varied; but it seems to us perfectly clear that the plaintiff's claim in appeal must fail. We accordingly dismiss the appeal with costs.

A.L./R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 832

DALIP SINGH, J.

Lal Singh-Amir Singh—Plaintiffs—Appellants.

v.

Dhanna Singh-Diwan Singh—Judgment-debtors—Respondents.

Misc. First Appeal No. 849 of 1927, Decided on 26th January 1928, from order of 1st Class Sub-Judge, Jhang, D/- 25th February 1927.

(*a*) *Contract Act, S. 243—Son of a deceased partner admitted to share in the partnership decree—He does not thereby become a partner.*

Where a firm was the decree-holder and the son of a deceased partner was admitted to be entitled to a share in the decree assets:

Held: that this fact did not mean that he was a partner in the firm. [P 833 C 1]

(*b*) *Contract Act, S. 251.*

Son of a deceased partner cannot give a complete discharge of a debt due to the partnership. [P 833 C 1]

Jagan Nath Aggarwal and *Mukand Lal Puri*—for Appellants.

Nand Lal and *A. R. Kapur*—for Respondents.

Judgment.—The firm Lal Singh-Amir Singh obtained a decree against the firm Dhanna Singh-Diwan Singh on 1st July 1925. Execution of the decree was taken out and on 23rd April 1926 Diwan Singh pleaded an adjustment of the decree by payment to one Gopal Singh. Gopal Singh is admitted to be the son of Lal Singh, a deceased partner of the firm Lal Singh-Amir Singh. Dhanna Singh and Diwan Singh are real brothers of Lal Singh. The Court below held that Gopal Singh was one of the six partners of the decree-holders' firm. This was based largely on the admission of counsel for the decree-holder. I have read the statement in which the alleged admission was made. I find no such admission. In the

first sentence the words are *Gopal Singh pisar Lal Singh zarur hai* and not *Gopal Singh pisar Lal Singh hissadar hai* as counsel for the respondent would have me read it, and the words are too clearly written for any dispute on the point. There is a dot which could not possibly occur in the word "hissadar" and if the word were "hissadar" either an *alif* or a *dal* is missing. I, therefore, hold that the word is "zarur".

The next portion of the statement on which reliance is placed reads as follows: *Digree haza ke chhe dar hain.* Assuming that the word *dar* is a miswriting for "hissadar" the fact that Gopal Singh is admitted to be entitled to a share in the decree assets does not mean that it is admitted that he was a partner in the firm because even as the son of a deceased partner he would be entitled to realize his share of whatever assets came to the hands of the partnership as partnership property. Further, it is in evidence and admitted that Lal Singh died in 1921. There is nothing to show that there was any contract by which the firm was to continue in spite of the death of one of the partners. Therefore, presumably, the firm dissolved on the death of Lal Singh and there is nothing to show that Gopal Singh was continued as a partner or taken into the firm after the death of Lal Singh. Gopal Singh was a minor up to 1921 and it is difficult for me to see how he could be a partner in the firm before the death of Lal Singh, the firm not being a joint Hindu family firm. However, be that as it may, I hold that it is not proved that Gopal Singh was a partner in the firm of Lal Singh-Amir Singh. It is further not proved, as was contended by counsel for the respondent in the alternative, that he was an agent for the purpose of receiving this debt on behalf of the firm. It is also, so far as I am aware, clear law that the son of a deceased partner cannot give a complete discharge of a debt due to the partnership.

Counsel for the respondent took some preliminary objections which were overruled by me without calling on counsel for the appellant. One was that the case was not in execution of a decree between parties and, therefore, no appeal lay under S. 47. Secondly, that as Gopal had been held to be a partner of the firm, a right had been declared in his favour and, therefore, ad valorem Court-fee was payable. *Valliappa Chetty* v. *Rangaswamy Naicker* (1) was cited by counsel in support of this second proposition, but neither point seems to me to arise. The question here is simple, whether the decree has been adjusted or not, and the decree-holder can surely appeal when it is held that it has been adjusted, and it is obviously also a question arising in execution.

The appeal is accepted; the case will be remanded to the Court below for disposal according to law. The appellant will have his costs throughout.

D.B./R.K. *Appeal accepted.*

(1) [1916] 10 Bur. L. T. 42=35 I. C. 429=8 L. B. R. 300.

A. I. R. 1928 Lahore 833

BHIDE, J.

Ruchiram-Sukha Nand—Defendant—Appellant.

v.

Charan Das—Plaintiff—Respondent.

Misc. Second Appeal No. 2774 of 1927, Decided on 14th March 1928, from order of Dist. Judge, Gurdaspur, D/- 9th August 1927.

Limitation Act, S. 89 — Termination of agency—Last transaction in 1918—Accounts not rendered—Suit for accounts brought in 1924—Suit is out of time.

Plaintiff had certain transactions in cotton, wheat, etc., with three different firms, which acted as his agents for the purpose. The last date of the transactions was 19th May 1918. Thereafter no transaction took place, but accounts were not rendered. Subsequently the three firms were merged in the defendant firm; and the latter firm was sued for accounts by the plaintiff as the representative of the three firms in 1924.

Held: that the period of limitation began to run from the date of the last transaction and hence the suit was out of time: 39 *Mad.* 376, *Rel. on*; 26 *Cal.* 715 and 12 *All.* 546, *Dist.*

[P 834 C 1]

Anant Ram—for Appellant.

Judgment.— This appeal has been heard ex parte as the respondent failed to appear in spite of service.

The suit out of which this appeal arises purported to be one for rendition of accounts. Parties were agreed that limitation for such a suit is governed by Art. 89, Lim. Act. That article lays down that time will begin to run when the account is, during the continuance of

the agency, demanded and refused, or, where no such demand is made, when the agency terminates. It is admitted that there is no proof of any demand having been made or refused in this case. Consequently limitation will run from the time the "agency" terminated.

The plaintiff's allegations were that he had certain transactions in cotton, wheat, etc., with three different firms, which acted as his agents for the purpose. The last date of the transactions was 19th May 1918. Thereafter no transaction took place, but accounts were not rendered. Subsequently the three firms are said to have merged in the defendant firm Ruchi Ram-Sukha Nand and hence the latter firm was sued for accounts by the plaintiff as the representative of the said firms. The trial Court held that the period of limitation began to run from the date of the last transaction and hence the suit, which was instituted on 10th June 1924, was out of time. The suit was accordingly dismissed. The learned District Judge held on appeal that there was nothing to show that the agency had come to an end and hence held the suit was within time. He accordingly remanded the case for redecision.

Defendant has filed a second appeal. It seems to me that the learned District Judge's finding that the agency has not terminated has been based on a misconception of the facts of the case. It was nowhere alleged by the plaintiff, that the three firms referred to above or the defendant firm in which these firms merged were his general agents. The agency was apparently confined to particular transactions and in the absence of any allegation to the contrary, must be taken to have terminated with the last transaction: cf. S. 201, Contract Act. It was for the plaintiff, in these circumstances to show that the agency still subsisted, but he has failed to show this.

It has been no doubt laid down in *W. R. Fink* v. *Buldeo Das* (1) and *Mitthu Lal* v. *Kishan Lal* (2) that the agency subsists till accounts are rendered, but this view has been dissented from in *Venkatachalam Chetti* v. *Narayanan Chetti* (3) and for good reasons.

The learned District Judge has not proceeded on the ground that the agency subsisted, because accounts had not yet been rendered and hence I do not think it necessary to discuss these rulings.

In my opinion the presumption made by the learned District Judge, that the agency subsisted is not justified by the pleadings or any evidence on the record. The agency must be taken to have terminated when the business of the agency was transacted. This happened over three years before the suit. The plaintiffs tried to bring the suit within time by proving an acknowledgment of liability contained in a postcard dated 5th November 1921. This card was not proved. Moreover it appears to contain no specific reference to the liabilities in dispute.

I accept the appeal (ex parte) with costs, set aside the order of the learned District Judge and restore the order of the trial Court.

N.K. *Appeal accepted.*

(1) [1899] 26 Cal. 715=3 C. W. N. 524.
(2) [1890] 12 All. 546=(1890) A. W. N. 77.
(3) [1916] 39 Mad. 376=26 I. C. 740=28 M. L. J. 140.

A. I. R 1928 Lahore 834

SHADI LAL, C. J. AND JOHNSTONE, J.

Rattan Lal-Sultan Singh—Defendants—Appellants.

v.

Bishen Sahai-Bhagwan Das and *another*—Plaintiffs—Respondents.

First Appeal No. 1347 of 1923, Decided on 18th April 1928, from decree of Sr. Sub-Judge, Delhi, D/- 12th May 1923.

(a) *Contract Act, S. 51—Control of the requisite goods or capacity to deliver them to the purchaser when called upon to do so is sufficient to prove readiness and willingness on the part of sellers.*

In order to prove readiness and willingness on the part of the sellers, it is sufficient to show that on the due date they had control of the requisite goods or capacity to deliver them to the purchaser when called upon to do so. [P 836 C 1]

(b) *Contract Act, S. 73—Measure of damages.*

The measure of damages is the difference between the contract price and the market price at the date of the breach. [P 837 C 1]

Jagan Nath Aggarwal and *Mehr Chand Mahajan*—for Appellants.

Sardha Ram and *Jagan Nath Bhandari*—for Respondents.

Shadi Lal, C. J.—On 14th August 1918, the defendants, Rattan Lal-Sultan Singh contracted to purchase from the plaintiffs Bishan Sahai-Bhagwan Das

twenty-five bales of Ratnam's mulls at a certain price per piece. The goods were to be shipped in August, September and October 1918, and on their arrival at Delhi the sellers were required to send patterns and invoices to the buyers who promised to accept the goods on payment of the price thereof. It appears that sixteen bales arrived at Delhi in January 1919, but the buyers did not accept for the reasons to be discussed hereinafter. Thereupon, the sellers brought an action for damages for the breach of the contract and obtained from the Subordinate Judge a decree for Rs. 11,970 with interest thereon at six per cent per annum from the date of the suit upto the date of realization.

The decree in favour of Bishan Sahai-Bhagwan Das was made by the trial Judge on 12th May 1923, but was attached on 13th June 1923, by a firm known as Narain Das-Jaini Mal in execution of their decree against Bishan Sahai-Bhagwan Das. On 14th June 1923, the judgment-debtors Ratan Lal-Sultan Singh preferred the present appeal to the High Court, and on 20th March 1925, Narain Das-Jai Mal were impleaded as respondents to the appeal under O. 22, R. 10, Civil P. C.

Mr. Jagan Nath for the appellants asked us to give effect to a compromise alleged to have been made on 26th October 1924, by which Bishan Sahai-Bhagwan Das agreed to receive Rs. 2,900 from the judgment-debtors in full satisfaction of their claim. It is admitted that Narain Das-Jaini Mal were not a party to the alleged compromise, and, as they had attached the decree before the date of the compromise, they could not be adversely affected by any transaction entered into by Bishan Sahai-Bhagwan Das. The learned counsel for the appellants urged that on 5th December 1924, the compromise was placed before the Court executing the attached decree, and that that Court made an order certifying the adjustment of the decree. It is, however, clear that the order was passed in the absence of the attaching decree-holders who were not even aware of the alleged settlement or the proceedings takne to get the satisfaction of the decree recorded by the Court. Now O. 21, R. 53, sub-R. (6) provides that no payment or adjustment of the attached decree made by the judgment-debtor in contravention of the order of attachment, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force. It is doubtful whether the settlement of the claim was a bona fide transaction, but it is absolutely clear that the alleged settlement cannot bind the attaching creditors who were the persons vitally interested in the result of the appeal.

Coming now to the merits of the appeal, we find that 25 bales of mulls, with which we are concerned in the present case formed part of 100 bales which Ratnam had contracted to sell to the firm of Jawala Dutt-Ram Kanwar and out of which the latter firm promised to sell 25 bales to Narain Das-Jaini Mal. Narain Das-Jaini Mal in their turn agreed to sell the bales to Bishan Sahai-Bhagwan Das, and it is in respect of these 25 bales that Bishan Sahai-Bhagwan Das made the contract with Ratan Lal-Sultan Singh which is the subject of the dispute between the parties.

The learned Subordinate Judge holds that, while 16 bales forming part of the shipments of August and September 1918, arrived at Delhi within a reasonable time, the remaining goods were unduly delayed, and that the buyers were not bound to accept them after the expiry of the due date for delivery. The learned Judge has accordingly held the buyers liable for the breach of the contract in respect of only 16 bales, and has assessed damages on the basis of the difference between the contract price and the market rate on the date of the breach.

It is contended on behalf of the defendants that the sellers were not ready and willing to perform their part of the contract, and they are not, therefore, entitled to recover any damages from the buyers. Now, it is beyond dispute that seven bales arrived at Delhi on 4th January 1919, and nine bales on 11th January 1919; and that all these bales were lying in the godown of the Chartered Bank of India, Australia and China. The evidence on the record shows that the sellers sent to the buyers patterns and copies of invoices, and that the latter were unwilling to accept the goods owing to the prices having fallen since the armistice in October 1918. As stated above, there was a chain of sellers and

buyers in respect of these goods, and it appears that each firm while anxious to enforce their claim *qua* sellers, did not wish to discharge their obligations as purchasers. It was for this reason that though the plaintiffs, Bishan Sahai-Bhagwan Das, asked the defendants to accept the goods, they wrote to their own sellers Narain Das-Jaini Mal denying their liability to take delivery owing to the delay in the arrival of the goods at Delhi. This correspondence was obviously inspired by a desire to get some concessions from the sellers, but was never intended to be taken seriously. We have, however, the undoubted fact that on 21st January 1919, when the defendants had directed their bankers King, King & Co. to pay for the goods, the plaintiffs, accompanied by Jugal Behari, the cashier of King, King & Co , Ratnam and the representatives of the firms Jawala Dutt-Ram Kanwar and Narain Das-Jainl Mal, went to the office of the Chartered Bank in order to get the goods from the bank and deliver them to Jugal Behari, but they reached there after 3 p. m. when the bank ceased to do business. The plaintiffs accordingly asked Jugal Behari to come on the following day to take delivery and also took the precaution of sending a telegram in the afternoon to King, King & Co., and a letter on the following day asking them to pay for the goods and take delivery on 22nd January. The sellers, however, declined to accept the goods and made various execuses to account for their denial.

It has been repeatedly held that, in order to prove readiness and willingness on the part of the sellers, it is suffieient to show that on the due date they had control of the requisite goods or capacity to deliver them to the purchaser when called upon to do so. The evidence produced by the parties shows that the sellers were in a position to fulfil their part of the bargain, and the contract was broken by the buyers.

It is to be observed that the plaintiffs were to deliver 16 bales to the defendants on account of the first two shipments; but it appears that, while there were two separate invoices for two instalments of seven bales each, the remaining two bales formed part of six bales for which there was a third invoice. It is argued that the plaintiffs could not deliver the full quantity of the goods on 21st Jannary without meeting the drafts for all the three invoices comprising 20 bales, and that they had not sufficient funds to pay the entire amount due on the three drafts. This contention rests upon the assumption that none of the four firms, namely Ratnam & Co , Jawala Dutt-Ram Kanwar, Narain Das-Jaini Mal and Bishan Das-Bhagwan Das, who had all consented to obtain the goods from the bank in order to deliver them to the defendants, could pay the small sum which represented the difference between the amouut due on the drafts and the price payable by the defendants for 16 bales, or get credit for that sum from the bank. There is no warrant for this assumption, and there can be little doubt that, if the defendants had shown willingness to receive the goods on payment of the price, the firms mentioned above would not have experienced any difficulty in satisfying the claim of the bank and getting the goods delivered to the defendants. The truth of the matter is that, as the performance of the contract involved a heavy loss to the buyers, they were trying to find some excuse in order to avoid the transaction.

Mr. Jagan Nath for the appellants also invites our attention to the stipulation in the contract which provided for the delivery of 25 bales in three instalments and argues that, as the amount of each instalment was not specified in the indent, the presumption is that they were to be of equal quantities. He accordingly contends that the first instalment should have been of not less than eight bales, but, as only seven bales were offered in respect of that instalment, the tender of the goods made by the sellers was invalid. No such objection was, however, raised when the invoices were sent to the defendants, and even, according to their own version, they were ready to accept on 21st January 1919, 16 bales in respect of the two instalments.

There can be little doubt that, after the infructuous visit of Jugal Behari to the Chartered Bank on that day, the buyers made it absolutely clear that they were not going to accept the goods, and the mere fact that the sellers did not show sufficient diligence in asserting their claim after the breach cannot be treated as an acquiescence on their part in the cancellation of the contract by the buyers.

The Subordinate Judge has rightly held that the defendants failed to perform their part of the bargain, and they are, therefore, liable to pay damages to the plaintiffs. It is common ground that the measure of the damages is the difference between the contract price and the market price at the date of the breach. No definite date was fixed by the parties for the performance of the contract; but the delivery of each instalment was to be made at Delhi on the arrival of the goods. It appears that there was some delay in dispatching the goods of the first instalment from Calcutta to Delhi, but this delay cannot be treated to be an unreasonable one. The goods admittedly reached Delhi on 4th and 11th January 1919, and the defendants could have taken delivery at once if they had shown their willingness to do so. The date of the delivery appears, however, to have been postponed to 21st January 1919, when the defendants broke the contract. The damages have, therefore, been rightly assessed on the basis of the market price on that date. The evidence, however, shows that there was little or no variation in the price of the goods in the first three weeks of January, and it is, thorefore, immaterial whether the 21st January or any earlier date in that month is to be taken as the due date for the purpose of determining the amount of damages.

The trial Judge has awarded interest on the sum adjudged to the plaintiffs at six per cent. per annum from the date of the institution of the suit upto the date of payment. This award is in accordance with the law enacted by S. 34, Civil P, C., and cannot be open to any reasonable objection.

For the foregoing reasons I concur in the conclusion reached by the trial Judge and dismiss the appeal with costs.

Johnstone, J.—I concur.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 837

ADDISON AND BHIDE, JJ.

Secy. of State and *another* — Defendants—Appellants.

v.

Ghanaya Lal-Sri Kishan of Amritsar —Plaintiff—Respondent.

Second Appeal No. 2915 of 1926, Decided on 21st May 1928, from decree of Dist. Judge, Amritsar, D/- 4th Oct. 1926.

(a) Civil P. C., S. 100—Whether facts established amount to "wilful neglect" is a question of law—Railways Act, S. 72.

"Wilful neglect" is a matter of inference from facts proved and the question whether the facts established amount to "wilful neglect" is a question of law : *A. I. R.* 1918 *P. C.* 92, *Foll.* [P 838 C 1]

(b) Railways Act, S. 72 — Wilful neglect—Merely sealing the waggon and not locking it does not amount to wilful neglect in the absence of proof that practice of sealing waggons was an inadequate safeguard.

Where it is not proved that the practice of sealing waggons in vogue had been an inadequate safeguard or that a system of locking waggons was known to be a necessary precaution in the case of a train travelling over a long distance and yet was deliberately and intentionally not adopted by the railways, the mere fact that the wagons were only sealed and not locked does not amount to wilful neglect on the part of the railway company : (*Case-law Considered*). [P 838 C 1 ; P 840 C 1]

(c) Railways Act, S. 72 — "Wilful neglect" defined.

A person is said to be guilty of wilful neglect when he intentionally and of set purpose does something which ought either to be done in a different manner or not at all, or omits to do something which ought to be done : 9 *S. L. R.* 177 and *A. I. R.* 1928 *P. C.* 24, *Foll.* [P 838 C 2]

(d) Evidence Act, S. 57—It is unfair to take judicial notice of thefts on railways.

It is obviously unfair to the railway company to take judicial notice of thefts on the railways. It is for the plaintiff asking for damages to prove "wilful neglect" on the part of the defendant railway. If he wishes to rely on the occurrence of thefts and inadequacy of the method of sealing waggons, it is for him to lead evidence on the point : *A. I. R.* 1926 *All.* 641, *Rel. on.* [P 839 C 2]

(e) Railways Act, S. 72—Risk-note—Consignee must prove that loss was due to railway's misconduct.

The explanation of the loss is often within the exclusive knowledge of the railway company, and to compel the trader to prove that it was due to wilful misconduct on the part of the railway company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. None the less, that is the burden that he undertakes in chosing to send the goods under a risk-note and at reduced rate : *H. C. Smith, Ltd.* v. *G. W. Ry. Co.* (1922) 1 *A. C.* 178, *Foll.* [P 840 C 1]

C. H Carden Noad—for Appellants.

Moti Sagar and *W. Chandra Dutta*—for Respondent.

Bhide, J.—Out of a consignment of 17 blocks of tin booked from Howrah to Amritsar in the name of the plaintiff only nine blocks were delivered to him at Amritsar, the rest having been lost in transit. The plaintiff sued the railway

administrations concerned for the value of the missing blocks. The defendants admitted the loss, but claimed protection under Risk-note B. The suit has been decreed by the Courts below on the finding that the loss of the goods was due to "wilful neglect" on the part of the defendants. From this decision the defendants have appealed.

The main contention urged by the learned Government Advocate on behalf of the appellants was that the facts proved in this case do not amount to "wilful neglect" within the meaning of that term in Risk-note B. On behalf of the respondents a preliminary objection was raised that the finding as regards "wilful neglect" being one of fact cannot be challenged in second appeal. We are unable to uphold this objection. "Wilful neglect" is a matter of inference from facts proved. The term has a special significance in law as established by judicial decisions and the question for consideration is whether the facts established in this case amount to "wilful neglect" in law It is well settled that the legal effect of proved facts is a question of law, vide inter alia *Nafar Chandra Pal* v. *Shukur Sheikh* (1).

We accordingly overrule the preliminary objection.

Coming to the merits of the case, it is necessary to clear the ground by stating at the outset the facts found by the learned District Judge, which in his opinion amount to "wilful neglect". The learned District Judge found that there is no definite evidence to show how the goods were lost. The wagon in which the tin blocks were sent was, however, not locked but only sealed. The sealing consisted in passing a piece of string through the hasp on the door of the waggon, knotting it, pressing some tin round the knot to prevent its loosening and sealing the ends of the string. The main point for consideration according to the learned District Judge was whether the sealing of the waggon door in this manner was sufficient to exculpate the defendants from the charge of wilful negligence. Considering that the waggon had to travel over a very long distance from Howrah to Amritsar, and that there were no special watchmen employed, he came to the conclusion, that the defendants were guilty of wilful neglect, in sending the waggon without being locked. In support of his finding he relied on the following rulings of the Allahabad High Court: *B. N. W. Ry. Co.* v. *Haji Mutsaddi* (2), *A. I. R.* 1925 *All.* 172, and *A I. R.* 1925 *All.* 562.

Before proceeding to discuss whether the above facts, as found by the learned District Judge, amount to "wilful neglect", it is necessary to consider first of all the exact significance of that expression. In *Jagannath Baij Nath* v. *Secy. of State* (3), a Single Bench decision of this Court, Campbell, J., followed a definition of that term as given by the Judicial Commissioner, Sind, in *Firm of Daulat Ram* v. *Secy. of State* (4), which was as follows:

> A person is said to be guilty of wilful neglect when he intentionally and of set purpose does something which ought either to be done in a different manner or not at all, or omits to do something which ought to be done.

This definition is in accord with a recent pronouncement by their Lordships of the Privy Council. In *Ardeshir Bhikaji* v. *Agent G. I. P. Ry. Co.* (5) their Lordships adopted Lord Russell's interpretation of the expression "wilful neglect" in *R.* v. *Senior* (6) in which it was taken to mean that

> the act is done deliberately and intentionally and not by accident or inadvertance, but so that the mind of the person who does the act goes with it.

The question for decision in this appeal, therefore, is whether the failure to lock the waggon in which the plaintiff's goods were placed amounted to "wilful neglect" in the above sense in the circumstances of the case. In none of the cases relied upon by the learned District Judge is there any discussion as to the meaning of the term "wilful neglect" and hence it is not clear, what meaning was attached to it by the learned Judges who decided those cases. But the rulings are clearly distinguishable on facts. In *B. N. W. Ry. Co.* v. *Mutsuddi* (2), which was followed in the other two cases the facts found were that the waggon was not properly fastened, that the means used by the rail-

(1) A. I. R. 1918 P. C. 92 = 46 Cal. 189 = 45 I. A. 183 (P. C.).

(2) [1910] 7 A. L. J. 833=7 I. C. 160.
(3) A. I. R. 1926 Lah. 614.
(4) [1916] 9 S. L. R. 177=32 I. C. 551.
(5) A. I. R. 1928 P. C. 24=52 Bom. 169=55 I. A. 67 (P. C.).
(6) [1899] 1 Q. B. 283 = 68 L. J. Q. B. 175= 79 L. T. 562=63 J. P. 8=47 W. R. 367= 19 Cox. C. C. 219=15 T. L. R. 102.

way for fastening the doors were quite ineffective and that thefts were constant. The learned Judges remarked :

> Now if the railway company had knowledge as we assume from the finding of the Court below it had, that the fastening of the doors of the waggons were absolutely insecure and ineffective and that constant thefts were taking place, it was their duty to see that these fastenings were made more secure so that goods of consignors might be carried over the line with reasonable security.

No such evidence was produced in the present case. There was no evidence of any thefts, nor was any attempt made to prove that the method of sealing the doors was quite ineffective, and that other means were necessary to ensure the goods being carried over the line with reasonable security. The other two rulings relied upon by the learned District Judge are similarly distinguishable. In *A. I. R.* 1925 *All.* 172 there was evidence to show that ten cases of breaking of seals were being reported every month. In *A I. R.* 1925 *All.* 562 also there was evidence of prior thefts.

Certain other rulings were cited by the learned counsel for the respondent before us in support of the learned District Judge's decision, but these are also distinguishable on the same ground. In all these rulings, the occurrence of frequent thefts on the railway is emphasized and inference of " wilful neglect" is drawn from the inadequacy of the method of sealing of waggons known to the railway on account of thefts, vide inter alia *Bindraban* v. *G. I. P. Ry. Co.* (7), *Abdul Karim* v. *Secy. of State* (8), and *Mathra Prasad* v. *G. I. P. Ry. Co.* (9). As remarked in *Bindraban* v. *G. I. P. Ry. Co* (7) :

> As an abstract proposition, it is impossible to lay down that a more failure properly to secure waggons always amounts to wilful neglect or that the mere sealing of waggons necessarily excludes wilful neglect. Every case must depend on its own circumstances.

Where a railway company chooses year after year merely to seal waggons in spite of repeated thefts when the sealing has been proved by the thefts to be an inadequate safe-guard, the continuance of that inadequate method may show neglect on their part amounting to wilful and determined neglect not to avail themselves of any other measures that may be open : vide *Mathra Prasad* v. *G. I. P. Ry. Co.* (9). But no evidence of this description has been produced in the present case and it will therefore serve no useful purpose to discuss these rulings. It was urged by the learned counsel for the respondent that we should take judicial notice of the occurrence of thefts on the East Indian Railway from the reported cases cited before us. As to this point, it may be noted at the outset that the goods had to pass over two railways, and it has not been proved that the loss took place wholly on the East Indian Railway. But even apart from this, I find myself in accord with the view taken by the Mukerjee, J., on this point in *Baldeo Sahai* v. *B. B. & C. I. Ry. Co* (10), in which the learned Judge refused to take any such judicial notice and remarked that he was not aware of a single case in which judicial notice of such thefts had been taken. It would be obviously unfair to the defendants to take any such judicial notice of thefts on the railways. It was for the plaintiff to prove "wilful neglect" on the part of the defendant railways. If he wished to rely on the occurence of thefts and the inadequacy of the method of sealing waggons, it was for him to lead evidence on the point. If he had done so, the defendants would have been in a position to rebut that evidence.

It has been contended by the learned Government Advocate, that thefts on the defendant railways are not only not common, but are, in fact negligible in comparison with the volume of traffic carried by the railways, that the method of sealing waggons has not been proved by of experience to be inadequate, and that there is no warrant for the assumption that a system of locking (which is bound to entail an enormous amount of expenditure) will be of any substantial advantage. Attention was invited in this connexion to the fact that the Judicial Commissioner's Court in Oudh has frequently held that the practice of sealing waggons was the usual one and does not show any wilful neglect, vide *Bhagai Ram* v. *B. N. W. Ry.* (11) and *Rohilkand Kumaon Ry* v. *Gawri Lal* (12). If the plaintiff had led evidence as regards the occurrence of thefts, defend-

(7) A. I. R. 1926 All. 394=48 All. 766.
(8) A. I. R. 1926 Nag. 399.
(9) A. I. R. 1927 All. 751.

(10) A. I. R. 1926 All. 641.
(11) A. I. R. 1925 Oudh 631.
(12) A. I. R. 1926 Oudh 68.

ants might have been in a position to produce evidence in rebuttal in support of the above contention.

As stated already all that the learned District Judge has found in this case is that the wagons were merely sealed and not locked, although the train had to travel over a long distance and no special watchmen were employed. It seems impossible to draw from these facts alone any inference of "wilful neglect" as interpreted by their Lordships of the Privy Council in *Ardeshir Bhikaji* v. *Agent, G. I. P. Ry. Co.* (5). There is nothing on the record to show that the practice of sealing waggons in vogue had been proved to be an inadequate safe guard or that a system of locking waggons was known to be a necessary precaution in the case of a train travelling over a long distance and yet was deliberately and intentionally not adopted by the railways.

It was finally urged that it will be almost impossible for a plaintiff to prove "wilful neglect" in the above sense in any case. But it must be remembered that the plaintiff has himself chosen to send the goods under the special contract embodied in Risk-note B, at "Owner's risk", and reduced rates. The following remarks of Lord Buckmaster in *H. C. Smith Ltd.* v. *G. W. Ry. Co.* (13), in connexion with similar provisions in the Risk-note in that case are noteworthy.

> It is in my opinion a clause which throws upon the trader, before he can recover for any of the goods, the burden of proving in the first instance that the loss sustained arose from the wilful misconduct of the company's servants. It is perfectly true that this results in holding that the apparent protection afforded to the trader is really illusory; it practically gives him no protection at all, for it is often impossible for a trader to know what it is that has caused the loss of his goods between the time when he delivered them into the hands of the railway company's servants and the time when they ought to have been delivered at the other end of the journey. The explanation of the loss is often within the exclusive knowledge of the railway company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the railway company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. None the less, that is the burden that he has undertaken.

I accordingly hold that that the learned District Judge's finding on the question of "wilful neglect" cannot be sustained. I would, therefore, accept the appeal and dismiss the plaintiff's suit, but in view of all the circumstances leave the parties to bear their costs.

Addison, J.—I agree.

N.K. *Appeal accepted.*

(13) [1922] 1 A. C. 178.

A. I. R. 1928 Lahore 840

JAI LAL, J.

Puran Singh and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 177 of 1928, Decided on 28th March 1928, from order of Addl. Sess. Judge., Amritsar, D/- 9th January 1928.

Penal Code, Ss. 116 *and* 161—*Abetment of bribing Head Constable of Police—First and not second part of S.* 116 *applies.*

Where a person is accused of abetment of bribing a Head Constable of Police, the first part of S. 116 is applicable and not the second part as an offence under S. 161 is not cognizable by the police and is not one, the commission of which it is the duty of the head constable to prevent. [P 841 C 1]

Brij Lal—for Petitioners.

Judgment. — This is a petition for revision directed against the order of the Additional Sessions Judge, Amritsar, dismissing the petitioners' appeal against their conviction under Ss. 161/116 I. P. C.

The facts found are that Muhammad Ali, Head Constable of Police, while investigating a case of burglary received information that some wood which had been stolen from the Canal Department some time previously was in possession of one Thakar Singh, carpenter. He, therefore, sent for Thakar Singh and made enquiries from him and was told that one Chanchal Singh had given the wood to Thakar Singh. Consequently enquiries were made from Chanchal Singh.

When such enquiries were being made, the petitioners, Puran Singh and Mala Singh both tendered a bribe of Rs. 93 to the Head Constable with a view to drop the matter against Chanchal Singh. The Magistrate and the Sessions Judge have found the above facts to have been proved by the evidence on the record and though an attempt was made by the learned counsel for the petitioners to show that the evidence as against Puran Singh is not good, I am not prepared to

differ from the conclusion of the Courts below.

The petitioners have been sentenced to rigorous imprisonment for one year each and this petition has been admitted for consideration of the question whether the first or the second part of S. 116 applies. If the first part applies then the maximum sentence that could be awarded to the petitioners was nine months. Under the second part it may amount to eighteen months. The first part of S. 116 provides that whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and in the absence of an express provision to the contrary in the Indian Penal Code, be punished with imprisonment provided for that offence for a term which may extend to one-fourth part of the longest term provided for that offence. The second part of this section provides that if the abettor or the person abetted is a public servant whose duty it is to prevent the commission of such offence the abettor shall be punished with imprisoment for a term which may extend to one-half of the longest term provided for that offence.

The question, therefore, is whether in the present case Muhammad Ali, Head Constable, was a public servant whose duty it was to prevent the commission of an offence under S. 161, I. P. C. An offence under S. 161 is not cognizable by the police and no provision of law has been brought to my notice that it was the duty of the Head Constable to prevent the commission of such an offence. Under the circumstances it is the first part of S. 116 that is applicable to the facts of this case, and, therefore, accepting the petition, I reduce the sentence awarded to the petitioners to what they have already undergone. They will be discharged from their bail bonds.

D.B./R.K. *Sentence reduced.*

A. I. R. 1928 Lahore 841

FFORDE AND AGHA HAIDAR, JJ.

Begg Sutherland & Co. and *another*—Defendants—Appellants.

v.

Bahadur Chand—Plaintiff — Respondent.

First Appeal No. 2272 of 1925, Decided on 12th March 1928 from decree of 1st Cl. Sub-Judge, Lahore, D/- 31st August 1925.

(a) Civil P. C., O. 3, R. 1—Counsel's clerk.

Presence of a counsel's clerk does not mean presence of the counsel. [P 842 C 1]

(b) Damages—There is no preliminary decree in suits for damages.

A preliminary decree which is followed by a final decree is unheard of in suits for breach of contract claiming damages. [P 842 C 1]

(c) Civil P. C., S. 2 (2) —Suit for damages—Agreement by parties to determine damages themselves — Judgment before ascertaining damages—Case is not finally and completely disposed of—Appeal against decree is premature.

In a suit for damages parties agreed to calculate the damages themselves but before they determined them, a judgment was passed without the amount of damages being ascertained. The defendants field an appeal.

Held : that the appeal was premature, as the suit had not been finally and completely disposed of by the Court below and consequently there was no decree against which an appeal could be filed. [P 843 C 1]

Moti Sagar and *Jai Gopal Sethi*—for Appellants.

Badri Das and *J. L. Kapur*—for Respondent.

Agha Haidar, J. — The plaintiff brought this suit against the defendants on the allegation that the defendants had undertaken to supply him with quotations in respect of certain sugar transactions and that the defendants were guilty of breach of contract as a result of which the plaintiff suffered loss. The plaintiff accordingly claimed a tentative sum of Rs. 5,100 as damages. He accordingly prayed that :

a decree may be passed against defendants severally and jointly for Rs. 5,100 or such sum as may be found due on examination of the defendants' book and record.

I may note here that the plaint is a very inaritistically drawn up document which is not easy to understand. The written statement is not better ; but for the purposes of this appeal it is not necessary to discuss the pleadings at length.

The Subordinate Judge, First Class, fixed four issues in the case and recorded findings on three of them, namely, issues 1, 2 and 3. As regards issue 4, namely : "To what relief is the plaintiff entitled ?", the Subordinate Judge refers in his judgment (p. 46 of the printed paper-book Part 1) to an agreement arrived at between the parties before him according to which the parties had expressed their willingness to calculate the damages themselves. Before the parties had determined the amount of

damages the Subordinate Judge concluded his judgment in these words :

I accordingly give plaintiff a decree in terms of my findings noted above with costs. The amount of damages will be fixed in the final decree as soon as the calculations are put in by the parties.

This document is dated 31st August 1925. Below this are the following words. "Announced. Plaintiff and the clerk of the defendants' counsel present." I may here observe, parenthetically, that the Subordinate Judge, First Class, ought to have known that the Code of Civil Procedure does not recognize the status of a counsel's clerk, and he ought not to have further disfigured his already unsatisfactory judgment by making a reference to the counsel's clerk as the individual in whose presence he announced his judgment. Below this quotation the following words appear over the signatures of the Subordinate Judge:

The calculations tc be put in on 10th October 1925.

There is a document printed at p. 47 of the paper-book which bears the heading

" simple money decree "

and, after giving the designation of the Court, the number of the suit, and the names of the parties with the amount of the claim runs as follows :

This suit coming on this day for final disposal before me in the presence of plaintiff and Mr. Jiwan Lal, advocate for the plaintiff, and Mr. Jai Gopal Sethi for the defendant, it is ordered that a decree be given to the plaintiff with costs in terms of my findings in the judgment. The amount of damages will be fixed in the final decree as soon as the calculations are put in by the parties.

This document bears the same date as the last order passed by the Subordinate Judge.

Now, the whole procedure adopted by the Subordinate Judge in the present case shows deplorable ignorance of the elementary principles of law. The parties are agreed before us that the present suit is one for damages for breach of contract and a perusal of the pleadings which are not by any means intelligible, also point in the same direction. There are certain well-known suits in which the Court passes a preliminary decree which is followed by a final decree, but a preliminary decree, which is followed by a final decree is unheard of in suits for breach of contract claiming damages. There is only one decree in such suits, and if the plaintiff succeeds, the decree mentions the amount of damages awarded to him and the costs if any, allowed to him by the Court. No question of preliminary and final decree arises. In this view the Subordinate Judge was wrong in passing, what he considers to be a preliminary decree in the suit. He ought to have waited till the parties, according to their mutual agreement, had calculated the amount of damages, and then he should have decided the case once and for all. The so-called decree is a document which on the face of it is meaningless and contrary to law as it does not contain a word about what the Judge had decided in his judgment. It simply says that :

a decree be given to the plaintiff in terms of my findings in the judgment.

This is a very unsatisfactory way of drawing up a decree. Moreover, this document refers to "the amount of damages" which have not yet been ascertained and which would form the subject-matter of future adjudication after the parties have filed their calculations. Such an imperfect and incomplete document cannot be called a decree. The whole thing shows colossal ignorance of all the recognized canons of procedure relevant to such cases. It appears that some clerk has written out on the ordinary printed form of a money decree the substance of the Subordinate Judge's interlocutory order as he understood it, but this would not make it a decree from which an appeal is allowed by law. I may note that the so-called decree is signed by another Subordinate Judge and not by the Judge who passed the orders dated 31st August 1925.

The defendants have filed an appeal to this Court. The memorandum of appeal contains no less than fourteen grounds but curiously the real vices in the procedure adopted by the Subordinate Judge have not been specifically dealt with in the grounds of appeal, and in para. 4 the so-called decree has been criticized in very mild terms as being merely vague and indefinite and its patent irregularities have not even been hinted at.

The question as to what should be done by this Court in this appeal is a difficult one to decide. There is no doubt, however, that the suit has not been finally diposed of, as the all-important question of the amount of damages claimed by the plaintiff has not yet been decided. In fact the document itself points out to certain steps which

will have to be taken before the suit would be finally disposed of. Therefore, without expressing any opinion whatsoever upon the conduct of the suit in the Court below and the findings on issues 1, 2 and 3 recorded by the trial Judge, I would simply hold that the appeal is premature, that the suit has not yet been finally and completely disposed of by the Court below and that there is consequently no decree against which an appeal could be filed. Under these circumstances, I would hold that no appeal lay and dismiss the appeal but, having regard to the document, called a "simple money decree" at p. 47, which must have misled the defendants-appellants, with the result that they filed the appeal to this Court, I would make no order as to costs The result is unfortunate but inevitable and is due entirely to the erroneous procedure adopted by the Subordinate Judge.

A copy of this order should be sent to the Subordinate Judge whereever he is posted at present for his perusal.

Fforde, J.—I agree.

N.K. *Order accordingly.*

A. I. R. 1928 Lahore 843

SHADI LAL, C. J.

Hassu—Petitioner.

v.

Ishar Singh—Accused—Respondent.

Criminal Revn. No. 46 of 1928, Decided on 20th April 1928, reported by Dist. Magistrate, Montgomery, on 20th December 1927.

Criminal P. C., S. 439 — Order accepting withdrawal of complaint under S. 161, Penal Code, is not revisable.

Order of a Magistrate allowing a complainant to withdraw a case under S. 161, amounts to an acquittal and can be appealed against by the Local Government. It cannot therefore be interfered w th in revision. [P 843 C 2]

Abdul Rashid—for Respondent.

Report.—This is a case under S. 161 against Ishar Singh, Head Constable. I sent for the file under S. 435, Criminal P. C. I sent for the accused Ishar Singh through the Superintendent of Police. Isbar Singh replied that he could not attend as certain circumstances did not allow him to leave his post. I consider, however, that he could have come if he had wished. He has been given an opportunity to attend. I, therefore, proceed without him. The prosecution story is that Ishar Singh went to a village to investigate a case. He arrested one Hassu on suspicion, and finally said he would release him on receiving his *haq* of Rs. 15. The Rs. 15 was paid and Hassu was released. There are a number of witnesses, who say they were present at the time, and others who say they were present a few days later, when the Superintendent of Police was on tour and Hassu went to complain to him. Ishar Singh is said to have told Hassu not to report the matter on which condition he wouid return the Rs. 15. The witnesses include a Zaildar, and one or more lambardars The case was first heard by Diwan Khan Chand, who framed a charge and heard some of the re-cross-examination. He was then transferred and the case went to Sayad Qasim Ali Shah. The accused asked for a de novo trial. The file then shows that Hassu appeared and told the Court that he could not proceed with the case as his witnesses would no longer support him. The Magistrate then accepted a withdrawal of the case and acquitted the accused. It is clear that such a withdrawal is illegal and that the Magistrate could not pass orders without deciding on the merits of the case. The prosecution witnesses should clearly have been summoned; if they contradicted their former statements, they would have been liable for perjury for either the one statement or the other. In cases of this sort where a public official is accused of corruption, and a charge has been framed against him, it is very desirable that a proper decision should be reached on the merits of the case. I, therefore, consider that the case is of sufficient importance to send up on revision. I accordingly send the file to the High Court for orders with the recommendation that a re trial be ordered.

Order.—The learned counsel for the Crown admits that, though the order of the trial Magistrate is open to objection, the District Magistrate cannot ask this Court to set it aside on revision, as the order in question amounts to an acquittal, and the Local Government is competent to prefer an appeal against acquittal. Accordingly, I decline to accept the recommendation made by the District Magistrate.

N.K. *Order accordingly.*

* A. I. R. 1928 Lahore 844 (1)

ZAFAR ALI, J.

Mt. Allah Di and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 472 of 1928, Decided on 18th May 1928, from an order of Sess. Judge, Karnal, D/- 3rd December 1927.

(a) Penal Code, S. 494—Accused marrying a woman having husband—Accused is guilty—Penal Code makes no distinction between void and invalid marriages.

The word "void" which occurs in S. 494 is not used in the technical sense in which it is used in the Mahomedan law. Penal Code makes no distinction between a void and an invalid marriage and the term "void" used therein covers marriages of both classes. [P 844 C 1, 2]

A Mahomedan was prosecuted for bigamy. The accused knew of the former marriage of the woman married by him. It was argued that the marriage with the accused being only invalid and not void under Mahomedan law, the accused could not be said to have committed bigamy.

Held ; that the accused was guilty. [P 844 C 2]

(b) Criminal P. C., S. 403—Magistrate, acquitting an accused, under S. 498 not competent to try him under S. 494—He can be tried under S. 494 subsequently.

Where a person is acquitted under S. 498, Penal Code, by a Magistrate, who was not competent to try him under S. 494, he can subsequently be tried under S. 494, and the finding of the former Magistrate is not binding on the Magistrate trying him under S. 494. [P 844 C 2]

Muhammad Amin Khan—for Petitioners.

Des Raj Sawhney—for the Crown.

Judgment.—The learned counsel for the petitioners does not now contest the finding that Abdul Ghafur, petitioner, knew of the former marriage of the woman married by him. But he points out that the Mahomedan law makes a distinction between a void and invalid marriage and argues that the marriage with a woman, who is the wife of another man being invalid and not void according to the Mahomedan law, the petitioner Abdul Ghafur, who married such a woman, could not be said to have committed on offence under S. 494 read with S. 109, I. P. C. There is no force in this argument, because the word "void" which occurs in S. 494 is not used in the technical sense in which it is used in the Mahomedan law. The Indian Penal Code makes no distinction between a void and an invalid marriage and the term "void" used therein covers marriages of both classes.

One other point taken is that as the petitioner had previously been acquitted of a charge under S. 498, I. P C., he could not subsequently be convicted under S. 494 of the Code. But the case under S. 498 was tried by a Magistrate of the Second Class who was not competent to try a case under S. 494; so the Magistrate who did so was not bound by the finding of the former Magistrate.

The only other point taken was that the sentences that have been passed upon the petitioners are excessive. The sentence in the case of the female petitioner appears to be so, and I reduce it to simple imprisonment for six months. I see no reason for reducing the sentence of Abdul Ghafur. The petition is accepted to the extent stated above.

R.K. *Order accordingly.*

A. I. R. 1928 Lahore 844 (2)

ADDISON, J.

Emperor—Petitioner.

v.

Data Ram and *another*—Accused—Respondents.

Criminal Revn. No. 1862 of 1927, Decided on 10th February 1928, reported by Sess. Judge, Karnal, on 11th November 1927.

Criminal P. C., S. 439—High Court can interfere with acquittals where injustice is caused.

High Court has jurisdiction to interfere with acquittals in revision, though this is not encouraged, where serious injustice has been caused by an error of law. [P 845 C 2]

Where the accused were acquitted on account of wrong appreciation of a point of law with the result that an assault on an officer of Court, while on duty, had been allowed to go unpunished, the acquittal was set aside. [P 845 C 2]

Public Prosecutor—for Petitioner.

Kahn Chand for *Amin Lal*—for Respondent.

Report.—Surja Mal, Mahajan of Panipat, obtained a money-decree against Data Ram, Lodha of Panipat and in execution of this decree he took out a warrant of attachment against Data Ram. Gita Ram and Shakur Ali process-servers went to Data Ram's place on 2nd January 1927, to execute this warrant.

A quantity of hemp was lying just outside the house of Data Ram. At the instance of the decree-holder, the process-servers proceeded to attach this hemp, but they were resisted by Data Ram and Amin Lal, who not only abused the process-servers, but assaulted them as well. The District Magistrate on the recommendation of the Senior Subordinate Judge, ordered the trial of Data Ram and Amin Lal under Ss. 183 and 186, I. P. C. The case was sent for trial to the Court of Qazi Fazal Ilahi, Tahsildar, Panipat, exercising powers of a Second Class Magistrate, who acquitted the accused on 31st May 1927.

Surja Mal, decree-holder, has filed a petition for revision of the above order.

The trial Magistrate has held that the process-servers were resisted by Data Ram and Amin Lal, but notwithstanding this finding the learned Magistrate has acquitted Data Ram and Amin Lal on the ground that the hemp sought to be attached had already been sold by Data Ram to Puran Chand Mahajan whose servant had come at the time of attachment to take delivery of the hemp, and that for this reason Data Ram and Amin Lal had the right to prevent the bailiffs from attaching the property.

This defence was never raised by Data Ram and Amin Lal during the course of the trial. It was a defence made out for the accused persons by the trial Court and it was based on some evidence which had come on the record from the prosecution side. Assuming that the hemp sought to be attached had been sold to Puran Chand, who had sent his man to take delivery thereof, the fact cannot be denied that delivery had not yet been given to Puran Chand through his servant. The property was still lying at Data Ram's place Then there is no evidence on the record that this property had, as a matter of fact, been sold to Puran Chand. Data Ram and Amin Lal should have left it to Puran Chand to object to the attachment after it had been made and should not have resisted the execution of the warrant. The question of title was not to be determined by the executing bailiffs on the spot. The learned Additional Sessions Judge, who first heard the petition for revision, was of the opinion that any resistance to the bona fide performance of duty would be punishable in law. I agree with this view. Judgment-debtors cannot take it upon themselves to decide whether or not a certain property in their possession sought to be attached by the decree-holder should be attached or should not be proceeded against. So long as the property is in their possesssion they have no right to offer resistance to the attachment thereof.

In my opinion the respondents, Data Ram and Amin Lal, have been acquitted on insufficient grounds. They never put up the defence in the trial Court that they had sold the property to Puran Chand or that the property was no longer in their possession. They simply pleaded that they did not offer any resistance to the attachment. This defence was discredited by the trial Court which should not have created a line of defence, which was not taken up by the respondents.

I would, therefore, refer the case for the orders of the Hon'ble Judges of the High Court with the recommendation that the wrong order of acquittal passed by the Magistrate be set aside.

Order.—The learned Sessions Judge has given good reason why this revision should be accepted. This Court has jurisdiction to interfere with acquittals in revision though this is not encouraged. Where serious injustice has been caused by an error of law it should do so. In this case the Magistrate obviously erred in his appreciation of the law, with the result that an assault on the civil officers of the Courts, acting in exercise of their duty, has been allowed to go unpunished. It is imperative that such officers should be protected in proper cases. As Government did not appeal, the Sessions Judge took the only course open to him. This is, in my opinion, an exceptional case. I accept the reference for the reasons given by the learned Sessions Judge, set aside the acquittal of the respondents, and direct them to be re-tried by a First Class Magistrate at headquarters to be nominated by the District Magistrate.

A.L./R K. *Reference accepted.*

A. I. R. 1928 Lahore 846

SHADI LAL, C. J. AND JOHNSTONE, J.

Sher Singh and *another*—Plaintiffs—Appellants.

v.

Gordhan Das and *another*—Defendants—Respondents.

First Appeal No. 127 of 1923, Decided on 26th April 1928, from decree of Sr. Sub-Judge, Delhi, D/- 9th December 1922.

Contract—Construction—Indent form making seller liable for damages caused by non-shipment—Sellers must request for an extension of time if goods are shipped late.

The plaintiff indented on the defendants some piecegoods. The indent forms provided that should the goods of the contract or any portion of them not be shipped by the specified time the contract for the quantity so delayed shall at our (buyers') option if exercised within three days be either cancelled without an allowance or such extention of time as you (sellers) may ask for shall be granted by us at the allowance as specified,

Held: that if the goods are shipped late and that is a matter within the knowledge of the sellers, the sellers must on pain of damages ask for an extension of time and unless they made a request plaintiff could not exercise their option: *A. I. R.* 1927 *Lah.* 557; *Dist.* [P 847 C 1]

Raj Narain, Sardha Ram and *Mehr Chand Mahajan*—for Appellants.

Moti Sagar, Nanwan Mal and *Kishen Dial*—for Respondents.

Johnstone, J.—The plaintiffs indented on the defendants for 31 cases of piece goods, of three different kinds, shipments for each kind of goods to be in two lots, June and July 1920 shipments. The contracts were made on 3rd November 1919 on the usual printed forms of the Delhi Piecegoods Association and contained the following written agreement:

We agree to accept the goods without any allowance or without requiring any certificate of the cause of delay if shipped late up to two months from extreme date of shipment.

The numbers of the indents were 322, 291 and 298. The defendants made delivery of portions of each kind of goods and the plaintiffs' suit was for damages for non-delivery of two cases under first indent, ten cases under the second indent and 11 cases under the third indent. The total claim, including interest, amounted to Rs. 13,896-6-9.

The defendants preferred several pleas against the claim and issues were framed on the parties' pleadings. Of those issues the majority was decided in the plaintiffs' favour, but the trial Court held that the plaintiffs' claim for damages was barred under Cl. 8 (b) of the indent forms. The quantum of damages was not determined, and the suit was dismissed by reason of the interpretation placed on Cl. 8 (b) just mentioned.

It will be seen from the preceding observations that the whole case hinges on the proper interpretation of Cl. 8 and for the sake of convenience I quote that clause and its sub-Cls. (a) and (b):

Should the goods of a contract or any portion of them not be shipped by the specified time the contract for the quantity so delayed shall at my (our) option if exercised within three days either be cancelled without an allowance or such extension of time as you may ask for shall be granted by me (us) at allowance as under, otherwise the goods shall be cancelled.

For cotton goods (goods on which 3½ per cent. import duty is charged):

If shipped one month or under later than the time specified the total allowance to be 1½ per cent.

If over one month but not more than two months 2½ per cent.

If over two months but not more than three months 3½ per cent.

If over three months later than the time specified 7½ per cent.

For woollen and other goods. (Goods on which 7½ per cent., import duty is charged):

The allowance in the

first instance not to exceed ...			2½ per cent.
second	...	...	4 do.
third	...	...	5 do.
fourth	...	...	7½ do.

(a) All the allowance before mentioned shall be calculated on the sale price of the contract and any larger or subsequent allowance for late shipment whether expressly named above or the subject of a separate agreement shall be in substitution of and not in addition to any smaller allowance or any allowance previously granted.

(b) In case of non-shipment within six months from extreme date of shipment excepting when non-shipment is due to cause as stated below I (we) hold you responsible to pay me (us) whatever damages may be assessed by arbitration as provided for below, provided that in case of non-delivery or non-shipment a claim will be time-barred if not made within eight months from extreme date of shipment.

Sub-clause (c) refers to delay on account of storms, fires, war and so forth and has no concern with the facts of the present suit.

Various interpretations of these terms have been suggested in the course of arguments, but after a careful consideration of the terms we have no hesitation in assigning the following meaning to them.

It is necessary for our purpose first to interpret sub-Cl. (b). That sub-clause refers to cases of non-shipment within

six months from the extreme date of shipment (subject to exceptions not relevent to our enquiry). It provides that the sellers are liable to damages and that the damages are to be assessed by arbitration as provided in Cl. 15, subject to the condition that the buyers make their claim within the specified time. As I shall show, this sub Cl. (b) does not apply to the facts before us for the reason that this is not a case of non-shipment later than six months from the extreme date of shipment allowed by the contracts.

I turn now to the first part of Cl. 8. Here we are concerned with delay in shipment not exceeding six months. In such cases allowances, at percentage varying with the degree of lateness are provided for. If the goods are shipped late—and that is a matter within the knowledge of the sellers—the sellers must ask for an extension of time. The buyers receive this request for extension and then they can exercise an option. Their option is: (a) to cancel the contract within three days and get no allowance, or (b) within three days to allow an extension and by doing so get the allowance provided for in the second part of the main clause. If the events mentioned above do not happen, then "the goods shall be cancelled." The primary duty rests with the sellers who, as soon as they realize that the goods are shipped late, must ask for an extension. If they do not perform that primary duty they are liable for damages.

It was argued on behalf of the defendants that the sellers need not ask for an extension and that damages can only be claimed if the goods are shipped more than six months late. But with neither those propositions can I agree, for they both conflict with the clear provisions of Cl. 8.

The shipments were of June and July 1920 and consequently the dates within which the goods had to be shipped were 10th July and 10th August, the usual ten days' grace being allowed. The manuscript terms of the contracts have been interpreted by both parties as extending the extreme dates of shipments by two months. It is admitted before us that the actual dates of shipment of the disputed cases were as follows :

Indent No. 322 6th November 1920.
Indent No. 291 1st lot 27th November 1920.
2nd lot 3rd January 1921.
Indent No. 293 1st lot 10th November 1920.
2nd lot 29th November 1920.

From these dates it is apparent that the goods were shipped within six months of the proper dates and, therefore, as I have pointed out above, Cl. 8 (b) of the indent forms could not apply.

The shipments were, however, all made late and the main question was whether the defendants had asked for extension of time. It is proved on the record, vide p. 13 of the printed book, that the defendants were aware of the delay in shipments as early as the end of August 1920. They took no action, however, until their sending of invoices to the plaintiffs in December 1920 and January to March 1921. The invoices contain foot-notes regarding the charging of interest and godown rent and so forth, but nowhere is there any request either in the invoices or in the covering letters for an extension of time. Nor was it pleaded by the defendants that they had asked for an extension. The plaintiffs returned the invoices and refused to accept the goods. It is true that before the plaintiffs did this they sent the invoices to their buyers, but that circumstance does not affect the justice of their claim against the defendants It was contended for the defendants that the mere sending of an invoice (though even the allowance due under Cl. 8 was not noted thereon) was equivalent to a request for extension of time, but that contention cannot be accepted. Reliance, too, was wrongly placed on *Mansa Ram* v. *Mangalsain* (1) and *Prag Das* v. *Muni Lal A. I. R.* 1927 *Lahore* 557, for in both of those cases a request for extension of time was made expressly or impliedly and was made before the due date. I am not prepared to hold that the mere sending of invoices was an express or implied request to the plaintiffs to exercise the option allowed to them under Cl. 8. The plaintiffs were justified in declining to accept the invoices, and the fact that they afterwards demanded a survey and so forth, apparently under the impression that the shipments were more than six months late, does not alter the fact that the defendants had already broken the contract and were liable in damages for non-delivery.

The trial Court observed that, but for its interpretation of Cl. 8 of the indents it would have held the plaintiffs to be ready and willing to perform their part

(1) A. I. R. 1922 Lah. 149.

of the contracts. On this subject I have no doubt. Ranbir Singh plaintiff went into the witness box and explained that during 1920 his firm had taken delivery from the defendants of goods worth between Rs. 2½ lakhs and Rs. 3 lakhs and that his firm had a large deposit in hand with the defendants. That statement was not rebutted and I am satisfied that readiness and willingness were proved.

The quantum of damages has not been assessed by the Court below and the case must be remanded for a decision on that point. I would accept this appeal for the reasons given above and direct the Senior Subordinate Judge to come to a finding on the sixth issue. The stamp on appeal shall be refunded and other costs shall follow the event.

Shadi Lal, C. J.—I concur.

A.L/R.K. *Case remanded.*

A. I. R. 1928 Lahore 848

ZAFAR ALI, J.

Kedar Nath and *another*—Petitioners.

v.

Dwarka Das-Badri Das — Respondents.

Civil Misc. Petn. No 649 of 1926, Decided on 4th July 1927.

Provincial Insolvency Act, S. 36—*Insolvency proceedings started at* R *on application of debtors and subsequently at* D *on application of creditors—Creditors at* D *having to realize more amount than creditors at* R *and to contest alienation of property at* D *by debtor—Creditors at* R *agreeing to accept part payment of debts out of sale proceeds of property at* R—*Both Courts should continue proceedings—Which should annul its order of adjudication should be decided by them.*

Insolvency proceedings were started at Rawalpindi and subsequently at Delhi at the instance of the debtor and the Delhi creditors respectively. The Delhi creditors of the debtor had not only to realize a much larger sum than his Rawalpindi creditors, but had also to contest an alienation made by him. The Rawalpindi creditors agreed to accept part payment of their debts out of the sale-proceeds of the debtors' property situated at Rawalpindi :

Held : that having regard to the peculiar circumstances of the case it would be proper to allow the proceedings to continue in both the Courts leaving it to them to decide ultimately which of them should annul the order of adjudication that it might make. [P 849 C 1]

B. Narain—for Petitioners.

Sardha Ram, Shiv Narain, Nanak Chand, Gobind Ram Khanna and *Shiv Ram*—for Respondents.

Order.—It appears that the brothers Kedar Nath and Sheo Parshad, proprietors of the firm "Mul Chand-Ganga Bishan" of Delhi belong to Rawalpindi, but they have long been established at Delhi. They carried on business at Delhi, Rawalpindi, Amritsar and Karachi and had creditors in all these places. On 17th April 1926, they lodged an insolvency petition at Rawalpindi. On 2nd June 1926, one of their creditors applied to the insolvency Court at Delhi for their being adjudged insolvents. The Rawalpindi insolvency Court made an interim order appointing a Receiver. The debtors applied to this Court praying that the case against them pending at Delhi be transferred from that Court to the Court of the District Judge of Delhi or to the Court at Rawalpindi. This petition is opposed by all the creditors of Delhi except three. Mr. Sardha Ram and Mr. N. C. Pandit who appear on behalf of the opposing creditors of Delhi urge that proceedings should continue in both the Courts as provided in S. 36, Provincial Insolvency Act, and that it should be left to those Courts to decide which of them should ultimately annul the order of adjudication that it might pass to enable the other Court to carry on the insolvency proceedings. Further they urge that the Rawalpindi creditors having made a compromise with the debtors are not interested like the creditors of Delhi to exert themselves to get at every available property belonging to the debtors and to contest the alienations made by them. Mr. Gobind Ram Khanna who appears for the three non-opposing creditors of Delhi desires that the proceedings at Rawalpindi should continue. Pandit Sheo Narain who appears for the Rawalpindi creditors urges, on the other hand, that the Rawalpindi Court which commenced the proceedings earlier should be given preference and should be allowed to continue them and that the Delhi Court should be directed to stay its proceedings. In support of his contention he cites *In re Aranvayal Sabhapaty Moodliar* (1) and *In the matter of William Watson* (2). In the former case a Division Bench of the Bombay High Court came to the following conclusion :

It appears to us that it would not be just or equitable to allow the proceedings in both

(1) [1897] 21 Bom. 297.
(2) [1904] 31 Cal. 761=8 C. W. N. 553.

Courts to go on concurrently. This would lead to most undesirable conflict of jurisdiction ; and as the proceedings in Madras were prior in time, and all the assets of the insolvent are vested in the Official Assignee there, this Court ought to yield to the prior claim of the Court at Madras. The best course, we think, under the circumstances will be to stay the proceedings here till further orders of the insolvent Court, leaving the Bombay creditors to take such steps in Madras as they may be advised to take. This may appear to be hard upon them, but it would be equally hard on the Madras creditors to be compelled to take steps in Bombay, ...

The following were the conclusions inter alia arrived at in the Calcutta cases :

The insolvency Courts in India have a discretion in making an adjudication order notwithstanding the existence of a prior adjudicating order in another country ; provided the conditions of the Insolvency Act are satisfied and there is no valid reason to the contrary. The presence of large assets within the jurisdiction of those Courts is a strong circumstance in favour of making such an order.

The different High Courts in India exercising concurrent jurisdiction should also be guided by the above mentioned rule, but where there is a conflict, having regard to questions of convenience, one Court should yield to another as it may not be just or equitable to allow the proceedings in all the Courts to go on concurrently.

But in the present case the debtors owe to the Delhi creditors Rs. 97,334-4-3, while to the Rawalpindi creditors they owe only Rs. 40,961-11-3. Further the debtors own very valuable properties at Delhi and it is stated that they have alienated the main portion thereof to a relative of theirs. Thus the Delhi creditors have not only to realize a much larger sum than the Rawalpindi creditors, but have also to contest an alienation made by the debtors. Further, it is clear that the Rawalpindi creditors are not concerned in taking a keen interest in the proceedings affecting the Delhi property and debts due to the Delhi creditors. They have already made a compromise with the debtors and agreed to accept part payment of their debts out of the sale-proceeds of the debtors' property situated at Rawalpindi. Having regard to the peculiar circumstances of this case it would be proper to allow the proceedings to continue in both the Courts leaving it to them to decide ultimately which of them should annul the order of adjudication that it might make. The debtors' application, is, therefore, dismissed with costs.

D.B./R.K. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 849

ZAFAR ALI AND JAI LAL, JJ.

Bansi Lal—Defendant—Appellant.

v,

Gopal Lal—Plaintiff—Respondent.

First Appeal No. 529 of 1927, Decided on 4th April 1928, from decree of Sr. Sub-Judge, Gujranwala, D/- 31st January 1927.

* *Civil P. C., Sch. 2, para. 21 (2)—Decree not in accordance with award—Whole case cannot be re-opened in appeal.*

Although a person can appeal against the decree passed on an award, so far as it is in excess of or not in accordance with the award, he is not entitled to re-open the whole case and to address on all other questions which were raised before the lower Court. [P 850 C 1]

Shamair Chand and *Qabul Chand Mital*—for Appellant.

Madan Gopal and *Jagan Nath Aggarwal*—for Respondent.

Judgment.—This is an appeal from the decree of the Senior Subordinate Judge, Gujranwala.

It appears that during the pendency of the suit in his Court the dispute was referred by the parties to arbitration. The award of the arbitrator was that the defendant should hand over to the plaintiff a certain factory within a specified time and on his failure to do so he should pay to the plaintiff Rs. 13,000. Objections were taken to the award by the appellant which were finally decided against him ; but the Senior Subordinate Judge being of the opinion that the time for handing over possession of the factory having expired on the date when he decided the case, the only practicable course was for him to grant the plaintiff a decree for Rs 13,000 and costs. It is against this decree that the defendant appeals. The only ground on which an appeal in a case like this is entertainable is that the decree is in excess of or not in accordance with the award. There is no doubt that the decree in this case technically is not in accordance with the award which provided that the defendant shall give possession of the factory to the plaintiff before a certain date and on failure to do that shall pay Rs. 13,000. The Senior Subordinate Judge has not incorporated the first condition in his decree and to that extent his decree cannot be substained.

We are, however, unable to agree with the learned counsel for the appellant and

because he can appeal against the decree, so far as it is not in accordance with the award, he is entitled to re-open the whole case and to address us on all other questions which were raised before the Senior Subordinate Judge. His attack must be confined to the legality of the decree as compared with the award.

We accept this appeal and in place of the decree passed by the Senior Subordinate Judge we direct that a decree be passed to the effect that the defendant shall give possession of the factory mentioned in the award of the arbitrator to the plaintiff within the time fixed by the arbitrator and on his failure to do so shall pay Rs. 13,000. In other words the decree shall be in accordance with the award irrespective of the consideration that the date fixed by the arbitrator for the giving possession of the factory had expired on the date of the decree. Under the peculiar circumstances of the case we leave the parties to bear their own costs in this Court.

R.K. *Appeal accepted.*

A. I. R. 1928 Lahore 850

ADDISON, J.

Ghulam Rasul—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1764 of 1927, Decided on 20th January 1928, reported by Sess. Judge, Dera Ghazi Khan, on 15th October 1927.

Criminal P. C., S. 526 (8)—Intention notified to the Court for transfer of a case—Reasonable postponement must be granted—Proceedings after refusal are unwarranted and ought to be set aside.

When an accused notifies to the Court before which his case is pending, his intention to make an application under S. 526, Cl. (8), for a transfer of his case, it is the duty of the Magistrate to grant adjournment. The Magistrate has no power to proceed with the hearing of the case until a reasonable postponement has been granted. All the subsequent proceedings after his refusal are unwarranted by law and ought to be set aside. [P 580 C 2]

Report.—The petitioner is a process-server attached to the Court of Khan Bahadur Sardar Mir Dost Muhammad Khan, Honorary Subordinate Judge and Magistrate at Rojhan. A complaint was filed against him in that Court under S. 161, I. P. C, for having accepted illegal gratification in the discharge of his duties as a process-server. Notice of this charge was served on accused on 18th June last. The petitioner appears to have instructed Lala Parma Nand, Advocate, on the same day to file a petition for transfer of the case which was presented by him on 20th June to the District Magistrate at Dera Ghazi Khan. On 19th June, when the case was taken up for hearing by the Honorary Magistrate, the accused intimated that he had submitted an application for the transfer of his case from that Court and prayed that proceedings be stayed. The Honorary Magistrate refused to do so and proceeded to record evidence. The petitioner has been convicted and sentenced to a fine of Rs. 40.

Undes S. 526, Cl. (8), when an accused notifies to the Court before which his case is pending his intention to make an application under that section in respect of his case, it is the duty of the Magistrate to grant an adjournment, and it has been held in numerous cases that a Magistrate has no power to proceed with the hearing of the case until a reasonable postponement has been granted. All the subsequent proceedings after the refusal are unwarranted by law and ought to be set aside: Sohoni's Code of Criminal Procedure, Edn. 12, p. 1117.

The Court of the Honorary Magistrate is situated at a distance of 110 miles from the headquarters. The petitioner could not leave that place without permission which was not granted, and consequently, he had no reasonable opportunity for getting his case transferred.

I recommend that the proceedings be quashed, the conviction set aside and a retrial ordered.

Order.—For reasons given by the learned Sessions Judge I quash the trial of Ghulam Rasul under S. 161, I. P. C., set aside his conviction and order his retrial before a Magistrate at headquarters to be nominated by the District Magistrate. The fine, if paid, will be refunded.

A.L./R.K. *Conviction set aside.*

A. I. R. 1928 Lahore 851 (1)

TEK CHAND, J.

Khuda Yar—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1884 of 1927, Decided on 4th May 1928, from order of Dist. Magistrate, Lyallpur, D/- 24th August 1927.

Punjab Restriction of Habitual Offenders Act (5 of 1918), Ss. 3 and 7—Order under this Act can be substituted by District Magistrate in appeal by an order under S. 110, Criminal P. C.

The Restriction of Habitual Offenders Act only provides for a higher penalty for offenders who are found to be incorrigible.

A District Magistrate in appeal has jurisdiction to substitute an order under S. 110, Criminal P. C., for that passed by the trial Magistrate restricting a certain person proceeded against under the Restriction of Habitual Offenders Act, [P 851 C 1, 2]

Abdul Qadir for *M. Sleem*— for Petitioner.

Abdul Rashid—for the Crown.

Judgment.—This order will dispose of Criminal Revisions Nos. 1884 and 1885 of 1927.

The proceedings were started against the petitioners in both cases on notices being issued calling upon them to show cause why their movements should not be restricted under Act 5 of 1918 (Restriction of Habitual Offenders Act). The trial Magistrate passed orders against the petitioners restricting their movements to their village for a period of eighteen months. On appeal the learned District Magistrate was of opinion that the petitioners were not incorrigible habitual offenders, and that in the circumstances disclosed on the record the proper order was to bind them down under S. 110, Criminal P. C. He, accordingly, ordered that if the appellants furnished security in Rs. 5,000 each, together with two sureties each, to be of good behaviour for a period of eighteen months from the date of the Magistrate's order, the order restricting them to their village for that period would be cancelled. Accordingly the petitioners furnished security as directed, and the District Magistrate cancelled the order restricting them to their village.

The petitioners have now come up on revision to this Court and Sir Abdul Qadir on their behalf has contended that the District Magistrate had no jurisdiction to substitute the order under S. 110 for that passed by the trial Magistrate restricting them to their village I am, however, of opinion that this contention is devoid of all force. A reference to the provisions of Act 5 of 1918 shows that the procedure to be followed in proceedings under that Act is the same as that described for action under S. 110, Criminal P. C., and that the evidence required to justify the passing of an order under both provisions of the law is also the same. The Act provides for a higher penalty for offenders who are found to be incorrigible. I, therefore, can find no irregularity in the procedure adopted by the learned District Magistrate, nor can I see that he has done anything which would indicate that any prejudice was caused to the petitioners. I, therefore, overrule this objection. Sir Abdul Qadir has also attacked the findings of the Magistrate on the merits and has argued that the evidence does not justify the petitioners being put on security. The District Magistrate has, however, written a careful judgment and has discussed the evidence in detail and I see no reason to interfere with his finding on the revision side. I dismiss both the petitions.

N.K. *Petitions dismissed.*

A. I. R. 1928 Lahore 851 (2)

TEK CHAND AND AGHA HAIDAR, JJ.

Fazla and *others*— Accused — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1106 of 1927, Decided on 11th April 1928, from order of Sess. J. Gujranwala, D/- 14th July 1927.

Penal Code, S. 302—Death due to pneumonia incidental to grievous injuries—Person causing injury is guilty of murder.

If a person receives grievous injuries and is detained in hospital and as a result of those injuries pneumonia supervenes and the victim dies, the perpetrators of the attack upon him are guilty of murder : 7 *S. L. R.* 83, *Foll.* [P 852 C 2]

Mohsin Shah—for Appellants.

Raj Krishna for *Govt. Advocate*— for the Crown.

Judgment.—Three persons, namely, Fazla alias Phalla, Muhammad Din and Muhammad have been convicted under S. 302, I. P. C., and have been sentenced

to transportation for life. They have appealed.

The case for the prosecution is that about a year ago a lady named Mt. Fatima, the sister of Muhammad and daughter of Kamman, was enticed away by Ali, son of Jalal, deceased. She lived with Ali for several months but on the intercession of the brotherhood, she returned to her parents. A day before the alleged occurrence she was again enticed away by Ali. On the day of the occurrence Jalal came to know that Fazla, Muhammad Din and Muhammad, along with another person, with whom we are not concerned, were cutting his green wheat crop in his field. He went accompanied by his brother Allah Din and remonstrated. On this the three appellants made a murderous attack upon him which resulted in the fracture of a number of his ribs and other injuries. In fact, according to the medical evidence he received more than 13 injuries. The eyewitnesses to the occurrence are two persons, namely, Lal Khan and Karam Din. Lal Khan went immediately to make the first information report at the nearest police station which is at a distance of about five miles from the scene of the occurrence. Jalal was removed to the hospital and his condition was so serious that his dying declaration was recorded by the Sub-Inspector. This dying declaration was followed by another dying declaration before a Magistrate. The subject-matter of these two dying declarations is very much the same, and in these declarations Jalal makes it perfectly clear that he was attacked by the three appellants before us. Jalal died ten days after his injuries. A post mortem examination was held and we have the evidence of Dr. S. Sadiq that the deceased died of multiple injuries and pneumonia which was incidental to the injuries.

On the evidence of the eyewitnesses, there can be no manner of doubt that the accused did, as a matter of fact, mercilessly assault the deceased with lathis. The question which requires our consideration is as to what offence has been committed. It was argued by the counsel for the appellants that the deceased died of pneumonia, and, therefore, it cannot be said that death was the direct result of the injuries which he had received at the hands of the appellants. Our attention has been invited by the Public Prosecutor to at least one reported case, namely, *Nuro* v. *Emperor* (1), which lays down very clearly that if a person received grievous injuries and is detained in hospital, and as a result of those injuries pneumonia supervenes and the victim dies, then the perpetrators of the attack upon him are guilty of murder. There is a very informing passage in Russell on Crimes, Vol. 1, p. 651, which also supports the contention put forward on behalf of the Crown. Under these circumstances the guilt of the appellants comes within the provisions of S. 302, I. P. C. Whatever might have been the grievances of the appellants against Ali, the son of Jalal, they had no excuse whatsoever for attacking Jalal. Under these circumstances, the convictions and sentences seem to be appropriate and we accordingly dismiss the appeal.

N.K. *Appeal dismissed.*

(1) [1914] 7 S. L. R. 83=23 I. C. 744=15 Cr. L. J. 376.

A. I. R. 1928 Lahore 852

JAI LAL, J.

Durga Das and *others*—Plaintiffs—Petitioners.

v.

Nihal Chand and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 214 of 1926, Decided on 23rd April 1928, from order of District Judge, Gurdaspur, D/- 2nd November 1925.

Court-fees Act, S. 7 (5) (d)—Claim for possession of land—Buildings on land not claimed—Jurisdiction of Court and amount of the Court-fee stamp are determined by its market value irrespective of buildings—Suits Valuation Act, S. 8.

Where the claim in a suit is for possession of the land and not of the buildings on the land, it is the market value of the land, having regard to its nature at the time of institution of the suit irrespective of the buildings, that determines the jurisdiction of the Court, and the amount of the Court-fee stamp payable on the plaint is also to be calculated on the same.

[P 853 C 1]

Mehr Chand Mahajan—for Petitioners.

Faqir Chand—for Respondents.

Judgment.—The petitioners obtained the usual decree for declaration that an alienation of the land in suit would not affect their reversionary rights except to the extent of Rs. 105 which was held to be the consideration for necessity for the alienation paid by the alienee. After the

death of the alienor the present suit was instituted for possession of the same land. It is described as a suit for redemption on payment of Rs. 105. But, in my opinion, the suit should be for possession of the land on payment of Rs. 105 by virtue of the decree obtained by the plaintiffs.

It appears that after the decision of the first suit the property was sold by the then vendee to another person who put up rather valuable buildings thereon. The present suit was instituted in the Court of a Subordinate Judge of the Second Class, but the plaint was returned by the Judge on the ground that he had no jurisdiction to entertain the suit because the value of the structure put by the defendant far exceeded his jurisdiction, the learned Judge also directed the plaintiffs to pay Court-fee stamp on the value of the building constructed by the defendant and also of the land. The plaintiffs appealed to the District Judge from this order, but the learned Judge also agreed with the trial Court.

In my opinion the view of the Courts below is erroneous. In a suit like the present it is the market value of the land that determines the jurisdiction of the Court, and the amount of Court-fee stamp payable on the plaint is also to be calculated on the same. So far as the buildings are concerned the plaintiffs are entitled to ignore them leaving it to the defendant to remove them or to claim such remedy as he may be advised to claim in respect thereof. Their claim is for possession of the land and not of the buildings with the land. The market value of the land is to be determined under the provisions of the Court-fees Act and the Suits Valuation Act having regard to its nature at the time of the institution of the suit irrespective of the buildings. The respondents' counsel concedes that this is the correct view of the matter.

I accept this petition, set aside the orders of both the Courts below and return the case to the trial Court with directions to proceed with it in accordance with law with due regard to the observations made above. The defendant will pay the plaintiffs' costs in both the Courts below. I leave the parties to bear their own costs in this Court.

N.K. *Petition accepted.*

A. I. R. 1928 Lahore 853

JAI LAL, J.

Allah Ditta—Petitioner.

v.

Mt. Sakina Bibi—Respondent.

Criminal Revn. No. 313 of 1928, Decided on 27th April 1928, reported by Session Judge, Gujranwala, on 2nd February 1928.

(a) *Criminal P. C., S. 488—Application under, —Husband not refusing notice — Ex-parte proceedings are not justified.*

In proceedings for grant of maintenance, the Magistrate is not justified in proceeding ex parte against the husband when circumstances show that there was no refusal of acceptance of service of notice by him. [P 854 C 1]

(b) *Criminal P. C., S. 488—Jurisdiction—Husband resident of X district—Wife residing with her father in Y district—Last visits of husband to his wife in her parents' house when he lived there—Wife's petition for maintenance in a Court in Y district can be entertained.*

A husband was a resident of *X* District and the father of his wife resided in *Y* district. The husband paid some visits to her in her parents' house and those were the last occasions when the husband and the wife lived together, after which the wife made an application for grant of maintenance in a Court in the *Y* district.

Held : that it must be taken that the husband last resided with his wife in her parents' house and therefore the Court in the *Y* district had jurisdiction to entertain the petition. [P 854 C 1]

V. N. Sethi—for Respondent.

Order.—Mt. Sakina presented an application for grant of maintenance against her husband Allah Ditta under S. 488, Criminal P. C. Notice was issued to the husband but was returned with a report that he had refused to accept service. It appears that the notice was alleged to have been tendered to Allah Ditta in the house of Mt. Sakina's father where the lady herself resided, the suggestion being that he had gone on a visit to his wife there. The Magistrate accepting this report as true proceeded ex parte against the husband and made an order of maintenance fixing Rs. 10 as the monthly allowance.

The Sessions Judge of Gujranwala has reported this case with the recommendation that the proceedings under S. 488 be quashed on the grounds :

(1) That the Magistrate had no jurisdiction to entertain the petition ;

(2) that the Magistrate was not justified in proceeding ex parte against Allah.

Ditta because in the opinion of the learned Judge, the report on the summons that he had refused to accept the same was false ;

(3) that it had not been established that he had neglected or refused to maintain his wife ; and

(4) that the amount fixed was excessive.

I do not propose to deal with the last two grounds because, in my opinion, the second ground in support of the learned Sessions Judge's recommendation is sound. I agree with him that the circumstances show that there was no refusal of acceptance of service of notice by him.

With regard to the question of jurisdiction : it appears that the husband is a resident of the Jhelum District and the father of Mt. Sakina resides in the Gujrat District. The learned Sessions Judge is prepared to accept the allegation of the wife that the husband paid some visits to her in her parents' house, but he is not prepared to hold that this amounts to his having resided with her in her parents' house. This view, in my opinion, is erroneous. If it is true that the husband paid some visits to his wife in her parents' house, and those were the last occasions when the husband and the wife lived together then it must be held that the husband last resided with his wife in her parents' house, and consequently the Courts in the Gujrat District would have jurisdiction to entertain the petition.

I consider, therefore, that, while the Magistrate had jurisdiction to entertain the petition, he was not justified in proceeding ex parte against Allah Ditta, and, therefore, I set aside his order and remit the case to him to hear the application for maintenance after due notice to the respondent Allah Ditta.

N.K. *Order set aside.*

A. I. R. 1928 Lahore 854

JAI LAL, J.

Parkash Chand—Plaintiff—Appellant.

v.

Strauss & Co., Ltd., Karachi, and *others*—Defendants—Respondents.

Second Appeal No. 673 of 1927, Decided on 28th February 1928, from decree of Dist. Judge, Montgomery, D/- 7th December 1926.

(a) *Contract Act, S. 183—Minor principal not bound unless agent is a legal guardian and even then in specified cases.*

A minor principal is not bound by the acts of his agent unless the latter be his legally constituted guardian and even then under certain specified circumstances. [P 854 C 2]

(b) *Contract Act, S. 184—Minor can be appointed agent so as to bind principal—Capacity of principal to contract determines its binding nature.*

A minor can be appointed an agent so as to bind the principal and it is the capacity of the principal to enter into a contract which determines the binding nature or otherwise of the contract. [P 854 C 2, P 855 C 1]

Anant Ram Khosla—for Appellant.

Judgment. — Parkash Chand, the plaintiff who is a minor, is the owner of a firm called Kanhaya Lal Ram Sarup, which has recently been started on his behalf. It is not, therefore, his ancestral business. One Ram Kishen, who also apparently is a minor, was the manager of this firm and in that capacity he entered into two contracts on behalf of the firm with Messrs. Strauss and Co., Ltd., of Karachi. The plaintiff instituted a suit for a declaration that Ram Kishen had no authority to bind the minor by entering into those contracts. This suit has been dismissed both by the trial Court and the District Judge ; by the latter on the ground that

the relief claimed is an equitable one and since in this case it is obviously not equitable it cannot be granted.

The question whether the contracts are or are not advantageous to the minor does not, in my opinion, arise in this case. No authority is needed for the proposition that a minor is incapable of entering into a valid contract either personally or through an agent and that the only person who can bind a minor is his legally constituted guardian and that also under certain specified circumstances. This case has not been fought on behalf of the defendants on the ground that Ram Kishen was acting under the authority of a legally constituted guardian of the minor or even that there was any such guardian of the minor. It is indisputable that what a minor cannot himself do he cannot do through an agent. At the same time it is immaterial in this case whether the agent, Ram Kishen, was a minor at the time when he entered into the contract, because a minor can be appointed an agent so as to bind the principal without in-

curring any personal liability and it is the capacity of the principal to enter into a contract which determines the binding nature or otherwise of the contract.

As in the present case the minor was not capable of entering into the contracts, his agent Ram Kishen was subject to the same incapacity in the matter of making a contract enforceable against the principal. The contracts in suit, therefore, are void and must be declared as such.

I accept this appeal, set aside the decree of the Courts below and decree the plaintiff's suit with costs throughout.

D B./R.K. *Appeal accepted.*

A. I. R. 1928 Lahore 855

SHADI LAL, C. J., AND COLDSTREAM, J.

Harnamun—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 370 of 1928, Decided on 12th May 1928, from order of Sess. Judge, Lyallpur, D/- 24-2-1928.

Penal Code, S. 302 — Youth charged with murder—No personal enmity with victims—Accused only a tool in hands of enemy of victims — Sentence of death should not be imposed.

Youth alone does not constitute such an extenuating circumstance as would justify the imposition of the lesser penalty prescribed by the law.

But where a youth charged under S. 302 had no personal enmity with the victim, and he was found to be only a tool in the hands of the enemies of the victims,

Held: the extreme penalty of the law should not be exacted in the case. [P 856 C 1]

Vasheshar Nath—for Appellant.

Des Raj Sawhney—for the Crown.

Shadi Lal, C. J.—On the night of 28th/29th October 1927 Narain Singh, an Arora of Chicho-ki-Mallian in the district of Sheikhupura, and his wife, Mt. Amar Kaur, were brutally assaulted, while they were sleeping on the roof of their house. The medical evidence shows that the husband sustained six incised wounds including fatal injuries on the neck; and that the wife received four incised wounds on the head and other parts of the body. To these injuries the victims succumbed almost instantaneously.

Now Jagat Singh, a son of the victims, deposes that on the night in question he was sleeping on a charpoy at a short distance from his parents, and that at about midnight he woke up on hearing the sound of blows being struck. He then saw one or two persons standing near the bed of his father, and he recognized one of them to be Kartar Singh. He also saw the prisoner Harnamun striking Mt. Amar Kaur with a hatchet. The witness, thereupon, raised an alarm. While the person or persons who were seen standing near the bed of Narain Singh, managed to make good their escape; Harnamun was arrested after he had jumped on to the roof of the shop of one Mela Ram and ultimately into the lane near the house of one Isa Teli. In the lane the arrest was made by Nawab Teli with the help of his nephew Sardara and one Ahmad Din.

The evidence of Nawab, Sardara and Ahmad Din leaves no doubt that Harnamun, when arrested by them, was holding a hatchet which was besmeared with blood, and that his hands and feet as well as his garments were stained with blood. The Imperial Serologist discovered human blood not only on the hatchet, which was recovered from the prisoner on the night in question, but also on the shirt and two chadars which were removed from his person. It is to be observed that the prisoner has not been able to impeach the impartiality or the veracity of these witnesses who have absolutely no motive for fastening a false charge upon him. Indeed, he admits that on the night in question he was arrested by the above-mentioned witnesses, but explains that the arrest was made when he was running through the lane. It appears that he lives in a house which is at some distance from the lane where the arrest was made, and it is not explained why he happened to be in the lane in the dead of the night and why he was running away.

The direct evidence given by Jagat Singh, corroborated, as it is, by the testimony of the disinterested witnesses, Ahmad Din, Nawab and Sardara, and reinforced by the recovery of the hatchet and the garments which were found to be stained with human blood, leaves no doubt whatsoever that the convict participated in the assault which resulted in the death of Mt. Amar Kaur. It appears that he had no motive for causing the death of either Mt. Amar Kaur or her husband Narain Singh, but it is beyond

dispute that he is a *sepi* (partner in cultivation) of one Kartar Singh, who was apparently not on good terms with Narain Singh. Be that as it may, the evidence summarized above makes it absolutely clear that the prisoner, either alone or in concert with one or more persons, committed the murder; and that he has been rightly convicted under S. 302, I. P. C.

The question of sentence, however, requires careful consideration. On the one hand we have the facts that the prisoner is responsible directly for the murder of Mt. Amar Kaur and constructively for that of Narain Singh, and that the double murder was committed after premeditation and in cold blood. On the other hand the medical evidence shows that he is a boy of about 17 years of age. I am not prepared to assent to the proposition that youth alone constitutes such an extenuating circumstance as would justify the imposition of the lesser penalty prescribed by the law. We have, however, in this case, the additional circumstance that the prisoner had no personal enmity with either of the victims, and that he was probably a tool in the hands of their enemies like Kartar Singh who has been acquitted by the learned Sessions Judge. Having regard to all the relevant circumstances I am of opinion that the extreme penalty of the law should not be exacted in this case. I, accordingly, accept the appeal so far as to reduce the sentence of death to one of transportation for life.

Coldstream, J.—I concur.

N.K. *Sentence reduced.*

A. I. R. 1928 Lahore 856

ADDISON, J.

Udc Singh and *others*—Petitioners.

v.

Mohammada—Respondent.

Criminal Revn. Petn. No. 2102 of 1927, Decided on 20th April 1928, from order of Sess-Judge, Ludhiana, D/- 12th December 1927.

Criminal P. C., S. 139-A—Order under S. 133—Denial of the existence of public right—Provisions under S. 139-A are mandatory—The Magistrate is not to see the sufficiency but reliability of evidence in support of the denial.

Where an order under S. 133 is made and the person proceeded against denies the existence of any public right, the Magistrate must first look to a finding under S. 139-A whether there was any reliable evidence in support of such denial. Where there is any reliable evidence the Magistrate must stay proceedings. If he finds, however, that there is no such evidence he can then proceed under S. 137. It is not the duty of the Magistrate to come to a finding whether the evidence is in his opinion sufficient to support the case. All he has to see is whether there is any reliable evidence in support of the denial of any public right. If there is, the Magistrate must stay his hand till the other side has gone to a civil Court.

[P 857 C 1]

Fakir Chand—for Petitioners.

Jagan Nath—for Respondent.

Judgment.—One Mohammada applied to a Magistrate, First Class, under S. 133, Criminal P. C., that the petitioners in this Court should be directed to remove the obstruction erected by them in a public way or show cause why this should not be done. The petition was referred to the Naib-Tahsildar for report, on receipt of which the Magistrate, on 3rd October 1926, issued notice to the petitioners to remove the obstruction or to show cause. When the petitioners appeared, certain witnesses on behalf of Mohammada were examined, but only one on behalf of the petitioners. Thereafter, on 19th July 1927, the Magistrate by order directed the petitioner to clear away the obstruction from the public way within ten days. Against this order a revision petition was preferred in the Court of the Sessions Judge. The learned Sessions Judge was of opinion that a proper opportunity had not been given to the present petitioners to present their case and he directed the Magistrate that the petitioners should be given an opportunity to produce their evidence, documentary and oral, in support of their allegations and that thereafter the record of the case should be sent back to his Court for disposal. Accordingly, the present petitioner examined certain witnesses and proved certain documents before the Magistrate who returned the record to the Sessions Judge. On receipt of the record the learned Sessions Judge, without considering the evidence which he had ordered to be recorded as the petitioners had not been given an opportunity to produce it, dismissed the revision petition apparently on the ground that the matter had finally to go to a civil Court and it did not much matter which of the parties had to institute the suit. The petitioners

have now applied to this Court on the revision side.

It is not disputed before me that this case has not been properly heard by the Magistrate. Both he and the learned Sessions Judge seem to have neglected entirely the provisions of the new S. 139-A, Criminal P. C., which enacts that when an order is made under S. 133 for the purpose of preventing obstruction to the public in the use of a way the Magistrate shall question the respondent as to whether he denies the existence of any public right in respect of the way. If the respondent does so the Magistrate shall, before proceeding under S. 137 or under S. 138, Criminal P. C., enquire into the matter. It is further enacted that if in such enquiry the Magistrate finds that there is any reliable evidence in support of such denial he shall stay the proceedings until the matter of the existence of such right has been decided by a competent civil Court, while if he finds that there is no such evidence he shall proceed as laid down in S. 137 or S. 138, as the case may require. In the present case nothing like this was done. The Magistrate proceeded entirely under S. 137 and decided the case without first coming to a finding under S. 139-A whether there was any reliable evidence in support of such denial. Where there is any reliable evidence the Magistrate must stay proceedings. If he finds, however, that there is no such evidence he can then proceed under S. 137. I might note in this connexion that it is not the duty of the Magistrate to come to a finding whether the evidence is in his opinion sufficient to support the case of the respondents, that is, the present petitioner before me; all he has to see is whether there is any reliable evidence in support of the denial of any public right in respect of the way. If there is, the Magistrate must stay his hand till the other side has gone to a civil Court.

With these remarks I accept this petition, set aside the orders of the Courts below and direct the Magistrate to proceed as laid down in S. 139-A, Criminal P. C., and as explained above. The evidence already recorded before the Magistrate and by order of the Sessions Judge can stand, but additional evidence can be produced.

N.K. *Petition allowed.*

A. I. R. 1928 Lahore 857

ZAFAR ALI AND DALIP SINGH, JJ.

Bishen Chand and *other*—Plaintiffs—Appellants.

v.

Narain Singh and *another* — Defendants—Respondents.

First Appeal No. 2728 of 1923, Decided on 11th April 1928, from a decree of 1st Cl. Sub-Judge, Lahore, D/- 21st/24th August 1923.

Contract Act, S. 74—Entire principal to be paid in default of any instalment—Bond providing interest at Rs. 2 per cent. per mensem from the date of execution—Plaintiff claiming that rate only from the date of default—Interest was held not penal, the rate being ordinary.

Interest which is payable after default, no interest being payable until default, may be treated as a penalty if the rate of interest charged is exhorbitant. [P 858 C 1]

The bond provided that the entire principal was to be paid in case of default of payment of any instalment and though it stipulated interest at the rate of Rs. 2 per cent. per mensem from the date of execution of the bond, the oreditor claimed that rate only from the date of default.

Held: that interest at that rate from the date of default was not penal the rate being the ordinary rate. [P 858 C 1]

Tirath Ram and *Amar Nath Monga*—for Appellants.

Amar Nath Chopra and *Maya Das*—for Respondents.

Judgment.—In this case the plaintiffs sued the defendants on a bond alleged to be executed by the father of the defendants and the defendants on the 19th November 1927. The said bond, the execution of which was admitted by the defendants, contained a condition for payment of the principal due by instalments. It also provided that in case of default of payment of any instalment the entire amount of debt found due at the time of default was to be paid at once and further that the executants would pay interest at the rate of Rs. 2 per cent. per mensem from the date of the execution of the bond. Upon this bond, therefore, the plaintiffs prayed for a decree for Rs. 13,664 and future interest at the rate of Rs. 6 per cent. per annum from the date of institution of the suit till realization and for costs.

The defendants raised the plea that the interest was penal and that the claim included an enormous amount of interest.

The trial Court framed two issues : (1) Is the interest penal? and (2) To what amount is the plaintiff entitled? On the first issue it held that though admittedly default had been made, the stipulation to pay interest at 2 per cent. per mensem from the date of the execution of the bond upon default was penal and, therefore, it allowed the plaintiffs the principal amount of Rs. 6,100 and only half the amount of interest, namely, Rs. 3,782. The plaintiffs were given a decree for Rs. 9,882 with costs in proportion and no future interest was allowed.

The plaintiffs on appeal urge that they should be allowed interest from the date of default at the rate agreed upon between the parties and that this term of the contract was not penal. Plaintiffs-appellants' counsel has referred us to S. 74, Contract Act and the commentary of Mr. Pollock at p. 429, 5th Edition. We agree generally with the view expressed by the learned author that though the rulings of the Court have not always been consistent on the point, the general principle seems to be that interest which is payable after default, no interest being payable until default, may be treated as a penalty if the rate of interest charged is exorbitant. In the particular case before us the rate of interest on the present bond, which is made up of previous bonds, is 2 per cent. per mensem, and the evidence led by the defendants themselves shows that 2 per cent. per mensem was the ordinary rate of interest in these suits. As the plaintiffs-appellants are not claiming interest from the date of the execution but only from the date of default, it beomes unnecessary to decide that question. We hold on the facts of this case that the plaintiffs-appellants are entitled to the enhancement of Rs. 3,000 claimed by them in this appeal.

We accordingly accept the appeal and increase the amount of Rs. 3,000. We further consider that future interest at the rate of 6 per cent. per annum should be allowed to the appellant from date of suit till realization. The appellants will have the costs of this appeal.

N.K. *Appeal allowed.*

A. I. R. 1928 Lahore 858

BROADWAY AND AGHA HAIDER, JJ.

Des Raj—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 435 of 1928, Decided on 13th June 1928, from order of Sess. Judge, Karnal, D/- 17th March 1928.

(a) *Penal Code, Ss. 201 and 302—Accused knowing the fact of murder and also the place of the dead bodies—Removal of ornaments by accused from the dead body—Confession made to lambardar—Conviction under S. 302 based on such confession was held to be not safe and the accused was convicted under S. 201.*

A who was charged under S. 302 knew where the bodies of the murdered persons were. He also knew that murder had been committed. The jewellery removed by him from the dead body was subsequently produced and identified. Moreover he confessed his guilt to the lambardar of the village.

Held : that it was not safe to rely upon the the confession made to the lambardar and therefore he could not be convicted under S. 302. But the evidence was sufficient to convict him under S. 201. [P 860 C 1]

(b) *Evidence Act, S. 24—Extra judicial confessions are not entitled to any weight—To base conviction on such a confession is not safe.*

Apart from the question whether or not extra judicial confessions are inadmissible in evidence, they are not of such a nature as entitle them to any weight, because it is impossible to ascertain the exact words used by the person. To base a conviction on such a confession is not safe : 14 *P. R.* 1911 (*Cr.*), *Relied on.* [P 860 C 1]

Shamair Chand and *Qabul Chand*—for Appellant.

Ram Lal—for the Crown.

Broadway, J.—Des Raj, son of Jowahar, a Jat of Mouza Chiri in the Rohtak District, has been convicted of having caused the death of Mt. Pato and her boy, Jage Ram, aged five years, and, under S. 302, I. P. C., has been sentenced to death. He has appealed and the case is also before us under S. 374, Criminal P. C., for confirmation of the death sentence.

According to the prosecution the appellant is said to have murdered Mt. Pato and her little boy on 5th September 1927, the motive being pure greed as the unfortunate woman was wearing a few ornaments and was a total stranger to Des Raj. Having murdered the mother and child he is supposed to have buried them in the field of a relative of his named Dharam Chand. This Dharam Chand, on the evening of 6th September 1927,

was sitting outside his house smoking with a man named Nahna when, after the night had fallen, he noticed the appellant pass in front of his house with a kassi in his hand and a basket on his head. Dharam Chand, who is a cousin of the appellant and is a Sarbrah Lambardar, suspected that Des Raj was up to some mischief, as he looked on him as a bad character. He accordingly with Nahna proceeded to follow him. He saw Des Raj go to his (Dharam Chand's) field and begin digging in a Khand or water course there. Presently they saw him dig out of the earth the body of a child and put it in a gunny bag. Upon this they approached and seized him. They also noticed that there was a larger grave which contained the body of a grown-up person. According to Dharam Chand he and Nahna, his companion, questioned Des Raj, who, after some prevarication admitted that he had killed the woman and the child in order to rob them of their jewelry and that he had buried the bodies in the field and had come this night in order to dig up the corpses and place them further away, preferably within the area of the neighbouring village. Dharam Chand fell in with the idea and made the suggestion that, in order to make things quite certain, it would be as well to take the bodies away to a considerable distance.

Leaving Des Raj and Nahna on the spot he returned to the village promising to bring a bullock cart in order to dispose of the corpses properly. On arriving at the village he collected the lambardars and choukidars telling them that he had something of importance to convey to them, and when they came out of the village he told them that Des Raj had committed the double murder. The party then went to the field, and, on seeing people coming instead of bullock cart, Des Raj attempted to run away but was pursued by Dharam Chand and Nahna and brought back. It is said that, at the instance of the lambardars and sufaidposh, Des Raj admitted his guilt and stated that he had got the jewelry, some in his own house and some deposited or pawned with Kanaya goldsmith. Dharam Chand was sent off to make a report and after he had gone the lambardars took Des Raj to the village where he produced from his house certain articles of jewelery which the lambardars made him replace and closing the door placed a guard on it. He then took them to the shop of Kanaya goldsmith and got him to produce a hasli. This hasli was also left with Kanaya who was directed to replace it in his shop and the shop was guarded. Des Raj was then taken back to where the corpses were and there kept till the arrival of the police. Subsequently the police recovered from his house the articles of jewelry that were there and from Kanaya goldsmith the hasli referred to above.

The appellant denied all knowledge of these articles of jewelry and states that he knows nothing about them. The husband and brother-in-law of the unfortunate woman have sworn that these ornaments belonged to Mt. Pato. I see no reason to doubt the correctness of this identification and hold that they have been properly identified as the property of the murdered woman Mt. Pato.

It is clear that, owing possibly to his relationship with the appellant, Dharam Chand has somewhat trimmed his evidence in favour of the appellant. Having adhered to his statement as made at the police station, when he made the first information report, in his cross-examination, he boldly admitted that a few weeks before he had been assaulted by his cousin, the appellant, although that assault appears to have led to no complaint of any kind. He also admits that he had been followed to where the bodies were discovered by one Ram Chand Khati and further that this Ram Chand Khati had informed him that the bodies were there on the morning of 6th September 1927. Ram Chand has been produced as a witness for the defence and his statement has only to be read for it to be realized that he is an unmitigated lair. The whole story told by him is false from beginning to end. Similarly Dharam Chand has admitted in his cross-examination that the wife of his half brother Sartu for whom he is acting as sarbrah lambardar was suspected of having a liason with the appellant, a statement that is to my mind clearly false.

There is ample evidence on the record to show that the appellant knew where the bodies of these murdered persons were. There can be no doubt to my mind that he also knew that murder had been committed. The fact that he removed the jewellery which was subsequently

produced and identified as belonging to the deceased woman is also an important piece of evidence against him. These pieces of evidence, however, do not, in my judgment, establish his guilt under S. 302, I. P. C., and as I consider that it would be not safe to rely on the confessions to the lambardars, zaildars and suffaidposh, his conviction under S. 302, I. P. C., cannot be maintained. On this record it is unsafe to rely on the confessions, because as is usual in extra-judicial confessions of this kind, it is almost impossible to ascertain the exact words used by the person confessing. In the present case the lambardars, etc., have frankly admitted that the confession made to them was made by the appellant on their definitely promising immunity if he made a clean breast of the affair. Whether or not, therefore, the confessions are inadmissible in evidence (as would appear to be indicated by the decision of a Division Bench of this Court in *Qutb Ali* v. *Emperor* (1), they are not of such a nature as entitled them to any weight. At the same time there can be no doubt the appellant has committed an offence under S. 201, I. P. C., and as the offence which he knew to have been committed was punishable with death, I would alter the conviction from S. 302 to one under S. 201, I. P. C., and sentence him to seven years' rigorous imprisonment. I would therefore accept the appeal to this extent, the sentence of death not being confirmed.

Agha Haidar, J.—I agree. In my opinion the evidence on the record is not sufficient to establish the offence under S. 302, I. P. C., against the appellant. The case appropriately comes under S. 201, I. P. C., and I agree with the order passed by my learned brother.

N.K. *Conviction altered.*

(1) [1911] 14 P. R. 1911 Cr.=12 I. C. 973—42 P. W. R. Cr. 1911.

A I R 1928 Lahore 860

ZAFAR ALI AND JAI LAL, JJ.

Bachan Singh and *others*—Defendants—Appellants.

v.

Lal Chand and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1439 of 1923, Decided on 9th March 1928, from decree of Addl. Dist. Judge, Ferozepore, D/- 12th May 1923.

Punjab Tenancy Act, S. 53, Cls. (1) (2) (3)—Agreement to sell occupancy holding to a stranger—Notice of sale served on the landlord—Period fixed by Revenue Officer to pay price—Landlord not paying price but privately purchasing the holding after that period—Such sale is voidable at the instance of the purchaser.

A tenant who had agreed to sell his occupancy holding to a stranger served a notice on his landlord as required under Cl. 2 of S. 53. But instead of taking this opportunity to purchase the holding, the landlord privately purchased the holding from the tenant after the expiry of the period fixed by the Revenue Officer for paying the price. The purchaser sued to enforce the specific performance of the contract of sale.

Held: that he was so entitled as the sale to the landlord was voidable at his instance

[P 861 C1]

Faqir Chand—for Respondents.

Judgment.—This was a suit to enforce specific performance of a contract to sell an occupancy holding. The tenant duly executed and registered the agreement and in accordance with its terms took action under S. 53, Punjab Tenancy Act, and served upon his landlords through a Revenue Officer, a notice of his intention to sell. Though the tenant had contracted to sell the holding for Rs. 600 the Revenue Officer fixed its value at Rs. 879-6-0 The landlords appealed against the order but the appeal was dismissed. They failed to deposit in the Court the price thus fixed, but after the expiration of the period within which they had to deposit the money they privately purchased the occupancy rights from the tenant himself. The plaintiff to whom the tenant had contracted to sell contended that he (tenant) was bound by his contract to sell the holding to him as the landlords had lost their right to purchase it and that the sale to them was consequently void as against him. This contention did not find favour with the trial Court but was accepted by the learned District Judge and the landlords have appeared in this Court in second appeal.

We are of opinion that the view taken by the learned District Judge is correct. By virtue of Cl. (1), S. 53, Punjab Tenancy Act, an occupancy tenant has the right to sell his holding to a stranger if his landlord should fail to purchase it when given an option to do so in accordance with Cls. (2) and (3) of that section. In the present case the landlords did not avail themselves of the opportunity thus given to them and the

tenant was then competent to sell the holding to the plaintiff in fulfilment of the contract made with him. By selling it to the landlords he broke that contract and as the landlords had notice of that contract the sale to them was voidable at the instance of the plaintiff.

We, therefore, dismiss the appeal with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 861

ADDISON, J.

Hans Raj—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1982 of 1927, Decided on 13th March 1928, from order of Sess-Judge, Ferozepore, D/- 14th November 1927.

Punjab Excise Act (1 *of* 1914), *S.* 61 (2) (*b*)—*Owner of a neglected garden open to public charged for cultivating hemp—Growth of hemp spontaneous—No secrecy observed—Owner cannot be so convicted.*

Where there was spontaneous growth of hemp in a neglected garden open to the public and no attempt at secrecy was made,

Held : the owner cannot be convicted under S. 61, (2) (b) and his negligence in not recognising these plants and having them weeded out of his garden did not make him guilty of the offence of cultivating them.

[P 861 C 2, P 862 C 1]

Bevan Petman and *Bhagat Ram Puri*—for Petitioner.

Anant Ram Khosla—for the Crown.

Judgment.—One Hans Raj, Banker, Mill Owner and Municipal Commissioner of Ferozepore, was sent up for trial under S. 61, Excise Act, for having cultivated hemp in his garden just outside Ferozepore City. An excise party went to this garden on 25th April 1927, and cut some six maunds of hemp which was growing in different places there. The Magistrate who tried the case framed two charges one under S. 61 (2) (b) of the Act for cultivating hemp and one under S. 61 (1) (a) of the Act for possession of an excisable article.

As regards cultivation the Magistrate said that the quantity was so large that it could hardly be concluded that the hemp was of spontaneous growth. Later on he said that the hemp plants must have been allowed to remain there intentionally, while his final conclusion was that they had been cultivated. He next held that the petitioner, the owner of the garden, had nothing to do with the cultivation and was not guilty of an offence under S. 61 (2) (b) of the Act. As, however, it was his duty to see that his mali and Beldar did not cultivate any objectionable article or cleared away any objectionable article when it grew and as the petitioner had not seen to this, he, as owner of the garden must be held to be in possession of the growing hemp plants and was thus guilty of a technical offence under S. 61 (1) (a) of the Act. For this offence he sentenced him to pay a fine of Rupees 300.

On appeal the Sessions Judge, set aside the conviction under S. 61 (1) (a) of the Act but convicted the petitioner under S. 61 (2) (b) of the Act for cultivating the hemp. The operative part of his judgment is as follows :

I reject all the grounds of appeal tending to dispute cultivation of hemp in appellant's garden. Even if hemp were of spontaneous growth in Ferozepore its preservation in such quantities in a garden which as it grows vegetables would normally be weeded amounts to cultivation.

The judgment is very brief and does not touch the voluminous evidence on the record. The garden is about seven ghumaons in size and from the evidence it is clear that it is neglected like the gardens of most Indians. A mali and some Beldars do look after it. It is full of trees the fruit of which is leased out each year. Only in one plot does it appear that vegetables were grown. It was watered but the fruit trees required watering. A fruit garden, as this is, is not usually carefully weeded. It is clear that the petitioner stays away from Ferozepore for long periods both in the cold and hot weather. It is also in evidence that this garden is open to the public and the public walk in it. Further, the principal places where the hemp was growing are near one of the two entrances. It is obvious from this description that no attempt at secrecy was made.

Further there is very good evidence on the record that the hemp plant grows in large quantities apparently spontaneously in and about Ferozepore Cantonment and City. Certain photographs of growing hemp plants have been put in. Photograph D. C. taken near the Cantonment Railway Station shows a growth of hemp plants which would lead any

person looking at it to think that these plants were cultivated though they are growing on waste land. Other two photographs show very fine hemp plants growing in the middle of vegetable fields. Captain G. S. Gill, I. M. S, has stated that he saw 50 or 60 such plants in the garden of the bungalow of the Deputy Commissioner two years ago. This gentleman was brought up in Ferozepore and has deposed that he used to go to the petitioner's garden when he was a boy some 15 years ago. He recollects that at that time the garden in question had much hemp growing in it. In these circumstances it appears to me a legitimate conclusion that the hemp found in the petitioner's garden by the excise party was of spontaneous growth. It was growing in a neglected garden open to the public and has always grown there. It may be that during the watering of the fruit trees or the small vegetable plot some water benefited these hemp plants which sowed themselves from year to year, but I do not think that that amounts to cultivation. The raid took place on 25th April last and when a Magistrate went there on 10th June he found the plants again beginning to grow.

I am in entire agreement with the Magistrate that even if the mali and Beldars had cultivated these plants, there was nothing to show that the petitioner had any hand in this. When the Excise party went to his garden he at once told them that there could be nothing wrong as he had seen plants of a similar nature growing in many other places and gardens. He offered to take the excise party to these places but they declined to go. This conduct of his tends to show his innocence and not his guilt. In my judgment, therefore, it must be held that the plants in question grew spontaneously and that in any case the petitioner had nothing to do with their cultivation. It may be the case that he was negligent in not recognizing these plants and having them weeded out of his garden, but that would not make him guilty of the offence of cultivating them.

I accept his petition and set aside his conviction and sentence. The fine, if paid, will be refunded.

N.K. *Conviction set aside.*

A. I. R. 1928 Lahore 862

BHIDE, J.

Hukam Chand—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1478 of 1927, Decided on 14th April 1928, from order of Dist. Judge, Attock, D/- 8th November 1927.

Criminal P. C., S. 195—*Prosecution under S.* 193 *Penal Code—Statement corrected in cross-examination—Sanction should be refused.*

Where a witness corrects, when cross-examined, his previous false statement, no sanction for his prosecution should be granted as no conviction can be sustained : 6 *W. R. Cr.* 92 ; 7 *W. R. Cr.* 49 and 19 *Bom. L. R.* 61, *Foll.*

[P 862 C 2]

Gokal Chand Narang—for Appellant.

Muhammad Monir—for the Crown.

Judgment.—This is an appeal from an order of the District Judge, Attock, sanctioning the prosecution of Lala Hukam Chand, contractor, under S. 193, I. P. C,, in respect of a statement made by him as a witness in the Court of the Subordinate Judge, Pindigheb, on 11th January 1926. The portion of the statement which has been made the basis of the complaint ran as follows :

The debt due on both the bonds has been paid now. Yaran and Nur Khan received Rs. 100 from Shera by means of this receipt Ex. D-2 * * * Receipt mentioned above is dated 18th May 1925 (equivalent to 5th Jeth 1982).

The learned Judge was apparently of opinion that the statement of Lala Hukam Chand that the receipt Ex. D-2 was written on 18th May 1925, in lieu of Rs. 100 was false and that the receipt was as a matter of fact a forgery. This view was based on a statement made by Lala Hukam Chand in the course of his deposition that two bonds for Rs. 200 and Rs. 80 respectively were executed by Shera on the same day. It appears that the bonds bore date 8th Har 1982, corresponding to 22nd June 1925, while the receipt is dated 5th Jeth 1982 corresponding to 18th May 1925. The receipt and the bonds were, therefore, obviously not executed on the same day. The witness at first made an incorrect statement in this respect, but when cross-examined he corrected himself and deposed that the documents were not executed on the same day. In the circumstances I do not think that the portion of the deposition of Lala Hukam Chand which has been made the basis of the complaint

could sustain any conviction. That portion had been subsequently corrected by the witness, and there is, vide inter alia, *Queen* v. *Kally Churn Gangooly* (1), *In re Pandu Namaji Gavande* (2) and *Queen* v. *Niruni* (3), ample authority for the proposition that in such circumstances no sanction for prosecution should be granted. The learned counsel for the Crown also did not oppose this appeal.

I accordingly accept the appeal, set aside the order sanctioning the prosecution of the appellant and direct that the complaint instituted in pursuance of the sanction shall be withdrawn.

R.K. *Appeal accepted.*

(1) 6 W. R. Cr. 92.
(2) [1917] 19 Bom. L. R. 61=39 I. C. 320=18 Cr. L. J. 460.
(3) 7 W. R. Cr. 49.

A. I. R. 1928 Lahore 863 (1)

ADDISON, J.

Qadir Bakhsh and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 196 of 1928, Decided on 4th May 1928, from order of Sess. Judge, Ferozepore, D/- 5th December 1927.

Criminal P. C., Ss. 424 and 367—An appellate Court should write such a judgment which can be followed without reference to the judgment of the trial Court.

It is the duty of an appellate Court not only to examine the evidence but also to write a judgment affording a clear indication that the appeal has been properly tried and the points urged by the appellants have been duly considered and decided. An appellate Court fails in the discharge of the duty imposed upon it by law if it writes a judgment which cannot be followed without a reference to the judgment of the trial Court. [P 863 C 2]

Lal Chand Mehra—for Petitioners.

Khurshaid Zaman for *Government Advocate*—for the Crown.

Judgment. — The three petitioners Mansa Singh, Qadir Bakhsh and Ghulam were sentenced under S. 411, I. P. C., to certain terms of imprisonment by a Magistrate of the First Class. They appealed against their convictions and sentences but the appeal against their convictions was dismissed by the learned Sessions Judge, though it was accepted by him to the extent of reducing the sentences of imprisonment to one year's rigorous imprisonment each. Against this decision they have preferred this revision petition.

The judgment of the learned Sessions Judge has been attacked on the ground that it does not satisfy the requirements of S. 367, Criminal P. C., the provisions of which are, under S. 424 of the Code, applicable to the judgment of an appellate Court. It is not necessary for such a Court to write a long and elaborate judgment, but as laid down in *Dalip Singh* v. *Emperor* (1) it is clearly its duty not only to examine the evidence but also to write a judgment affording a clear indication that the appeal has been properly tried and that the points urged by the appellant have been duly considered and decided. An appellate Court fails in the discharge of the duty imposed upon it by law if it writes a judgment which cannot be followed without reference to the judgment of the trial Court. In the present case the judgment of the learned Sessions Judge cannot be followed without reference to the judgment of the trial Court. It does not appear from it that the appellate Court appreciated the points for decision and considered the evidence.

In these circumstances I accept the petition, set aside the judgment of the learned Sessions Judge and return the appeal of the petitioners to him to be decided in accordance with law.

N.K. *Petition allowed.*

(1) A. I. R. 1921 Lah. 103=2 Lah. 308.

A. I. R. 1928 Lahore 863 (2)

ADDISON, J.

Kura Mal and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 31 of 1928, Decided on 13th April 1928, from an order of the Dist. Magistrate, Guragaon, D/- 31st August 1927.

Criminal P. C., S. 107—Two parties taking different sides—Order under S. 107 must clearly state risk or reasons for thinking that there is danger of breach of peace.

The mere fact that two parties had taken different sides in Municipal politics is not sufficient for an order being passed on the members of those parties under S. 107 without stating the risk or reasons which exist for thinking

that there was a danger of the breach of the peace between the two parties. [P 864 C 1]

C. L. Gulati—for Petitioners.

Edmunds for *Government Advocate*—for the Crown.

Judgment.—The seven petitioners, who are Hindu residents of Faridabad, a town in the Gurgaon District, were ordered on 21st June 1927, to execute bonds with one surety each to keep the peace for one year under S. 107, Criminal P. C. Their appeals were dismissed by the District Magistrate, and their petition for revision was admitted by a learned Judge of this Court with the following remarks:

Is there a judgment or an order intelligible to any but residents of Faridabad?

I have now heard the learned counsel appearing for the petitioners and for the Crown.

It is certainly the case that there is no proper judgment or order by the District Magistrate disposing of the appeals. Nothing appears in it from which the conclusion could be properly drawn that there was a danger of a breach of the peace on the part of the petitioners. Fourteen persons on the one side and six on the other, were placed on security. It does appear, however, from this judgment that in Municipal affairs certain members of the two parties placed on security were taking different sides, and the District Magistrate was of opinion that, in order to end this unseemly struggle, it would be taking too big a risk to let any of them go free. What the risk was is not stated, or what reasons there were for thinking that there was a danger of the breach of the peace between the two parties.

I have looked at the evidence in the case and the order of the Magistrate. It does appear that one day there was an altercation between several Musalmans in the presence of the Tahsildar. Apart from that event, there is no evidence that there was any danger of breach of the peace. The mere fact that two parties had taken different sides in Municipal politics is not sufficient for an order being passed under S. 107, Criminal P. C.

In these circumstances I do not consider it necessary to send the case back for the District Magistrate to write a proper order. Only three months remain before the year will expire. I accept the petition and set aside the order directing the seven petitioners to furnish security under S. 107, Criminal P. C.

N.K. *Petition allowed.*

A. I. R. 1928 Lahore 864

HARRISON AND DALIP SINGH, JJ.

Duni Chand—Petitioner.

v.

Commissioner of Income-tax, Lahore—Respondent.

Civil Misc. Appln. No. 350 of 1926. Decided on 6th February 1928.

Income-tax Act, S. 30, Proviso—Assesee held to be a resident of British India and assessed under S. 23 (4)—Appeal on the ground that he was not a resident of British India dismissed as not tenable under S. 23 (4)—Commissioner declining to make reference—Commissioner was directed to refer the question of law whether proviso to S. 30 bars appeal or not.

The assessee was held by the Income-tax Officer to be a resident of British India and was assessed under S. 23 (4) on his failure to comply with the terms of notice under S. 22 (4). He appealed to the Assistant Commissioner on the ground that he was not a resident of British India. The appeal was dismissed on the ground that no appeal lay from an assessment under S. 23 (4). The Commissioner refused to take action under S. 66 (2).

Held: that the Commissioner ought to have referred the question of law with his own opinion thereon, the question being, was the Assistant Commissioner bound to decide whether the assessee was or was not a resident of British India or does the proviso to S. 30 bar an appeal on the question of liability to assessment when action has been ostensibly taken under S. 23 (4): *A. I. R.* 1926 *Lah.* 400, *Dist.* [P 865 C 1]

G. C. Narang—for Petitioner.

Jagan Nath—for Respondent.

Order.

Harrison, J.—The Income-tax Officer of the Hazara Circle, in the North-West Frontier Province, in a considered order, held that one Bhagat Duni Chand was a resident of British India and carried on business at Haripur in the Hazara District. He thereupon served him with a notice under S. 22 (4) of the Act and, as he failed to comply with the terms of the notice, he made an assessment under S. 23 (4) to the best of his judgment. From that assessment Bhagat Duni Chand appealed to the Assistant Commissioner and took the ground that he was not a resident of British India. The Assistant Commissioner, holding that no appeal lay from an assessment

under S. 23 (4). dismissed the appeal. The Commissioner, in his turn, dismissed the application for review and, holding that no point of law arose, refused to take action under S. 66 (2) when asked to do so.

Before us it is urged that Bhagat Duni Chand was entitled to an adjudication by the Assistant Commissioner as to whether or not he is a resident of British India in the sense in which the words are used in the Act. Counsel for the Crown has relied on *Benarsi Das* v. *Commissioner of Income-tax* (1), but this ruling in our opinion does not advance the position at all. Granted that a man is an assessee and liable, therefore, to pay tax, and action is taken under S. 23 (4), the matter is ended and he cannot challenge the correctness of the assessment or any other question incidental thereto. The question still remains whether he is or is not liable at all. We, therefore, direct the Commissioner to refer the question of law with his opinion thereon, the question being was the Assistant Commissioner bound to decide whether Bhagat Duni Chand was or was not a resident of British India or does the proviso to S. 30 bar an appeal on the question of liability to assessment when action has been ostensibly taken under S. 23 (4).

R.K. *Reference directed.*

(1) A. I. R. 1926 Lah. 400=7 Lah. 226.

A. I. R. 1928 Lahore 865

TEK CHAND, J.

Aziz Ahmad—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1292 of 1927, Decided on 25th April 1928, from an order of Sess. Judge, Delhi, D/-5th July 1927.

Penal Code, Ss. 500 and 501—Communal tension in tense—Article calculated to stir up communal feelings—Editor should be severely dealt with—But editor a tool in hands of proprietor bearing ill-will towards complainant and writing the article—Lenient view in awarding punishment should be taken though the fact that editor is a dummy editor is no ground by itself for reducing sentence.

An editor of a newspaper who at a time of intense communal tension first publishes a false and fabricated account of an innocent social function in terms calculated to stir up communal feelings and then maliciously and incorrectly gives out that the false information on which the publication was based, had been supplied by a person who had in fact never done so, cannot be lightly dealt with. But where the editor is a mere tool in the hands of a proprietor who bears ill-will towards the complainant, and the proprietor admits that he wrote the article, lenient view should be taken in awarding punishment, though the mere circumstance that such an editor is not the writer of the article or is a dummy editor is no ground by itself for reduction of the sentence. [P 867 C 2]

Aziz Ahmad—for Petitioner.

Shamair Chand—for the Crown.

Judgment.—The petitioner Aziz Ahmad, Aziz Akbarabadi, Editor of a Vernacular newspaper called the "Muballigh," published at Delhi, has on a complaint filed by one Qazi Habib-ud-Din, Watch and Spectacles Merchant, Fatehpuri, Delhi, been convicted under Ss. 500-501, I. P. C., and sentenced to undergo simple imprisonment for three months and to pay a fine of Rs. 500 out of which (if recovered) Rs. 200 is to be paid to the complainant as compensation. The appeal to the Sessions Judge having been unsuccessful, a petition for revision has been preferred to this Court. The complainant Qazi Habib-ud-Din has also filed an application for enhancement of the sentence.

The relevant facts are as follows:

There is at Delhi an Association of Watch Merchants called the West End Watch Traders' Syndicate, the members of which belong to both the Hindu and the Mahomedan communities. In 1926 one Lala Bhana Mal was the President of the Syndicate, Muhammad Yusuf (P. W. No. 3) the Secretary and the complainant Habib-ud-Din one of the members. On 29th August 1926, a dinner party was given on behalf of the Syndicate, at which the members and some other guests were entertained. An account of this entertainment appeared in the leaderette in the "Muballigh," dated 1st September 1926, headed "West End Syndicate, Delhi, and Muhammadans" in which it was stated that before the party sat down for dinner the floor of the room had been plastered with cowdung, puja performed by a Brahmin and water sprinkled on the food which was subsequently served both to Hindus and Mahomedans. It was stated that this had been purposely done with a view to surreptitiously make the Mahomedan guests eat food which had been so "defiled" by a Hindu priest

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and thus to injure their religious sentiments. The Syndicate at once challenged the accuracy of this report and the Secretary, Muhammad Yusuf (P. W. No. 3) wrote to the Proprietor and Editor of the "Muballigh" stating that it was wholly untrue that the floor had been plastered with cowdung or that a Brahmin had performed puja or sprinkled water on the eatables. He called upon the newspaper to contradict the news, and to disclose the name of the informant.

In response to this communication, another note appeared in the "Muballigh" of 9th September 1926, in which it was stated that the earlier note had been written and published on information supplied by the complainant Qazi Habib-ud-Din, who was a member of the Syndicate and who had also secured from a learned Maulvi a fatwa declaring that it was sinful for a Mahomedan to take food "defiled" in the manner mentioned above. It was stated that Habib-ud-Din had made over this fatwa to the Editor at the time when he gave the information and had also given him to understand that several Mahomedans who had partaken of the feast were thinking of expiating their sin by killing a number of cows and distributing their flesh among the poor. A few days after the publication of this article the complainant Qazi Habib-ud-Din served the petitioner with a notice stating that he had been wrongly and maliciously accused of having been the informant of the false account of the entertainment which had appeared in the paper and that if amends were not made within a certain specified time legal action would be taken against him. No reply having been given, the complainant on 8th October 1926, lodged a complaint under Ss. 500-501, I. P. C., against Aziz Ahmad, petitioner, the Editor of the newspaper, with the result that he has been convicted and sentenced as above. Before me the first point urged on his behalf is that the trial is vitiated by the failure of the learned Magistrate to examine all the witnesses whom the petitioner had summoned and whom he wanted to produce. The learned Sessions Judge has in his judgment described in detail the proceedings, which took place on each hearing and I do not think it necessary to repeat them here. After carefully examining the record I am of opinion that the learned Magistrate showed much indulgence to the petitioner in the matter of producing his evidence, and gave him all reasonable facilities to do so, but the petitioner adopted dilatory tactics to unnecessarily prolong the decision of the case. At first he filed a very long list of witnesses, then he absented himself twice without sufficient cause, later on he failed to deposit the diet money for the witnesses and ultimately on 6th June he stated that he did not press for a further adjournment to have the witnesses served. In these circumstances he can have no legitimate grievance against the procedure adopted by the Magistrate and accordingly I overrule this contention.

On the merits the petitioner's counsel has conceded that the account of the entertainment which appeared in the "Muballigh" of 1st September 1926, to the effect that on the occasion of the feast the floor was plastered with cowdung or that a Brahmin recited prayers or sprinkled water on food which was served to the Mahomedan guests, is a pure fabrication and that, as a matter of fact, nothing had been done at or before the entertainment to which objection could be taken either by Hindus or Mahomedans. He, however, urged that it had been proved that the article in the newspaper was based on information supplied by the complainant Qazi Habib-ud-Din. At the trial the complainant went into the witness-box and denied having ever had any talk with the editorial staff or the management of the "Muballigh" on the subject or having directly or indirectly sent any message to them relating to that entertainment. He was subjected to an unnecessarily lengthy and harassing cross-examination by the petitioner's counsel, but nothing was elicited to indicate that the complainant's denial was false. The petitioner produced the fatwa Ex-D-A and alleged that the first part of it containing the "statement of facts" had been written at the complainant's instance by Muhammad Din, D. W. 11, who works at his shop, and that the answer was in the handwriting of the Maulvi. Muhammad Din, however, denied having written any portion

of Ex. D-A or having given it to the petitioner and the Maulvi was not produced as a witness. Reliance was next placed on a sentence in the statement of Muhammad Yusuf where he stated that the complainant had once told him that at the entertainment, puja had been performed and food "defiled" in the manner described in the article served to Mahomedan guests. This Muhammad Yusuf has, however, been proved to be inimical to the complainant and the lower Courts have righty rejected his testimony. It must, therefore, be held that there is no reliable evidence on the record to show that the article in question was based on information supplied by the petitioner

There is a good deal of evidence on the record to establish that the relations between the complainant and Muhammad Ishaq, proprietor of the "Muballigh" were not cordial. They had been friends at one time but seem to have fallen out on account of the failure of the complainant Habib-ud-Din to accede to Mahammad Ishaq's request to falsely implicate certain innocent persons before the Magistrate who was trying the cases arising out of the Hindu-Mahomedan riots at Delhi. In view of the strained relations between the complainant and Muhammad Ishaq the article imputing the false information to him cannot but be held to be malicious.

Again it is fully proved that the issue of the "Muballigh" of 9th September 1926, containing the offending article was "hawked about" in the locality in which the complainant's shop is situate and a number of posters (e, g., Exs. P. W. 4/1 and P. W. 4/2) denouncing the complainant as the person from whom the false account of his entertainment had originated were circulated and pasted on the street walls of Delhi. The complainant has also led evidence to show that as a result of the article in question, he had lost the confidence of both the Hindu and Mahomedan members of the Syndicate who regarded him as a promoter of class-hatred and a person who gave out false news with a view to create feelings of enmity between the watch merchants of Delhi belonging to the two communities who had so far lived in peace and harmony. On these facts there can be no doubt that the article in question is a gross and scandalous libel maliciously published with a view to injure the reputation of the complainant and that the petitioner has been rightly convicted under S. 500/501, I. P. C.

The Editor of a newspaper who at a time of intense communal tension first publishes a false and fabricated account of an innocent social function in terms calculated to stir up communal feelings and then maliciously and incorrectly gives out that the false information on which the publication was based had been supplied by a person who had in fact never done so, cannot be lightly dealt with and I would have been prepared to accept the petition for enhancement of the sentence filed by the complainant had it not been for the fact fully established on the record that the petitioner was a mere tool in the hands of the proprietor Hakim Muhammad Ishaq, who bore ill-will towards the complainant and who as D. W. 4 has admitted on oath that it was he who had written the article in question. From the evidence it is clear that he is the real Editor of the paper and that the petitioner Aziz Ahmad is only a "dummy" who has merely lent his name as the editor, printer and publisher. The mere circumstance that the petitioner is not the writer of the article or is a "dummy" editor is of course, no ground by itself for reduction of the sentence. Ordinarily a person who, for monetary or other consideration, allows himself to be used as a "blind" for concealing the identity of the "real" editor and thus assists the latter in deceiving the public and defeating the law cannot be heard to argue in mitigation of his guilt, that he was a mere figure head and must bear the full consequence of his acts. In this case, however, the circumstances are such that a lenient view must be taken. There is no doubt that the complainant knew from the beginning that the real offender was Muhammad Ishaq and that it was he who had defamed him with a view to satisfy his malice. But for some reason best known to himself, the complainant did not choose to proceed against him. In those circumstances I am of opinion, that the ends of justice will be amply met by reducing the sentence of imprisonment to the period (of about five weeks) which the

petitioner had already undergone when I released him on bail. But the sentence of fine and imprisonment in default must stand and so also the order directing that out of the fine (if paid) Rs. 200 will be paid to the complainant as compensation. With this modification the petition is dismissed.

The application for enhancement of the sentence filed by the complainant necessarily fails and is also dismissed.

N.K. *Sentence reduced.*

A. I. R. 1928 Lahore 868

ZAFAR ALI AND JAI LAL, JJ.

Emperor—Appellant.

v.

Manga and *others*—Respondents.

Criminal Appeal No. 1485 of 1927, Decided on 12th June 1928, from order of 1st Cl. Magistrate, Amritsar, D/- 10th October 1927.

Penal Code S. 304—Person charged under S. 304—Offence prima facie culpable homicide amounting to murder—Case ought to be committed to the Sessions.

Where a person is attacked and killed, it must be decided whether the assailant is guilty of culpable homicide and, if so, whether the culpable homicide amounts to murder or not. If it were found that the offence committed is culpable homicide but it does not amount to murder, it must be further made clear whether the offence falls under part 1 or 2, of S. 304. Where the offence committed is prima facie one of murder, the Magistrate empowered under S. 30 has no jurisdiction to try it, but he must commit the accused to the Sessions.

[P 869 C 2, P 870 C 1]

Carden Noad—for Appellant.

Muhammad Munir, Khurshaid Ahmad and *Shamsher Chand*—for Respondents.

Zafar Ali, J.—The case for the prosecution was that Bhagat Singh, deceased, and his cousin Arur Singh, and Budh Singh were sleeping one night in a field of melons when three men came to steal melons. By the barking of the dog Bhagat Singh and his companions awoke, and the thieves ran away. Soon after that seven men turned up and challenged Bhagat Singh, etc. One of them, namely Buta, was armed with a barchhi, another Manga had also a barchhi, and Chainchal Singh was carrying a gandasa. The culprits attacked Bhagat Singh and Budh Singh and injured both. Bhagat Singh succumbed to his injuries on about the third day.

Buta, Manga and Chainchal Singh were sent up by the police for trial under S. 304, I. P. C, and a Magistrate empowered under S. 30, Criminal P. C, to try all offences not punishable with death, tried them and convicted two of them under S. 304 and acquitted the third, namely Manga. The two convicts have appealed separately one through counsel and the other through the jail authorities, and the Government Advocate has applied on behalf of the Local Government for a fresh trial on the ground that the Magistrate had no jurisdiction to try the case, the offence committed being prima facie culpable homicide amounting to murder. Further the Government Advocate appeals against the acquittal of Manga.

From the medical evidence it appears that the deceased bore no less than 13 injuries out of which five were incised wounds. One of these incised wounds was on the right shoulder 6" × 2" and 1", cutting the scapula bone. There was another incised wound on the posterior auxillary of the right side deep to the ribs. The right 3rd, 4th and 5th ribs were fractured under this wound. Having regard to the nature of the injuries and the circumstances under which they were inflicted we come to the conclusion that the assailants were triable for murder. It is contended on behalf of Chainchal Singh that the application for revision being a belated one this Court should not exercise its powers of revision which are after all discretionary. Further it is argued that as the object of the Crown is to have the sentences enhanced a retrial should not be ordered. Thirdly, it is argued that it will not be possible to hold that any one of the accused was guilty of murder because it cannot be decided which of the several assailants inflicted the fatal injury. Of these contentions No. 3 does not appear to be well founded, and the rest must not be allowed to prevail under the circumstances of the present case.

It may be observed that the Magistrate did not apply his mind to appreciate the nature of the case, and proceeded to convict under S. 304 without realizing the gravity of the act done by the culprits and stating whether it fell under part 1 or part 2, S. 304. When a person is attacked and killed, it must be decided whether the assailant was guilty of cul-

pable homicide and, if so, whether the culpable homicide amounted to murder or not. If it were found that the offence committed was culpable homicide but that it did not amount to murder, it must further be made clear whether the offences fell under part 1 or part 2, S. 304, I. P. C.

As the case was prima facie one of murder and the Magistrate had no jurisdiction to try it, we accept the application for revision as well as the appeal by the Local Government against the acquittal and we set aside the convictions as well as the acquittal and order the Magistrate to commit the c se to the Court of Sessions under S. 302, I. P. C.

We must not be understood to have decided that all or any one of the accused committed murder or that the evidence on the record is sufficient to prove murder. All that we have decided is that this was prima facie a case of murder, and should have been committed to the Court of Sessions.

N.K. *Order accordingly.*

A. I. R. 1928 Lahore 869

SHADI LAL, C. J. AND AGHA HAIDAR, J.

Mohammad and *others*—Defendants—Appellants.

v.

Abdulla and *others*—Plaintiffs—Respondents.

Second Appeal No. 893 of 1922, Decided on 3rd December 1926, from decree of Dist. Judge, Ludhiana, D/- 24th January 1922

Civil P. C., O. 22, R. 4 (3)—Appeal by donees from a decree in favour of reversioners disputing the gift—One of the reversioners dying in the meanwhile—His legal representative not brought on record—Whole appeal abates.

Donees appealed from a decree passed in favour of reversioners, disputing the gift. During the pendency of the appeal, a reversioner died and no application was made to implead his legal representative within the prescribed period of limitation.

Held: that appeal abated against all reversioners: *A. I. R. 1925 Lah. 124, Foll.*

[P 870 C 1]

Zafarullah Khan—for Appellants.

Ghulam Rasul—for Respondents.

Shadi Lal, C. J.—On 4th January 1919, one Jhanda made a gift of certain landed property to defendants 2 to 4. Nine persons, who claim to be Jhanda's reversioners, thereupon, brought a suit for a declaratory decree that the gift should not affect their rights of inheritance on the death of Jhanda. Their suit was decreed by the trial Court, and that decree was confirmed by the District Judge. The donees preferred a second appeal to this Court, and during the pendency of the appeal two of the plaintiffs-respondents, namely, Dulla and Wazir, died; and no application to implead their legal representatives was made within the prescribed period of limitation.

The question for determination is whether the appeal has abated. It is to be observed that the deceased plaintiffs had obtained a decree which enabled them or their legal representatives to obtain possession of their share of the gifted land on the death of Jhanda, and it is admitted that Jhanda has since died. It is clear that the right to sue does not survive against the surviving respondents and that under O. 22, R. 4, sub-R (3), Civil P. C., the appeal has abated as against the deceased respondents. It is, however, contended by the learned counsel for the appellants that, as the suit was one of a representative character, the death of these two persons should not make any difference because the remaining plaintiffs-respondents represent the whole body of reversioners. As pointed out above, the deceased respondents or their heirs, in pursuance of the decree obtained by them, are entitled to recover from the donees their share of the estate, and we see no reason why they should be deprived of the fruits of their victory. The judgment of a Division Bench of this Court in the case of *Wali Muhammad* v. *Barkhurdar* (1) lays down a rule which, in our opinion, applies to this case.

The next question is whether the partial abatement of the appeal results in the abatement of the appeal as a whole. Now, there is ample authority for the view that the Court should not be called upon to make two contradictory decrees in the same litigation, which would be the result of allowing the appeal as against the remaining respondents and not disturbing the decree of the lower appellate Court as against the deceased respon-

(1) A. I. R. 1926 Lah. 124=5 Lah. 429.

dents. The same view has been taken in *Wali Muhammad* v. *Barkhurdar* (1).

We accordingly hold that the whole of the appeal has abated. The appellants must pay the costs incurred by the respondents in this Court.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 870

TEK CHAND AND JOHNSTONE, JJ.

Mt. Jandi—Plaintiff—Appellant.

v.

Chirag Din and *another*—Defendants—Respondents.

First Appeal No. 2803 of 1923, Decided on 22nd June 1928, from decree of 1st Class Sub-Judge, Lahore, D/- 6th November 1923.

Custom (Punjab)—Arains of Sande Kalan—Sister excludes uncle.

Among Arains of mauza Sane Kalan a sister excludes the uncle in succession to the ancestral estate left by her childless brother : 174 *P. R.* 1889 ; 190 *P. R.* 1888 ; and 29 *P. L. R.* 1902 ; *Rel. on* : 28 *P. R.* 1893, *Dist.* [P 873 C 1]

Ghulam Mohi-ud-Din and *Muhammad Hussain*—for Appellant.

Tirath Ram and *Gopal Chand*—for Respondents.

Tek Chand, J.—The dispute in this case relates to the property of one Mehraj Din, an Arain of the Nain *got*, resident of Mauza Sande Kalan, who died childless and wifeless on 1st June 1904, leaving him surviving an infant sister, Mt. Jhandi, aged one year, and an uncle Chiragh Din defendant 1. Before the revenue authorities rival claims to his estate were put forward on behalf of Chiragh Din, and Mt. Jhandi, but the mutation was sanctioned in favour of the former and since then he has been in possession. On 18th May 1921 Mt. Jhandi who was still a minor brought this suit (through her maternal grandfather Shahab-ud-Din as next friend) for recovery of Mehraj Din's property and other cognate reliefs alleging that according to the custom prevailing among the parties she was entitled to succeed to the estate of her deceased brother to the exclusion of his uncle Chiragh Din.

Chiragh Din denied that by custom, sisters excluded uncles and also pleaded that he had planted a garden at a considerable cost and rebuilt a house, and that in the event of the plaintiff's suit being decreed he was entitled to compensation for these improvements. Several issues were framed, the first of which is the only one material for our present purposes. This issue runs as follows :

Is plaintiff entitled by custom to succeed to her brother Mehraj Din in preference to her uncle Chiragh Din, defendant?
Onus probandi on plaintiff.
Or the uncle excludes the sisters ?
Onus probandi on defendant.

The Subordinate Judge (Pandit Omkar Nath Zutshi) who framed the issues was transferred after he had recorded a part of the evidence and the case was decided by his successor Lala Kanshi Ram. He held that the burden of proving the custom set up by the plaintiff was on her and as she had failed to discharge it, he dismissed the suit without deciding the other points arising in the suit. She has appealed and we have examined the record carefully and heard both counsel at length.

It may be stated at the very outset that the learned Subordinate Judge, who decided the case was in error in supposing that on the issue as framed the onus lay entirely on the plaintiff. The form of the issue leaves no doubt that it was intended to keep the onus open and to call upon both parties to prove their respective contentions. Neither party seems to have raised any objection at the time, probably owing to the fact that the entries in the riwaj-i-ams of 1891—94 and 1911—14 did not agree with regard to the rights of sister to succeed to the estate of a childless brother. In the riwaj-i-am prepared by Mr. Bolster in the current settlement (1911—14) it is stated in answer to question 71 that the rights of sisters are similar to those of daughters as defined in answers to question 61. The answer is supported by two instances, both of Arains, in one of which the sister is recorded as having been preferred to her male cousin and in the other she is said to have excluded collaterals in inheritance of ancestral property. In answer to question 61 it is stated that among Arains in the proximity of Lahore (villages of Harbanspura, Salamatpura, Mahmud Buti, Kotli Abdul Rahman, Fateh Garh, Baghbanpura, Mian Mir, Ganj, Tajpura, Dogaich, Shadipur, Babu Sabu, Bhadru, Kot Kamboh, Jhugian Nanga, Saidpur and Kot Kanjri) daughters of a sonless proprietor exclude

his agnates. In the Appendix to this riwaj-i-am at pp. 28 to 30, and pp. 11 to 12 numerous instances, supported by references to mutations, are mentioned in which daughters and sisters had succeeded to the exclusion of collaterals amongst Arains in various parts of the Lahore and Sharakpur tahsils. It will thus be seen that the entries in this riwaj-i-am are very much in favour of the custom set up by the plaintiff.

In the riwaj-i-am of 1891—94 it is stated (p. 10) that among Rajputs, Dogars and Arains a daughter or sister succeeds to the property

if there is no male collateral nearer related than in the fifth generation.

No instances are given in support of this entry; in the preface it is stated by the compiler, Mr. G. C. Walker,

that the information on which the riwaj-i-am was based was meagre and inadequate.

The riwaj-i-am prepared in 1868 is silent as to the rights of sister, but it is stated that among Arains a daughter succeeds to the estate of her sonless father in the presence of collaterals.

It was contended on behalf of the plaintiff-appellant that in view of the entry in the latest and more carefully prepared riwaj-i-am (1911—14) the initial presumption is in favour of the custom set up by her and that the onus ought to have been placed upon the defendant-respondent to prove the contrary. On the other hand, the respondent's learned counsel urged that as succession to Mehraj Din opened out in 1904 the onus ought to be regulated according to the entries in the riwaj-i-am of 1891—94, and it lay on the plaintiff to affirmatively establish that by custom she had a right to succeed. After fully considering the arguments of the learned counsel, I am of opinion that in view of the conflict in the riwaj-i-am the learned Subordinate Judge (Pandit Omkar Nath Zutshi) followed the proper course in keeping the onus open and calling upon both parties to prove their respective contentions. I shall, therefore, proceed to examine the evidence led by each party and then to see how the balance turns.

The plaintiff claims that the balance of judicial instances is decidedly in her favour. She relies, first, on *Zainah* v. *Amir* (1), which was a case among Ghelan Arains of the neighbouring village of Babu Sabu, in which the learned Judges of the Chief Court in their first order referred to two cases decided by subordinate Courts in 1856 and 1869 respectively in both of which sisters had succeeded their brothers in preference to uncles, but with a view to have the matter investigated further, they remanded the case. On remand a very full enquiry into the custom of the Arains of the Lahore District appears to have been made by Mr. W. A. Harris, District Judge, whose report dated 20th December 1889 (Ex. P-24) is printed at p. 1 of the supplementary paper-book. He recorded his finding in favour of the sisters and this finding was accepted by the learned Judge of the Chief Court who held that by the custom prevailing among the Arains of Lahore District

a sister excluded collaterals wholly from inheritance to her childless brother.

The plaintiff has further produced copies of judgments of two cases decided by Lala Udai Ram, Munsif, in 1910 (Exs. P-25 and P-22), the parties to which were Arains of Mauzas Faizpur Khurd and Faizpur Kalan respectively. In both these cases sisters succeeded to the exclusion of near collaterals. The decision in the second of these cases was affirmed on appeal by the Divisional Judge and a revision to the Chief Court was unsuccessful (Ex. P-21).

In another case (Ex. P-20) the parties to which were Arains of Muaza Salamatpur, the Chief Court refused to interfere on revision with the decision of the lower appellate Court affirming the trial Court's decree in favour of the sister. All these instances support the plaintiff's case and there are also observations in favour of the sister's right to succeed in 190 *P. R.* 1888 and *Khazan Singh* v. *Khushal Singh* (2) though the questions actually decided in those cases were different.

The plaintiff further relies on Ex. P-23, which is a judgment by Mr. Tapp, Munsif, 1st Class, Lahore, dated 5th April 1904, and in which there are remarks in favour of the sister's right to succeed. But as the property in dispute in that case was non-ancestral, it is not of much value as an instance. As against these not a single judicial instance has been brought to our notice on behalf of the defendant-respondent.

(1) [1889] 174 P. R. 1889.

(2) [1902] 29 P. L. R. 1902=83 P. L. R. 1902.

Coming now to mutations, we find that many instances are given in pp. 27 to 41 of Appendix to the Riwaj-i-am of 1911-14 showing that daughters and sisters exclude collaterals. The parties to a large number of these mutations were Arains; and of them those from Mauzas Nainsukh, Jai Moosa, Muzang, Nawankot, Kot Khoja Said, Khairpur Khurd, Pukki Thatti, Khairpur Kalan, Nawan Kot, Sande Kalan and Babu Sabu are of particular value. In some of them it is not stated whether collaterals were alive, but in most of them it is specifically recorded that the female heirs succeeded in preference to male collaterals. The respondent's counsel argued that in the list of villages mentioned in answer to question 61 of the Riwaj-i-am of 1911-14 the villages Sande Kalan and Nawan Kot are not mentioned, and, therefore, it should be concluded that the custom of these villages is different from that of the village named. But this contention is sufficiently disposed of by the entries in the Appendix, where we find instances of other villages in which the custom is exactly the same. It follows, therefore, that this list is not exhaustive but is merely illustrative of the villages situate in the proximity of Lahore in all of which the custom among Arains is more or less similar. This evidence is supplemented by further instances supported by mutation entries in which the sister was successful: see Ex. P. 27 (Sande Kalan); Ex. P. 29 (Bhogiwal); Ex. P. 30 (Sande Kalan), Ex. P. 35 (Kot Khawaja); and Ex. P. 36 (Nawan Kot).

The respondent has produced a number of mutation entries, some of which no doubt show that the estate of a childless Arain was taken by the collaterals as against the sisters. But in most of them (e. g. Exs D. 3, D. 4 and D 8) the sisters did not appear before the mutating officer and orders were passed ex parte. Some of them, like D. 13., are too recent and may yet be contested; while the remaining ones are irrelevant as in them the deceased person had left both a brother and a sister and the former excluded the latter.

The oral evidence cited by both parties was not of much value, except in so far as it was supported by the mutations already referred to, and I do not think it necessary to discuss it.

In deciding this issue, it must be borne in mind that among Arains generally and particularly among those of the Lahore District female relations occupy a much more favourable position, than among the other agricultural tribes of the central districts of the Punjab. In most of the Lahore villages a daughter succeeds in preference to a brother or an uncle to the ancestral property of her sonless father; and the entry in the latest Rawaj-i am is to the effect that in the villages in the proximity of Lahore the right of the sister and the daughter are the same.

Mr. Tirath Ram for the respondent urges, however, that the custom of the Arains of the villages situate in the neighbourhood of the town of Lahore is irrelevant as the parties to this litigation originially belonged to Mauza Nainsukh, which is situate across the river in the Sharakpur tahsil and where the custom is different. In support of his contention he relies upon certain observations of Plowden, J., in *Chiragh Din* v. *Mamman* (3), and on the fact that a part of the property in dispute in this case is similar in Mauza Nainsukh. There is, however, no evidence that the ancestors of this family ever lived at Mauza Nainsukh and if so, at what time they migrated to Sande Kalan. Further we have not been referred to any instances or other evidence, to the effect that the custom of the Arains of Mauza Nainsukh is different from that of Arains resident in the other Arain villages on both sides of the river; on the other hand we find at p 28 of Mr. Bolster's Riwaj-i-am that in Mauza Nainsukh itself an Arain daughter succeeded in 1898 in preference to a nephew. In my opinion this contention is devoid of force and should be overruled.

Mr. Tirath Ram next referred to a remark in the statement of Jamal Din (P. W. 8), Lambardar of Mauza Sande Kalan, but this remark obviously relates to a case where the deceased had left a brother and a sister and the brother had succeeded to the exclusion of the sister. There is no dispute as to the right of the brother to succeed in such circumstances, and this matter has no bearing on the question to be decided in this case.

After fully considering the evidence on the record I am of opinion that the custom is as recorded in the Riwaj-i-am of 1911-14 and it must be held that among

(3) [1893] 23 P. R. 1893.

Arains of Mauza Sande Kalan a sister excludes the uncle in succession to the ancestral estate left by her childless brother. The finding of the lower Court to the contrary cannot therefore be sustained.

I would accordingly accept the appeal; set aside the decree of the lower Court and remand the case under O. 41, R. 23, for decision of the remaining points. Court-fee on appeal shall be refunded; other costs shall be costs in the cause.

Johnstone, J.—I concur.

N.K. *Case remanded.*

A. I. R. 1928 Lahore 873

ZAFAR ALI AND JAI LAL, JJ.

Ghanaya Lal and *others*—Defendants—Appellants.

v.

Rallia Ram and *others*—Plaintiffs—Respondents.

First Appeal No. 2579 of 1924, Decided on 20th March 1928, from decree of Senior Sub-Judge, Amritsar, D/- 3rd July 1924.

Evidence Act, S. 92—Subsequent oral agreement modifying terms of a written contract cannot be proved by oral evidence.

A subsequent oral agreement to take less than is due under a registered mortgage-bond is an agreement modifying the terms of a written contract, and if it has to be proved, oral evidence is inadmissible under S. 92, prov. 4: 42 *Mad.* 41 and 44 *Bom.* 55, *Foll.* [P 874 C 1]

Moti Sagar and *Nawal Kishore*—for Appellants.

Badri Das and *Jiwan Lal Kapur*—for Respondents.

Zafar Ali, J—This was a suit for the recovery of mortgage money. According to the mortgage-deed bearing date 9th December 1906, the properties mortgaged were six shops and houses situated in Amritsar, and the mortgage was with possession for a sum of Rs. 30,000. But on the very date of the mortgage the plaintiffs-mortgagees granted a lease to the mortgagors allowing them to remain in possession of the properties as tenants on a monthly rent of Rs. 187-8-0, which was equal to the interest at the stipulated rate of ten annas per cent, per mensem. In 1910 the mortgagee sued to recover rent, and obtained a decree for Rs. 5,350 on account of rent up to 7th June 1910, and Rs. 577 as costs of the suit. On 12th February 1912, the mortgagors, in pursuance of an agreement with the mortgagees, sold off two of the houses for Rs. 16,500 and paid this amount to the latter in reduction of the mortgage debt. Rs. 444 more were realized by the mortgagees in execution of the decree for rent on 28th March 1914. On the date of the institution of the present suit, i.e., on 17th November 1916, the mortgagees claimed Rs. 31,059-3-0 as per detail below:

1.	Rs. 30,000	Principal.
2.	Rs. 5,350	The rent decreed.
3.	Rs. 577	Costs of the suit for rent.
4.	Rs. 3,787-8-0	Interest from the 7th June 1910 to 12th February 1912.
5.	Rs. 8,288-11-0	Interest from the 12th February 1912, to 17th November 1916, (the date of institution of the present suit).
	Total...Rs. 48,003 3-0	

Deducting from the above the total of the two sums received by them i., e., Rs. 16,500 and Rs. 444, the plaintiffs claimed the balance, Rs. 31,059-3-0. The defendants pleaded inter alia that the suit was barred by the provisions of O. 2, R. 2, Civil P. C. This plea found favour with the trial Court who dismissed the suit. On appeal by the plaintiffs a Division Bench of this High Court came to the conclusion that O. 2, R. 2, was not applicable and remanded the case for decision on the merits by order dated 27th November 1922.

Nearly a year later, i. e., on 25th November 1923, four of the mortgagors who had one half share in the properties mortgaged entered into a compromise with the mortgagees according to which the latter received from the former Rs. 16,000 in cash and hundis in satisfaction of half the mortgage debt then due and released one of the mortgaged houses in their favour. The remaining mortgagors pressed the original pleas, viz.: (1) that by a mutual settlement verbally made on 12th February 1912, the mortgagees had agreed to accept Rs. 35,500 in full satisfaction of the mortgage debt then due, and to charge interest at As. 7-6 per cent per mensem after that date, that Rs. 16,500 having been paid, the balance due was Rs. 19,000 only; and (2) that the plaintiffs had failed to give them credit for the sum of Rs. 300 which was paid to them on 17th March 1910.

With regard to the alleged oral agreement, the learned Senior Subordinate Judge of the Court below characterized the evidence produced in support of it as "flimsy, vague and indefinite," and further maintained that no oral agreement modifying the terms of the contract which was reduced to writing and registered could be proved. In respect of the item of Rs. 300 the learned Senior Subordinate Judge held that as the mortgagors had failed to claim credit for it in the suit for rent they could not be permitted to claim it in the present suit. Having arrived at these findings he granted the mortgagees a decree for Rs. 22,500 and costs in the terms of O. 34, R. 4, Civil P. C.

The contesting mortgagors appeal and on their behalf we have heard Mr. Moti Sagar. He has taken us through all the evidence bearing on the alleged oral agreement, and after a careful consideration of it we come to the conclusion that it is really vague and inconclusive. We do not, however, consider it necessary to review it here because we are of opinion that the alleged oral agreement could not be proved. In *Mallapa* v. *Matum Nagu Chetty* (1), a Full Bench of the Madras High Court decided that a subsequent oral agreement to take less than is due under a registered mortgage-bond is an agreement modifying the terms of a written contract, and if it has to be proved, oral evidence is inadmissible under S. 92, prov. 4, Indian Evidence Act. This ruling was followed by a Division Bench of the Bombay High Court in *Jagan Nath* v. *Shankar* (2), where it was held that oral evidence was inadmissible to prove discharge of the mortgage debt under S. 92, prov. 4, Evidence Act, 1872. Mr. Moti Sagar frankly concedes that these rulings are in point and that he is unable to say anything against them. But he lays claim to interest on the sum of Rs. 444 and further claims the item of Rs. 300 with interest, and lastly he urges that the mortgagors were liable to pay only half the costs of the suit. As regards the item of Rs. 444 it is clear that it was paid towards rent or interest and, therefore, the mortgagors are not entitled to any interest on this amount. We must allow the item of Rs. 300 with interest because it was admittedly received by the mortgagees and they have failed to account for it. With regard to costs we see no reason why the appellants should be made to pay full costs while the mortgagees press their claim for half the mortgage money as against them.

We, therefore, accept the appeal and modify the decree of the Court below only so far as to give the mortgagors credit for Rs. 300 plus interest thereon from the date of payment, and to allow the plaintiffs half the costs incurred by them in the trial Court. In this Court the parties shall bear their own costs.

S.J./R.K. *Appeal accepted.*

(1) [1918] 42 Mad. 41=35 M. L. J. 555=8 M. L. W. 522=48 I. C. 158=(1918) M. W. N. 719 (F. B.).

(2) [1920] 44 Bom. 55=54 I. C. 689=22 Bom. L. R. 39.

A. I. R. 1928 Lahore 874

TEK CHAND, J.

Jhanda Ram—Plaintiff—Petitioner.

v.

Musa—Defendant—Respondent.

Civil Revn. Petn. No. 189 of 1927. Decided on 20th June 1928, from decree of 4th Class Sub-Judge, Pakpattan, D/- 9th November 1926.

Civil P. C., Sch. 2, para. 14—Award granting some reliefs claimed by plaintiff but saying nothing as to others—The undecided matters cannot be deemed to be decided against plaintiff.

Where the award grants only some reliefs claimed by the parties, but is silent as to the others, it cannot be held that the undecided matters must be deemed to have been decided against plaintiff. [P 875 C 1]

Anant Ram Khosla—for Petitioner.

Bashir Ahmad—for Respondent.

Judgment.—The plaintiff instituted a suit for the issue of a perpetual injunction against the defendant, claiming a number of other reliefs in respect of several alleged illegal acts of his. The suit was by consent of parties referred to an arbitrator who delivered an award granting to the plaintiff some of the reliefs claimed by him but saying nothing with regard to the others. The plaintiff objected to the award on various grounds, one of them being that the award was incomplete as the arbitrator had failed to give any finding in respect of some of the acts complained of, in regard to which also a perpetual injunction was

claimed. The learned Subordinate Judge has overruled the objection, holding that the points not decided by the arbitrator must be considered to have been decided against the plaintiff.

The plaintiff has preferred a petition for revision to this Court, urging that either the award should be set aside as being incomplete and invalid. or, in any case, it should be remitted back to the arbitrator for decision on the points left undetermined.

Mr. Bashir Ahmad for the respondent admits that the arbitrator has not specifically decided several of the points raised by the plaintiff in his plaint, but urges that the order of the lower Court is not open to revision and cites several authorities in support of his contention.

In my opinion the learned Judge of the Court below has acted with material irregularity in not remitting the award to the arbitrator on the erroneous ground that if an arbitrator does not decide some of the points referred to him, he must be deemed to have decided them against the party who had urged them. I can find no warrant for this proposition and in my judgment the order of the trial Court filing the award is vitiated by this unwarranted assumption.

I do not, however, see any ground for setting aside the award as prayed by the petitioner. The proper course is to direct the lower Court to remit the award to the arbitrator under para. 14, Sch. 2 for determination of the matters left undecided. I accordingly accept the petition for revision and remit the case to the lower Court for disposal in accordance with the foregoing remarks. Costs shall follow the event.

D.B./R.K. *Petition accepted.*

A. I. R. 1928 Lahore 875

SHADI LAL, C. J. AND BHIDE, J.

Ahmad Din and *others*—Defendants—Appellants.

v.

Tulsa Singh and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 157 of 1923, Decided on 12th June 1928, from decree of Sr. Sub-Judge, Lahore, D/- 18th December 1922.

(a) Hindu Law—Widow — Alienation such as a prudent owner would make in order to benefit the estate—Bona fide lender is not affected by the precedent mismanagement of the estate when he is not a party to it.

The power of a widow to charge an estate not her own is under the Hindu law a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. But where in a particular instance the charge is one which a prudent owner would make in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance is the thing to be regarded. But it must be remembered that according to this principle it is only the bona fide lender who is protected. But, if that danger arises from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the widow grounded on a necessity which his own wrong has helped to cause: 6 *M. I. A.* 393 (*P. C.*), *Foll.* [P 877 C 1, 2]

(b) Hindu Law—Widow—Sale to pay sum due on a mortgage—Vendee's failure to prove the fact that he made inquiries as to the genuineness or good faith of the transaction—Omission is the strongest indication of the absence of good faith on his part.

In the case of alienation by a widow the onus lies heavily on a vendee to prove that a certain mortgage transaction for discharge of which the sale is effected, is a genuine and bona fide one and the discharge of this debt constitutes legal necessity. [P 878 C 1]

Where a vendee fails to prove what inquiry was made and how he was satisfied as to the genuineness or good faith of that transaction, though the fact was peculiarly within his knowledge, this omission must be taken as the strongest indication of the absence of good faith on his part: *A. I. R.* 1927 *P. C.* 230, *Foll.* [P 878 C 2]

(c) Hindu Law—Widow—Necessity—Pilgrimages to places like Benares, Muthra, Bindraban, etc., do not constitute a valid necessity for alienation.

According to Hindu Law only those pilgrimages which conduce to spiritual welfare of the husband constitute a valid necessity for an alienation by a widow. A pilgrimage to Gaya for performance of the husband's Shradha has been held to constitute such necessity but not pilgrimages to places like Benares, Muthra, Brindaban, etc.: *A. I. R.* 1924 *All.* 902 and 3 *C. W. N.* 544, *Ref.* [P 878 C 2, P 879 C 1]

(d) Hindu Law—Widow—Balance from income after paying interest payable on previous mortgage of property sufficient for her maintenance—Sale of property is not for necessity.

Where the balance from the income from the property after paying interest payable on a previous mortgage is sufficient to maintain a Hindu widow, the sale of that property by her is not for necessity: *A. I. R.* 1927 *P. C.* 37, *Expl. and Dist.* [P 879 C 2, P 880 C 1]

Badri Das and *Jiwan Lal*—for Appellants.

Jagan Nath Aggarwal, *Tirath Ram*, *H. C. Kumar* and *Chuni Lal Vohra*—for Respondents.

Bhide, J.—The pedigree-table of the parties concerned in this appeal is as follows:

S. Ratan Singh.

Mul Singh=Mt. Bhagwan Devi (Deft. 2).	Tulsa Singa (Plff. 1).	Kirpa Singh (Plff. 2).
Narain Das=Mt. Sohan Devi (Deft. 1). (died on 31st December 1911.)		

On 31st March 1919 Mt Sohan Devi, widow of Narain Das, and Mt. Bhagwan Devi, his mother, sold an ihata containing some 10 kothris to defendants 3 and 5 for a sum of Rs. 18,000. Plaintiffs sued for a declaration that this sale was without necessity and should not affect their reversionary rights. The learned Senior Subordinate Judge has granted the declaration subject to payment of Rs. 13,500 to the vendees before obtaining possession. From this decree defendants 3 to 5, the vendees, have appealed.

The details of the consideration for the sale according to the sale-deed were as follows:

	Rs.	
(a)	13,943	for payment to Mr. Lal Chand, a prior mortgagee.
(b)	2,630	for payment to Dharm Chand, another prior mortgage.
(c)	427	for payment to Sohan Singh on account of a hundi.
(d)	600	for expenses in connexion with pilgrimages.
(e)	400	for expenses in connexion with the sale-deed.
Total	18,000	

As regards item (a), it is alleged that although a sum of Rs. 13,943 was due to Mr. Lal Chand, a remission of Rs. 443 was secured by the vendees in the interests of the vendors and the latter sum was actually paid to the vendors. A receipt by the vendors for this sum has been produced but there seems to be no satisfactory evidence in support of this allegation. Prima facie it seems unlikely that the vendees would have cared to intercede on behalf of the vendors for such a remission or that Mr. Lal Chand would have granted it merely at their intercession. It has not been shown that a sum of Rs. 13,943 was actually due to Mr. Lal Chand on the footing of the mortgage. Mr. Lal Chand, when he was in the witness-box, was not questioned about the alleged remissions and merely stated that a sum of Rs. 13,500 was paid to him as shown in the endorsement on Ex. D-1. No other evidence has been produced in support of the alleged remission and the vendees have not even cared to go into the witness-box to depose to it. In view of all these facts the learned Senior Subordinate Judge's finding that only a sum of Rs. 13,500 has been proved to have been paid on account of the mortgage in favour of Mr. Lal Chand seems to be amply justified.

The main items in dispute, however, are items (b), (c) and (d). Item (e) relating to expenses in connexion with the sale can only be allowed if the sale is upheld, but not otherwise.

As regards item (b), it appears that in 1912, i. e., shortly after the death of Narain Das, the Amritsar Distillery Co. sued defendants 1 and 2 and Jai Chand, a brother of defendant 1, for recovery of Rs 1,752-3-6 due on account of the price of liquor purchased by Narain Das for his liquor shop. The suit was decreed against defendant 1 and her brother Jai Chand. The latter was held liable to the extent of the assets of the deceased in his hands, as it was found that he had taken possession of the stock of liquor left in the shop of Narain Das and had carried on the business under a license obtained in his own name. The decree was purchased by one Umrao Singh who took out execution and attached the immovable property of Narain Das, which was already under mortgage with Mr. Lal Chand. To save this property from sale, the widows Mt. Bhagwan Devi and Mt. Sohan Devi are alleged to have effected a second mortgage of the property on 20th February 1916 in favour of Dharm Chand, father of Mt. Sohan Devi for a sum of Rs. 2,000. It appears that the bulk of the amount secured by the above mortgage, viz, about Rs. 1,958 was actually paid in Court in satisfaction of the decree (vide receipts at pp. 63—64 of the printed paper-books). But the learned Senior Subordinate Judge has disallowed this item on the ground that the liquor left in the shop when Narain Das died was worth about Rs 3,467-8-6 and that Jai Chand could not be allowed to take this liquor and get the widows

to pay for it to the distillery. He also found that the widows must have obtained considerable cash on the death of Narain Das, as he had received Rs. 4,000 in cash only about three months before his death on the mortgage effected in favour of Mr. Lal Chand (vide item (a) above). The learned counsel for the appellants on the other hand points out that Mt. Bhagwan Devi has deposed that the liquor shop was being carried on at a loss even during the life of Narain Das and that a loss of Rs 2,000 was sustained in that business. The account books of the shop were, however, not produced before the Court and consequently there is no satisfactory evidence on the record to show the exact financial position of this business at the death of Narain Das. But it has been contended on behalf of the appellants, that even if there was some mismanagement at the time, the mortgagee cannot be prejudiced thereby as he had only to see the actual necessity for the loan at the time it was advanced. Reliance has been placed in this respect on the following passage in the leading case of *Hunooman Pershad Panday* v. *Mt Babooee Mundraj Kunweree* (1) at p. 423:

> The power of the manager of an infant heir to charge an estate not his own is under the Hindu law a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. But where in a particular instance the charge is one which a prudent owner would make in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance is the thing to be regarded.

It has been urged that the above principle governs the present case also and that inasmuch as the mortgage in favour of Dharm Chand was made to prevent an impending sale of the property in execution of a decree, the mortgage should be held to be for legal necessity. This contention does not seem to be sound. It is true that the above mentioned principle laid down by their Lordships of the Privy Council in the case of *Hunooman Pershad Panday* v. *Mt. Babooee Mundraj Kunweree* (1) has been held to be applicable to the case of alienations by widows (vide para. 634 at p. 923, Mayne's Hindu law and Usage, edn. 9); but it must be remembered that according to that principle it is only the bona fide lender who is protected.

The following remarks of Lord Justice Knight Bruce, in connexion with the danger to the estate which justifies alienation, which are to be found in continuation of the passage in *Hunooman Pershad Panday* v. *Mt. Babooee Mundraj Kunweree* (1) at p. 423 quoted above, are noteworthy in this connexion.

> But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir grounded on a necessity, which his own wrong has helped to cause.

The crucial point for decision, therefore, is whether Dharm Chand, the mortgagee was acting bona fide. As stated already he is the father of Mt. Sohan Devi. It was he who was apparently looking after her affairs ever since the death of Narain Das. Mt. Bhagwan Devi (defendant 2), has admitted in her statement as a witness that Narain Das had invested Rs. 6,000 in a gunny-bag shop. He had also a liquor shop. It is clear from the mortgage-deed in favour of Lal Chand, that Narain Das had received Rs. 4,000 in cash only about three months before his death. No attempt has been, however, made to show what happened to the stock in the two shops or the sum of Rs. 4,000. The financial condition of Narain Das at his death was a matter within the knowledge of the alienors and Dharm Chand, but they have refrained from producing reliable evidence on the point. The financial condition could easily have been disclosed by the account books of Narain Das but these have been withheld. It has been mentioned above that the Amritsar Distillery Co., obtained a decree against Jai Chand, brother of Mt. Sohan Devi, on the ground that he had taken possession of the stock of liquor in the shop. But Mt. Bhagwan Devi has denied that Jai Chand had anything to do with the shop or that any decree was passed against Jai Chand. Jai Chand himself was not produced as a witness and Dharm Chand although he appeared as a witness gave no evidence about the financial condition of the shops.

The decree in favour of the Amritsar Distillery Co., was passed jointly against Mt. Sohan Devi and Jai Chand in February 1913. It is significant that Jai Chand

(1) [1854-57] 6 M. I. A 393=18 W. R. 81=2 Suther 29=1 Sar. 552 (P. C.).

did not pay even a portion of the decretal amount and that a mortgage was effected in favour of his father Dharm Chand in order to pay it off. The decree was only for Rs. 1,705-7-6. It is difficult to believe in view of the facts stated above that Narain Das could not have left enough cash even for the payment of this amount. The fact appears to be that on the death of Narain Das the management of the affairs of the family fell into the hands of Dharm Chand and his son Jai Chand and they exploited the situation to benefit themselves. The widows being in a helpless condition were probably unable to protect their interests. It appears further that after the death of Narain Das their relations with the plaintiffs became strained (vide evidence of Mt. Bhagwan Devi) and this fact also may have induced them to connive at the doings of Jai Chand and Dharm Chand. Be that as it may, the fact remains that on the one hand a decree had been passed against Jai Chand for the price of liquor supplied to Narain Das on the ground that he had taken possession of the stock of liquor on the latter's death, while on the other hand a mortgage of the widow's property was created in favour of Dharm Chand to pay off the very same decree In these circumstances, Dharm Chand cannot be held to be a bona fide lender within the meaning of the rule laid down at p.423 in *Hunooman Pershad Panday* v. *Mt. Babooee Mundraj Kunweree* (1). If there was any mismanagement, it was he who was responsible for it and hence he cannot be allowed to take advantage of his own wrong.

The alienation being by widows the onus lay heavily on the defendants to prove that the mortgage transaction in favour of Dharm Chand was a genuine and bona fide one and the discharge of this debt constituted legal necessity. In view of the facts discussed above, I feel no hesitation in holding that this burden has not been discharged. The position of the vendees cannot be any better than that of Dharm Chand in respect of this mortgage. It was incumbent on them to show that they acted in good faith in accepting Dharm Chand's mortgage as a genuine charge on the estate. They were no strangers to the family. Ghulam Muhammad, vendee had been a tenant of defendants 1 and 2 for about ten years: vide evidence of Moti Ram D.W. 2. The mortgage in favour of Dharm Chand who was the father of Mt. Sohan Devi and was himself looking after her affairs should have at once aroused the vendees' suspicions and put them on enquiry. The vendees have entirely failed to prove that any bona fide enquiry was made by them. They have not even ventured to go into the witness-box and depose what enquiry, if any was made, and how they were satisfied as to the genuineness or good faith of this mortgage transaction, though the fact was peculiarly within their knowledge. In view of the observations of their Lordships of the Privy Council in *Gurbakhsh Singh* v. *Gurdial Singh* (2), this omission must be taken as the strongest indication of the absence of good faith on their part.

The next two items do not require much discussion. A sum of Rs. 400 is said to have been borrowed from Sohan Singh on a hundi for expenses in connexion with the "Sudh" ceremony of Narain Das. It seems strange that Sohan Singh should have been willing to lend this sum to the widows on a mere hundi (which was not even stamped) when Dharm Chand himself found it necessary to take security for his own loan. This Sohan Singh is a neighbour of the widows and the money is alleged to have been repaid to him, not by the vendees themselves, but through Dharm Chand. It is not shown that the "Sudh" ceremony was performed or that it required anything like the sum of Rs. 400. In the agreement of sale dated 26th March 1919, which was executed by the widows prior to the execution of the sale-deed in favour of defendants 3 to 5 this loan was not mentioned. In view of all these facts it must be held that neither the genuineness nor the necessity of this loan has been proved.

Lastly, we have the item of Rs. 600 alleged to have been taken for pilgrimages to holy places. In connexion with this item, it must be remembered that, according to Hindu law, only those pilgrimages, which conduce to the spiritual welfare of the husband constitute a valid necessity for an alienation by a widow. A pilgrimage to Gya for performance of the husband's Shraddha has been held to constitute such necessity, but not pilgrimages to places like Benares, which have no concern with the

(2) A. I. R. 1927 P.C. 230.

spiritual welfare of the husband : cf. *Darbari Lal* v. *Gobind Saran* (3) and *Hari Kissen Bhagat* v. *Rajrang Sahai* (4). In the present instance, Mt. Sohan Devi has deposed that the money was borrowed for visiting sacred places like Mathra, Bindraban, Rikhikesh, and Badri Narain, but it has not been shown that the proposed pilgrimages were according to Hindu religion believed to be conducive to the spritual welfare of the deceased. Apart from this, it appears that the lady had visited the sacred places even before the sale and the necessity of a second visit had not been explained. Her statement about the visit to these places after the sale is extremely vague and it seems very doubtful if the pilgrimages were undertaken at all. These pilgrimages again are not mentioned in the agreement of sale dated 26th March 1919 referred to above. This item also, like the preceding one, appears to be fictitious.

It will thus appear that the only item which could be held to constitute valid necessity according to law was that of Rs. 13,500 paid to Lal Chand. It was urged that a sale can be upheld even if necessity for a considerable portion of the purchase money is not established, provided that the sale itself was necessary. This contention is supported by a recent Privy Council ruling *Srikishan Das* v. *Nathu Ram* (5). But in the present instance it cannot be said that the sale of the property was necessary as the only item for which necessity is proved is that of Rs. 13,500. The interest payable to Mr. Lal Chand came to only Rs. 62-8-0 per mensem while the income from the property in the shape of house rent appears to have been about Rs. 100 per mensem. Mt. Sohan Devi has made vague and conflicting statements about the income and estimated it at Rs. 48 or Rs. 49 to Rs. 60. Mt. Bhagwan Devi puts the rent at approximately over Rs. 60 and Dharm Chand also estimates at Rs. 60 or Rs. 65. But no attempt has been made to prove the total income from rent at the date of sale, by producing the rent deeds of the tenants who occupied the property about that time. Dharm Chand himself admittedly collected the rent, and it should have been perfectly simple for him to produce definite documentary evidence on the point in the shape of the rent deeds and his accounts. But no such evidence has been produced. A few isolated rent deeds of the years 1912, 1915, and 1917 were produced, but most of them have not been proved. Even if they had been proved they could not show the total income from rent about the time of the sale. The plaintiffs on the other hand have produced some of the tenants as their witnesses and their evidence shows that the income from the property must have been a good deal more. Daulat Ram (P. W. 8), who is related to the plaintiffs as well as to Mt. Sohan Devi and who was himself a tenant in one of the ihatas, estimates the rent of the ihata sold at Rs. 80 and gives certain details of rent paid by different tenants, in corroboration of his statement. Besides this ihata, the defendants had admittedly another ihata and two shops in Anarkali, which also fetched rent. Daulat Ram alone was paying Rs. 20 per mensem as rent. The fact that Daulat Ram was a tenant in this ihata and used to pay Rs. 20 as rent is admitted by one of the defendant's own witnesses Umar Din, D. W. 1. Umar Din deposes that a European lady and a Bania also occupied part of the ihata. The rent paid by these tenants is not mentioned ; but the fact that a European lady was living in the ihata suggests that the property was in a decent condition and must have fetched good rent. Even Moti Ram D. W. 2, a Khatri who occupied some kothris in the ihata paid as much as Rs. 32 per mensem.

In view of the above facts it will not be, I think an exaggerated estimate to take the average income from rent of the property to be at least Rs. 100 per mensem. With this income the widows could not have had difficulty in paying the interest on the mortgage in favour of Lal Chand which amounted to only Rs. 62-8-0 per mensem and maintaining themselves. It has been also shown above that the widows must have obtained considerable cash and moveable property on the death of Narain Das, which has not been accounted for, and this must have been available to meet emergencies, periodical expenses of repairs of the houses etc.

(3) A. I. R. 1924 All. 902=46 All. 822.
(4) [1909] 13 C. W. N. 544 = 1 I. C. 434 = 9 C. L. J. 458.
(5) A. I. R. 1927 P. C. 37 = 49 All. 149 = 54 I. A. 79 (P.C.).

It seems, therefore, clear that no necessity for the sale arose in connexion with the mortgage in favour of Mr. Lal Chand and this was the only debt for which legal necessity was established. I would, therefore, uphold the decision of the learned Senior Subordinate Judge and dismiss the appeal with costs.

Shadi Lal, C. J.—I concur.

N.K. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 880

JOHNSTONE, J.

Ram Kishan—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 122 of 1928, Decided on 30th May 1928, from order of 1st Class Magistrate, Gurdaspur, D/- 26th November 1927.

* (a) *Evidence Act, S.* 15—*Criminal misappropriation in* 1925—*Evidence adduced of similar acts in common link done in* 1924—*Evidence is admissible.*

Accused were prosecuted for misappropriation by defalcation of accounts made in 1925 and 1926. Evidence was adduced by the prosecution of similar acts done by the accused before 1925.

Held : that the evidence was admissible under S. 15 to rebut the probable plea of mistake or innocent condition of the mind of the accused, the evidence being that of a system in which there was a common link between the acts of 1924 and those of 1925 : 6 *Cal.* 655 and 42 *Cal.* 957, *Ref.* [P 883 C 1]

(b) *Evidence Act, S.* 30—*Confession of co-accused during trial implicating the other accused* —*Case a warrant case and not a Sessions case—Co-accused need not be taken out of the dock—Confession is admissible.*

In a warrant case, although the statement of a co-accused amounts to an unqualified confession, he need not be forthwith convicted and removed from the dock. The co-accused is still to be deemed to be jointly tried with the others and his confession can be used as against the others. A sessions case is to be distinguished from a warrant case for the purpose : 15 *P. R. Cr.* 1911, *Dist.*: *A. I. R.* 1925 *Lah.* 435, *Rel. on.* [P 885 C 2]

(c) *Criminal Trial—First Information Report—Mere absence of accused's name therein is no proof of his innocence.*

First Information Report is never per se the statement of a case for prosecution and absence of any accused's name in the first information report is not by itself a sufficient proof of his innocence. [P 886 C 1]

Ram Chand Manchanda and *Ishar Das*—for Appellant.

Ram Lal and *Sant Ram*—for the Crown.

Judgment.—This judgment will dispose of Criminal Appeals Nos. 122, 127 and 166 of 1928, which have been preferred against convictions by the Special Magistrate at Gurdaspur in connexion with one of what are known as the Gurdaspur Treasury defalcation cases. The three appellants are Bawa Indar Singh (Treasurer), Ram Kishan (Cashier) and Kahan Chand (assistant dealing with stamps). These there perscns used to work in the treasury rooms, Indar Singh in the front room and the other two in a side room. At the back of the front room is the treasury proper protected by double locks

Briefly stated, the case for the prosecution is that these three appellants committed criminal misappropriation of Rs. 13,856-4-0, the sum of Rs. 13,715-12-0 having been embezzled in respect of Court-fee stamps and the sum of Rs. 140-8-0 having been embezzled in respect of non-judicial stamps. That there was a shortage to the extent stated is a fact which is not challenged and which is proved.

Until 15th December 1926 Lala Kesho Das was the Treasury Officer. Lala Narsingdas (P. W. 1) had been doing six weeks' treasury training up to that date and on 16th December he took over charge of the duties of Treasury Officer. He noticed that the stock of Court-fee stamps in the single lock was of the value of about Rs. 20,000 and he considered that the balance was unduly large : similarly the stock of non-judicial stamps was of the unnecessarily high value of about Rs. 4,000. Ordinarily the balance in the single lock should be the amount required for transactions for one month and it is in his evidence that the normal demand for Court-fee stamps in a month was of the value of Rs. 10,000. He is said to have questioned the treasurer about the balance and to have been told that the Divisional Treasurers had given security for Rs. 1,00,000 and could therefore keep stamps in the single lock up to the value of Rs. 50,000. On one or two occasions after taking over charge he permitted further withdrawals of stamps from the double lock, but gave a direction that the single lock balance must be reduced.

On 19th January 1927 Lala Narsinghdas announced his intention of checking the stamps in the single lock and was asked by Kahan Chand, appellant, who had been on leave for two days, to defer the checking for one day. Indar Singh,

appellant is said to have supported Kahan Chand's request. The check was accordingly made the next day and it transpired in the course thereof that a serious shortage existed. The various incidents that occurred during the check are given in detail by the Magistrate in his judgment. Here it is sufficient to observe that the Treasury Officer had Kahan Chand arrested on that day and reported the shortage to the Deputy Commissioner, who released Kahan Chand on bail and directed a further check to be made. Kahan Chand was re-arrested on 23rd January and next day Lala Narsingdas lodged a first information report with the police. Investigation proceeded, and on 28th January, both Ram Kishan and Indar Singh were placed under arrest. At the trial Kahan Chand confessed to the defalcations and implicated the other two appellants.

In order to understand how the embezzlements are said to have been committed, I shall begin by explaining briefly the method in vogue of buying stamps from the Treasury, it being premised that only licensed vendors can purchase from the Treasury. The purchaser first fills in a chalan, showing the denominations of stamps required and the value thereof. The chalan is presented to the Treasury receipt clerk (in the Treasury office); the receipt clerk initials the chalan in token of the payment to be made being a payment towards an authorized head of receipts. The purchaser then takes the chalan and his money to the cashier in the Treasury (e.g. Ram Kishan appellant) and presents both, but from the cash tendered he deducts a certain sum as commission. The cashier enters in the receipt register the full amount of the cash tendered and in the disbursement register the amount paid back or deducted as commission. The commission entry is initialed and then the chalan is passed on to the assistant dealing with stamps (e.g. Kahan Chand, appellant), who issues the stamps to the purchaser. The chalan is returned to the purchaser, who is expected to hand it back to the treasury office.

Such is the proper practice, with one variation, namely, that if the licensed vendor is a paid servant of the Divisional Treasurers then the Treasurer himself keeps the commission and accounts for it to his employers. The theory of the prosecution is that the proper practice was departed from thus : (a) the cash received from the purchaser of the stamps was not credited to Government in the receipt register; and (b) the chalans were not handed back to the purchasers. The method of embezzlement is simple enough and the only difficulty that the culprit or culprits would have to face is that, the stamps having been duly issued to the purchasers, there would be a shortage of stamps in the single lock. In order to conceal the shortage the culprit or culprits would have to keep a very large book balance of stamps in the single lock for if they did not do so a sudden large demand for stamps could not be met. It is contended on behalf of the prosecution that this is what was actually done by appellants ; and further that, in order to defeat a checking of the stock of stamps, sheets of stamps of low denomination were placed in the middle of bundles of sheets of stamps of high domination, so that a mere counting of the sheets (without regard to the value of the stamps in those sheets) would inflate the total value. This latter contention is admittedly borne out by the facts on the record, for, at ths time of checking, sixty sheets of one-anna Court-fee stamps were found in the middle of the sheets of eight-annas stamps.

In the course of evidence that will be discussed later there are certain statements which would not be intelligible without a brief word of introduction as to the machinery for distributing stamps throughout the district. As has been remarked, only licensed vendors may buy stamps from the Treasury, and they are of two kinds, namely (a) paid servants of the Divisional Treasurers, in which category are, e g., Amar Nath and Mulkh Raj (P. W. 4 and P. W. 8), and (b) ordinary licensed vendors, who themselves earn commission on sales, e. g. Charanjit Singh and Harcharan Das (P. W. 18 and P. W. 34), of Sri Gobindpur and Fatehgarh respectively. The main distinction between the two classes of licensed stamp vendors is that the one class is paid by the Divisional Treasurers while the other class earns income from the commission on the sale of stamps. Of the former class of vendors the control was principally in the hands of the Treasurer, who could get them appointed or dismissed through his influence, the latter class

had nothing to do with the treasurer. It is, in consequence, argued with much force that the former class would be willing to oblige the treasurer in various ways, and this circumstance will be important when certain evidence on the record comes to be examined.

The vendors keep registers showing the denominations of all non-judicial stamps, but with regard to Court-fee stamps they are required to maintain an account of stamps only of the value of Rs. 20 and upwards. The differentiation as between non-judicial and Court-fee stamps needs no explanation, but we know that Harcharan Das (P. W. 24), though not obliged to do so, kept a private bahi containing an account of all his transactions. The differentiation alluded to above is important for the purposes of the prosecution in two ways : (a) because embezzlements would be less easily detected in respect of Court fee stamps of low denomination and actually the main shortage is in Court-fee stamps of eight annas, one rupee and five rupees; and (b) because it is impossible for the prosecution to trace the stamps with regard to which embezzlement was committed: the objection that the prosecution has not produced the best material evidence being rightly met by the reply that any evidence of this kind, if produced, would certainly be false. It has also been contended by Mr Ram Lal on behalf of the Crown that Court-fee stamps of small value are more frequently indented for and more readily sold and that during a check by the Treasury Officer he is not required under the rules personally to count stamps of small denominations (vide Lincolin's Stamp Law and Practice, p 263, foot-note). All these circumstances would, it is urged, tend to a centralizing of misappropriations in Court-fee stamps of low denominations.

Two other general observations may be made at this stage. The method of withdrawal of stamps from the double lock to the single lock needs no comment, but on such occasions the Treasurer necessarily participates and is, as it were, fixed with the knowledge of the balance in the single lock at the time of withdrawal of stamps from the double lock. The matter is noteworthy in so far as the case against Indar Singh appellant is concerned. The other observation is this, that if the theory of the prosecution is correct, then the appellant Ramkishan must have played a leading part in the embezzlement, for it was he who received the cash tendered by licensed vendors when they came to purchase stamps.

There is a very large volume of documentary and oral evidence in this case and the learned counsel have taken me carefully through the depositions of the witnesses and the many exhibits produced at the trial. I have also had the advantage of seeing a model of the Treasury prepared on behalf of the Crown, and of hearing able arguments by counsel.

It is in the nature of a case of this kind that the prosecution cannot show, and cannot be expected to show, all the individual acts of embezzlement committed. There is no record of the embezzlements and persons engaged in a course of misappropriations would naturally avoid keeping any record. What the prosecution has, therefore, mainly devoted its energies to is the proving that the appellants put back money into the single lock and did other things in order to cover up the traces of their misappropriation. The object of the delinquents was to reduce the shortage and the heavy book balance and that object could be achieved by: (a) importing stamps into the treasury from outside and (b) getting wholly fictitious or partly fictitious chalans prepared and crediting the cash to Government but without issuing any stamps. Such gratuitous presents to Government, it is contended, would be themselves evidence of guilt.

Of replenishment of the stock and of repayments to Government in cash many instances have been cited in the course of the prosecution evidence but before dealing with them I shall mention direct evidence of permanent or temporary embezzlement. In the former class we have three instances shown in P. A. 196, record of stamp transactions of Charanjit Singh (P. W. 18). He used to make his purchases from Batala and Gurdaspur. The Batala transactions are in order, but on three occasions he bought stamps from Gurdaspur and made entries in his register : and yet there is in the treasury books no record of such stamps being issued and no receipt entry for the cash paid by him. In some other

cases he was obliged to accept stamps of denominations different from those indented for by him. There is no reason to doubt the correctness of Charanjit Singh's account and it is thus shown that three sums were embezzled on three different dates. Another instance of a permanent embezzlement is shown by the books of Harcharan Das (P. W. 34). He indented for stamps worth Rs. 145-8-0 and the chalan thereof was accidentally found during the investigation. He had received the stamps and paid the cash, but the treasury receipt register is silent. A temporary embezzlement is proved in this way : Harcharan Das indented for a stamp of Rs. 80 and had actually to pay Rs. 76, he being entitled to Rs 4 as commission. The treasury receipt register shows a receipt of Rs. 80 and a disbursement of Rs. 4 on a date considerably later than the day on which Harcharan Das actually received the stamp. If things had been done properly that would have been impossible. Charanjit Singh and Harcharan Das are both corroborated by other witnesses and I have no hesitation in accepting their evidence as true.

It has been urged that the evidence just referred to is not relevant because it deals with acts done before 1925. Some authority was cited on this point, e. g., *Empress* v. *M J. Vyapoory Moodaliar* (1) and *Amrita Lal Hazara* v. *Emperor* (2). As a matter of fact, one or two of the instances quoted did take place in 1925 and with regard to the earlier instances the evidence adduced is evidence of a system, in which there is a common link between the acts of 1924 and those of 1925. Moreover, it was necessary for the prosecution to rebut, by anticipation, the probable plea of mistake or innocent condition of mind, and in those circumstances I would hold that the evidence to which allusion has been made is admissible under S. 15, Evidence Act.

The appellants are said to have employed several devices for covering up their tracks One of these methods was to induce friends to present wholly fictitious or partly fictitious chalans. These which have been numbered in the series of Z, were prepared by Amar Nath and Mulkh Raj. They are fourteen in number and many of them show unmistakably that alterations have been made. This point need not be laboured. In some cases, notwitstanding the change in the total, the amount of commission was not altered. The receipt register entries are generally by Ram Kishan and the initialing of the commission entries by Indar Singh. In some instances Nanak Chand (P. W. 20) wrote a portion or the whole of the entries in the Court-fee stamp register. It was contended for the Crown that he filled in only the unimportant columns and that therefore he cannot be regarded as an accomplice, the important columns being filled in by Kahan Chand and thus the incriminating portions of the entries being concealed from Nanak Chand. That may be true in some instances in this series, but it is certainly not true of all, and I consider that it is not improbable that Nanak Chand had some inkling of what was being done. His evidence is full of contradictions in details, but the main consideration is that the gist of his evidence is corroborated by the documents on the record. The same remark applies to the testimony of Amar Nath and Mulkh Raj.

A considerable amount of argument has been focussed on these two witnesses and it will be convenient at this stage to examine their credibility. These men were both suspended, but were subsequently reinstated : their houses were searched. They belong to the same dramatic club as Kahan Chand and there is said also to be some connexion between them in respect of a partnership in some vegetable business. It was also urged that they had not volunteered information and had, when examined at the trial, expanded their evidence so as to incriminate Indar Singh and Ram Kishan. As to the suspension and reinstatement of Amar Nath and Mulkh Raj, it is obvious that those events were not the work of Indar Singh and Ram Kishan. Their suspension was ordered by the district authorities and their reinstatement was, no doubt, due to the facts that nothing incriminating was found when their houses were searched : also possibly because other men were not available. The connexion through the dramatic club was of the slightest, as the evidence shows, and the

(1) [1881] 6 Cal. 655=8 C. L. R. 197.
(2) [1915] 42 Cal. 957=21 C. L. J. 331=29 I. C. 513=19 C. W. N. 676.

partnership affair is nebulous. The contention that these two, Amar Nath and Mulkh Raj at first did not incriminate Indar Singh and Ram Kishan is incorrect : a perusal of their statements taken under S. 164, Criminal P.C., belies the contention, which is, it may be observed, quite inconsistent with the defence theory regarding their reinstatement. They did not volunteer information for the obvious reason that they depended ou the good will of Indar Singh : and it was only when they were confronted with particular documents that they found themselves compelled to make admissions against their patron, Indar Singh. Taking everything into consideration., I would hold that they were not biased in favour of Kahan Chand or inimical to Indar Singh and Ram Kishan ; further that they cannot be regarded as accomplices of the two latter appellants. I would note too that if Amar Noth and Mulkh Raj are to be regarded as quasi accomplices, their testimony is corroborated amply by documentary evidence.

This digression has been necessitated by the lengthy arguments addressed by learned counsel on the credibility of the two witnesses mentioned. I now resume the examination of other documents exhibited by the prosecution. From the evidence of four branch postmasters it is proved that Rs. 100 were repaid to Government on 1st September 1926 although no stamps were issued to them. The documentary evidence of this is contained in the P. W. series of exhibits. Ex. P D and P E have a peculiar significance when read with other evidence in the case. By these two chalans Rs. 900 were paid into the treasury on 19th January 1927, an important date, in view of the fact that the Treasury Officer had intimated on that day his intention of checking the single lock balance. With P D and P E we must take the four exhibits dated 19th January 1927 in the P V series each for Rs. 25 making up a total repayment of Rs. 1,000 on that day. The four witnesses of these four exhibits are branch postmasters of villages and they have proved that they sent no money orders to reach the Gurdaspur treasury on 19th January. Their evidence has not been rebutted.

There is a direct connexion between this repayment of Rs. 1,000 and the roznamcha of Indar Singh. According to the defence Indar Singh had a private account with Kahan Chand, who is said to have banked with him. On 19th January 1927 there is an entry of a "withdrawal" of Rs. 1,000 by Kahan Chand. The account begins in April 1925 and shows deposits and withdrawals totalling about Rs. 6,900 on each side, there being a final balance of Rs. 94 in Kahan Chand's favour. Now, Kahan Chand's financial position has never been sound and it is incredible that he could, for instance, have honestly deposited about Rs. 1,500 with Indar Singh during May 1925, (as the account shows) or deposited Rs. 4,000 on one day in the following month. It is manifest that the whole account is a bogus one, in the sense that Kahan Chand, if he made the deposits, did so with money dishonestly acquired. The explanation offered by the defence with regard to the Rs. 1,000 is preposterous that Ram Piari, Indar Singh's daughter, had lent Kahan Chand Rs. 1,000 on a promissory note without security and received back payment from Kahan Chand by the Rs. 1,000 which Kahan Chand withdrew from his account with Indar Singh on 19th January. It is a logical inference and Kahan Chand supports the proposition that this sum of Rs. 1,000 was a part of his payment to Government against the defalcations.

The P Y series of exhibits prove the replenishment of stock in the single lock by direct methods. The evidence has not been seriously challenged and is accepted as true. In this category also fall exhibits P R and P S relating to the acquisition of stamps worth Rs. 360 and Rs. 180 respectively. The story is told by Nathu Ram (P. W. 5), Brij Lal (P. W. 6), Amar Nath (P. W. 7), and Nanak Chand (P. W. 20). I have considered this evidence and am of opinion that, even if the veracity of Nanak Chand is doubted, the other witnesses prove the truth of this part of the case. The episode of Brij Lal's bicycle journey to Gurdaspur has been ridiculed by the appellant's learned counsel on what I consider insufficient grounds.

Another transaction in the case deserves notice. It is evidenced by the mortgage deed P T executed by Kahan Chand in favour of Gopal Singh, natural son of Indar Singh. I have heard much argument on

this subject and am satisfied that the consideration mentioned in the deed is fictitious. The defence theory was that two promissory notes, which form part of the consideration, were genuine, but the statements of Muhammad Raza and Mohammad Mohsin (P. W. 22 and P. W. 23) contradict the theory. These witnesses have been criticized as being hostile to Indar Singh, but I see no reason to hold that view. Gopal Singh is undoubtedly a benamidar mortgagee. The delay in securing the original mortgage deed from Gopal Singh is of no importance; it was a registered deed and if Gopal Singh had failed to produce the original the prosecution would probably have been entitled to lead secondary evidence. The delay is accounted for by the fact that a shortage was discovered in the double lock part of the treasury and a fresh investigation had to be undertaken. The fictitious nature of the transaction is deposed to by Kahan Chand.

It is now time to examine the statement made by Kahan Chand during the trial. The learned counsel for the defence have taken up two inconsistent positions with regard to this statment. On the one hand it was argued that the statement amounted to an unqualified confession and that therefore Kahan Chand should have been forthwith convicted and sentenced and removed from the dock. On the other hand, it has been argued with equal seriousness that the statement did not amount to a confession and that the Court was not justified in taking it into consideration against the other appellants under S. 30, Evidence Act.

The statement of Kahan Chand has been read and commented on minutely. I have no hesitation in holding that it amounts to a confession of guilt. It was criticized on the ground that Kahan Chand assumed a minor part in the affair of the embezzlement but that arose from the nature of the case. He confessed to a minor part because he was the least of the three actors in the drama. Had he confessed to the principal part, he would obviously have been lying. He has, however, admitted his guilt both then and subsequently, even in his appeal from prison.

It was argued that *Kanhzya* v. *Emperor* (3) supports the view that Kahan Chand's confession is inadmissible against the other two appellants, but that case dealt with a Sessions trial and a distinction has been drawn between warrant cases and Sessions trials in *Fakhr-ul-Din* v. *Emperor* (4). This authority I must follow in preference to *Emperor* v. *Mahadeo Prasad* (5), where a different view is taken. Kahan Chand, it should also be noted, wished to produce evidence in mitigation of sentence and the action of the Magistrate in not convicting and sentencing him forthwith was not irregular.

A certain amount of argument has centred round the conduct of Kahan Chand. It is not denied that at first he tried to conceal the shortage and then after his second arrest made a *volte face*. This tergiversation is attributed to his helping, and being well treated by the police. I have no doubt that the true explanation is that he knew that he was hopelessly involved and consequently was prepared to show up everything in order to mitigate his own punishment. I see no reason, however, to suppose that he implicated the other two appellants falsely. Indeed his confession has been largely corroborated by unimpeachable oral and documentary evidence. It was in the light of the evidence on the record impossible for him to have committed the misappropriations unaided.

Much capital has been made out of the fact that Kahan Chand was kept, and asked to be kept, in police custody after the other two had been arrested; but, as Mr. Ram Lal has pointed out, Kahan Chand was in the judicial lock-up for 37 days before he made his confession at the trial. He had made no statement under S. 164, Criminal P. C., and there was no reason for the recording of such a statement in his case. Another objection taken by the learned counsel for the defence was that the trial Magistrate made an improper use of S. 27, Evidence Act. There is force in this objection, for Kahan Chand's "information" to the police during the investigation has not been proved. The matter is not of much importance for the fact remains that the police were enabled to discover some

(3) [1911] 15 P. R. Cr 1911=12 I. C. 981=54 P. W. R. Cr. 1911.
(4) A. I. R. 1925 Lah. 435=6 Lah. 176.
(5) A. I. R. 1923 All. 322=45 All. 329.

documentary evidence, more speedily than they would otherwise have done, by the help of Kahan Chand. His confession has elucidated the value of such documentary evidence, which is also deposed to by independent witnesses.

On behalf of Indar Singh it was further contended that the first information report (dated 24th January 1927) in no way implicated him, although later on the Treasury Officer attributed to Indar Singh conduct not mentioned in that report. The report was made against Kahan Chand, who was the first and most obvious suspect. At that time the Treasury Officer did not have reason (rightly or wrongly) to think that Indar Singh had taken part in the embezzlement. It was, therefore, not only superfluous but undesirable that he should drag in the name of Indar Singh when he was reporting against Kahan Chand. The further information which the Treasury Officer gave at the trial is not inconsistent with the first report made to the police and a first report is never per se the statement of a case for the prosecution. The contention made on Indar Singh's behalf has no force.

The trial Magistrate framed charges in the alternative against the three appellants, and it has first been urged on their behalf that the charges are not intelligible. Indeed, it was even contended that the stamp case and the currency notes cases should not have been split up. I can find no force in this contention, for it implies that the Magistrate should have framed more complicated charges than those which he did frame. It is settled law that a general deficiency charge is regular. Now since the embezzlements were, in the nature of things, kept secret it was impossible to find out all the individual acts of misappropriation. The first part of the charge must, however, be deemed to be wrong because, although a total deficiency is alleged, no misappropriations are alleged to have taken place during the year preceding January 1927. On the other hand, I find no fault with the second portion of the charge, the facts in which are corroborated by Kahan Chand. It is clear that during 1924, for instance, any sums misappropriated were made good and that the real permanent misappropriations were done in 1925. The second portion of the charge refers to repayments made by the appellants to Government, and although the mention of repayments was not really a part of the charge, it cannot reasonably be argued that the appellants were in fact misled by the mention of those repayments. The evidence led by the prosecution pointed to and proved repayments and, if anything, the appellants were in a better position to meet the charge, if they could do so by evidence. I am satisfied that the criminal breach of trust did actually occur in the year 1925 and that some repayments were made in 1925, 1926 and the beginning of 1927.

It has been suggested that the shortage may have been due to extraneous causes, e. g., accident or mistake, and that all that Indar Singh and Ram Kishan incurred was a civil liability: in short, that a criminal act or series of criminal acts was not the only possible cause of the shortage. The evidence led by the prosecution amply rebuts such a suggestion. The guilt of the three appellants is the only conclusion that can be reached when all the circumstantial evidence, read with the confession of Kahan Chand, is examined and viewed in a reasonable light.

I have omitted in this judgment a few minor points which do not appear to me to have much value in the case., e g., the security bond of Indar Singh, the plus and minus memoranda and so forth. Nor have I thought it necessary to discuss with great minuteness all the arguments bearing on the credibility or otherwise of individual witnesses. I have, I think, discussed those points, both for and against the appellants, which have a real importance in deciding their guilt or innocence. It is proved that the three appellants combined together in committing the misappropriations, and the convictions of all three are accordingly maintained.

It was in the last report contended that the sentences imposed by the Magistrate are too severe, but such a contention loses sight of the positions of trust held by the appellants and also of the magnitude of their operations. The sentences are not, in my opinion, excessive.

The appeals are dismissed.

M.R./R.K. *Appeals dismissed.*

A. I. R. 1923 Lahore 887

JAI LAL, J.

Mt. Rajji and *another*—Defendants—Appellants.

v.

Abdul Hamid—Plaintiff—Respondent.

Second Appeal No. 2667 of 1927, Decided on 29th February 1928, from order of Dist. Judge, Jullundur, D/- 21st February 1927.

Provincial Small Cause Courts Act, Art. 35 (2)—Suit to recover certain articles or their value which was less than Rs. 500—Allegations that defendant was disposing of them to the plaintiff's prejudice, and that the defendant held them in trust for the plaintiff—Allegations amounted to criminal misappropriation—Claim is not small cause.

In a suit to recover certain ornaments and household goods, the value of which was less than Rs. 500, the plaintiff alleged that after his father's death, his mother took away the above articles belonging to the plaintiff and handed them over to defendant 2 whom she had remarried, and both were disposing of these articles to the prejudice of the plaintiff. It was further alleged that the articles were with the mother in trust for the plaintiff.

Held : that the allegations amounted to a charge of criminal misappropriation, if not criminal breach of trust, and the suit was therefore excepted from the cognizance of a Small Cause Court under Art. 35 (2).

[P 887 C 2]

Faqir Chand—for Appellants.

Nand Lal—for Respondent.

Judgment.—The respondent instituted a suit against the appellants for the return of certain ornaments and household goods or their value, Rs. 376. It was alleged by the plaintiff that defendant 1 was his mother and that after the plaintiff's father's death, she remarried defendant 2 and, with the abetment of the latter, took away the ornaments and household goods belonging to the plaintiff and handed them over to defendant 2, and that both were disposing of these articles to the prejudice of the plaintiff. It was alleged that, as a matter of fact, the articles were with defendant 1 in trust for the plaintiff.

The trial Court dismissed the suit. The Senior Sub-Judge on appeal has decreed the suit against both the defendants. Defendant 1 first admitted the claim of the plaintiff in writing, but subsequently alleged that she had been made to sign the admission by fraud of the guardian of the plaintiff. The Senior Subordinate Judge, however, has held that this allegation of defendant 1 has not been established and that she actually admitted the plaintiff's claim voluntarily. With regard to defendant 2 the learned Judge has given no finding whatsoever whether he had taken possession of or had disposed of any of the ornaments or household goods belonging to the plaintiff, nor any finding as to the value thereof. He has accepted the appeal of the plaintiff and decreed the suit against both the defendants. This second appeal has been presented by the two defendants.

A preliminary objection is taken on behalf of the respondent that the suit being of the nature of a small cause suit and its value being less than Rs. 500 no second appeal lies in this Court, but, having regard to the allegations made in the plaint, it seems to me that the suit is excepted from the cognizance of the Small Cause Court by Art. 35 (ii), Provincial Small Cause Courts Act, which excepts from the jurisdiction of the Small Cause Court a suit for compensation for an act which is, or, save for the provisions of Ch. 4, I. P. C., would be an offence punishable under Ch. 17 of the said Code In my opinion the allegations made in the plaint amount to a charge of criminal misappropriation, if not criminal breach of trust, against the two respondents. I, therefore, overrule the preliminary objection.

On the merits the appellant Mt Rajji, who was defendant 1 in the trial Court, having admitted the plaintiff's claim, is not entitled to appeal from the decree passed against her on her own admission. Her appeal, therefore, is hereby dismissed with costs.

With regard to Abdul Ghani, appellant, defendant 2, in my opinion the Senior Subordinate Judge has not given a proper decision. He has not decided whether this appellant received the property belonging to the plaintiff-respondent and if he received it what was the value of such property. I consider that under the circumstances, the case must be remanded to the learned Judge with direction to submit a finding to this Court on the points mentioned above. The remand is under O. 41, R. 25, Civil P. C. Report within two months.

N.K. *Case remanded.*

* A. I. R 1928 Lahore 888

ADDISON AND BHIDE, JJ.

Haidar Hasan and *others* — Defendants—Appellants.

v.

Anjuman Muhafiz Aukaf and *others*—Plaintiffs and Defendants—Respondents.

First Appeal No. 2118 of 1923, Decided on 23rd June 1928, from decree of 1st Class Sub-Judge, Delhi, D/- 18th August 1923.

(a) *Civil P. C., S. 92—Sanction.*

No sanction under S. 92 is necessary for a suit for a mere declaration that the property in dispute is wakf and that the alienations thereof are void: *A. I. R. 1927 Lah. 350, Foll.* [P 889 C 1]

(b) *Civil P. C., S. 11—Finding by necessary implication also acts as res judicata.*

For the purposes of res judicata a finding by necessary implication is no less potent than an express finding on a particular point: 15 *Bom.* 89; 24 *C. W. N.* 223, *Foll.* [P 891 C 1]

* (c) *Civil P. C., S. 11—Expl. 6— Decision that property is not wakf in a suit by* B *against* A *under S. 92 Civil P. C.—Subsequent suit by* B *against* A *and* C *for declaration that property is wakf—Previous decision is binding not only between* B *and* A *but also as between* B *and* C.

In a suit by *B* against *A* for an account of wakf property, it was decided that the wakf was void. A subsequent suit was brought by *B* against *A* and *C* who was not a party to the previous suit, for declaration that that property was wakf.

Held: that the decision in the previous suit not only operates as res judicata between *A* and *B* but is also binding as between *B* and *C*. [P 891 C 2]

Badr-ud Din Qureshi—for Appellants.

Sardha Ram and *Partab Singh*—for Respondents.

Bhide, J.—This was a suit by a society called the Anjuman Muhafiz Aukaf (Society for the protection of religious endowments) and two Mahomedan residents of Delhi for a declaration that two hujras, three shops and five houses described in the plaint were attached to a mosque named Sheikh Masita situated in that city, and for certain other reliefs. The facts alleged briefly were that the shops and hujras formed a part of the mosque and were wakf property. One of the shops with a balakhana was constructed along with the mosque in the year 1864 under the supervision of Kadar Bakhsh who was its "Mutwalli". The other two shops were originally bath-rooms and had been converted later into shops. As regards the houses it was alleged that these had been sold to the mosque in the year 1910 by Mt. Sakina Jan and Ibrahim. Since the year 1917, the defendants, who are mostly descendants of Kadir Bakhsh (vide pedigree-table attached to the plaint), asserted themselves to be the owners of the above property and made collusive alienations thereof amongst themselves to the prejudice of the rights of the plaintiffs and other Mahomedans. The plaintiffs therefore sued for the aforesaid declaration and the following reliefs in addition, viz.

(1) that the defendants be ousted from the property in dispute and that it may be ordered to be given back for the purposes of "wakf";

(2) that the plaintiffs may be awarded possession in the interests of the mosque;

(3) that a decree for Rs. 1,000 on account of mesne profits for three years and also for future profits till delivery of possession be passed in favour of the plaintiffs.

A preliminary objection was raised by the defendant that the suit was not maintainable owing to want of sanction under S. 92, Civil P. C., but the Court decided that the declaratory relief at any rate did not require any sanction under that section and the suit was therefore allowed to proceed with reference to that relief though without any amendment of the plaint (vide p. 152 of the printed record). On merits the defendants admitted that the hujras were attached to the mosque but denied that the shops and the houses were wakf. As to the houses their allegations were to the following effect: Kadar Bakhsh gifted three houses to the mosque as "wakf" in 1889 (vide p. 118 of the printed record). After the death of Kadar Bakhsh one of these houses was sold as it was sold by his son Ali Hassan to one Ramu Mal for Rs. 4,000 on the 8th December 1910. Out of the sale proceeds, the five houses now in dispute were purchased by him on the same date. The sale-deeds were executed in favour of the mosque because the house, out of the sale proceeds of which these houses were purchased, was believed at the time to be validly gifted to the mosque as "wakf." Later on in the year 1912, Dr. Muhammad Wazir and others instituted a suit for an account of the income and expenditure and prices of the properties sold and purchased by Ali Hasan as also for an account of the other properties mentioned in the plaint which included the three shops now in dispute. The

suit was tried by the District Judge of Delhi, who held the "wakf" made by Kadar Bakhsh in 1889 to be void for uncertainty and dismissed the whole suit. This decision was upheld in appeal by the Divisional Judge and on second appeal by the Chief Court, Punjab, (vide pp. 84,115,94 of the printed record). As the "wakf" of the house sold to Ramu Mal was declared to be void the houses purchased with sale proceeds thereof could not be treated as "wakf" property. Defendants, therefore, claimed to be fully entitled to treat the houses as private property and contended that the alienations thereof were valid. The defendants also pleaded that the question whether the shops and the houses were wakf property arose in the previous suit by Dr. Wazir Ali and others, and as that suit was dismissed, the decision operated as res judicata.

The learned Senior Subordinate Judge found the issues in favour of the plaintiffs and granted them the declaratory relief prayed for. The other reliefs were refused to them, but the decree directed that defendants be ejected from the properties in suit for the benefit of the mosque and that a sum of Rs. 1,000 be paid by the defendants as mesne profits. An enquiry was also ordered to be made as to profits subsequent to the institution of the suit.

From this decision, defendants have appealed. The main contentions of the learned counsel for the appellants were as follows:

(a) The suit should have been dismissed for want of sanction under S. 92, Civil P. C.

(b) The question whether the shops and houses in dispute were "wakf property" was res judicata.

(c) It has not been proved that the shops are wakf property.

(d) That the house in dispute, having been purchased out of the sale-proceeds of the house sold to Ramu Mal, could not be treated as wakf property as the wakf of the house sold to Ram Mal was itself declared to be void.

As regards the first point there is no doubt that no sanction under S. 92, Civil P. C. was necessary for a suit for a mere declaration that the property in dispute was wakf and that the alienations thereof were void: vide inter alia *Miran Bakhsh* v. *Allah Bakhsh* (1). The order of the learned Senior Subordinate Judge dated 15th January 1921 (at pp. 151-2 of the printed record) shows that the suit was really allowed to proceed with respect to this relief only. The learned Senior Subordinate Judge, however, apparently thought that it was open to him to pass a decree for possession and mesne profits in favour of the mosque, though these reliefs could not be granted to the plaintiffs owing to want of sanction under S. 92, Civil P. C. A decree for ejectment of defendants and mesne profits was accordingly passed for the benefit of the mosque. The learned counsel for the plaintiffs-respondents did not attempt to support this decree. It does not appear that the plaintiffs had ever asked for any relief in this form. The "mosque" not being a party to the suit the decree seems clearly unsustainable and cannot stand in this respect in any case It was conceded that the plaint should have been formally amended but as the parties really proceeded to trial on the question of "declaration" only, the absence of a formal amendment does not seem fatal to the suit. The learned counsel for the plaintiffs formally withdrew before us the prayer for the other reliefs in the plaint and the suit will be deemed to have been for the aforesaid declaratory relief only.

The next point for decision is that of res judicata. In October 1912, Dr. Muhammad Wazir and others instituted a suit, with the sanction of the Collector obtained under S. 92, Civil P. C., for an account of the income and expenditure and prices of the properties sold and purchased as also for account relating to other property mentioned in paras. 1, 3, 6, 7 of the plaint in that suit. It was stated in these paras. that three houses had been dedicated by Kadar Bakhsh to the mosque as wakf by a deed dated 16th December 1889. Later on, Kadar Bakhsh was alleged to have executed a will on 22nd October 1901 by virtue of which he entrusted the aforesaid three houses, along with certain shops mentioned in the will, to the trustees mentioned therein. After the death of Kadar Bakhsh, Ali Hassan, his son, who was managing the property sold one of the houses with the permission of the trustees as it had become dilapidated, to one Ramu Mal for Rs. 4,000, and purchased some other property with the sale proceeds. He, however, failed to render account to the trustees of these transactions and also of the total income and

(1) A. I. R. 1927 Lah. 850=8 Lah. 111.

the expenditure of the wakf property. Ali Hassan was alleged to be misappropriating the income of the wakf property and the plaintiffs therefore prayed that he may be required to furnish an account of the income and expenditure of the properties as stated above. Ali Hassan resisted the suit, pleading inter alia, that the wakf of the houses was unlawful and the shops were not attached to the mosque and had never been dedicated as wakf. The Court found the wakfnama executed by Kadar Baksh in 1889 to be void for uncertainty and the will to be spurious. On these findings, the whole suit was dismissed (vide judgment at pp 84-94 of the printed record). The decision was upheld by the Divisional Judge on appeal and a second appeal to the Chief Court also failed (vide judgment at pp. 115-118 and p. 94 of the printed record).

It seems perfectly clear that it was finally decided in the above suit that the wakf of the three houses dedicated by Kadar Baksh to the mosque in 1889 was void. The house sold to Ramu Mal was one of these houses and hence it must be held to have been finally decided that this house was not wakf. But the suit was not confined to the above houses only. It was stated in the plaint that one of these houses had been sold in 1910 and that certain other property was purchased with the sale proceeds. It was also alleged that Ali Hassan had failed to give an account not only of the sales and purchases but also of the income and expenditure of the whole of the wakf property. It is not disputed that the five houses now in dispute were purchased in 1910 with the sale-proceeds of the house sold to Ramu Mal. The plaintiffs asked in the previous suit an account of the income and expenditure of the property purchased as well as the property sold. It must be remembered in this connexion that the property purchased had already been in possession of Ali Hassan for about two years before the suit was instituted. It seems, therefore, clear that the plaintiffs in the previous suit did ask for an account of the houses now in dispute. This necessarily implied that the plaintiffs looked upon these houses also as wakf property. If there were any doubt on this point, it will be removed by a reference to the grounds of second appeal in the Chief Court in that suit in which it was distinctly alleged that the properties purchased were also wakf (vide clause (d) of ground No. 1).

The shops now in dispute were also included in the property which was the subject-matter of the previous suit. In para. 3 of the plaint it was distinctly alleged that the shops were attached to the mosque and had been made over to the trustees by the will dated 2nd October 1901. A reference to the will (vide p. 99 of the printed record) shows that the shops were described therein as having been already dedicated as wakf. The plaintiffs asked for an account of the shops mentioned in para. 3 of the plaint on the ground that they were wakf property. Ali Hassan, on the other hand, denied that the "shops" were wakf.

It is thus clear that the question whether the houses and shops now in dispute were wakf property was directly and substantially in issue in the previous suit also. It seems equally clear that these houses and shops were held not to be wakf property as the suit was dismissed in its entirety. It is true that no distinct finding was recorded that the shops and the houses now in dispute were not wakf; but this finding was necessarily implied by the final decision. If any part of the property had been found to be 'wakf' the plaintiff would obviously have been entitled to an account of that property at any rate. It is, therefore, clear that the Court did not hold any of the properties in that suit to be wakf. The finding that the wakfnama was void was apparently held to be sufficient to dispose of the question of the houses sold as well as purchased. As regards the dedication of the shops, reliance was placed by the then plaintiff only on the will of the year 1901 and this will having been found to be spurious, the shops were considered not to be "wakf."

The matter did not rest with the decision of the trial Court. An appeal was lodged in the Divisional Court and it was contended that the trial Court had not decided all the necessary issues. But this contention was not accepted and it was held that the District Judge had decided all the issues necessary at the time and that he was justified in refusing to undertake the administration of the institution. The grounds of appeal urged before the Divisional Court were re-considered by the Chief Court and the deci-

sion of the Divisional Court was upheld. It is thus clear that the Divisional Court as well as the Chief Court held that the dismissal of the whole suit was justified.

In view of the dismissal of the whole suit, there is, I think, no escape from the conclusion that the houses and shops now in dispute were held not to be "wakf" property. For the purposes of res judicata a finding by necessary implication is no less potent than an express finding on a particular point : cf. *Ram Krishna* v. *Vithal Ramji* (2), *Apurba Krishna* v. *Parmanik* (3). I have, therefore, no hesitation in holding that the above matter was heard and finally decided in the former suit.

It was, however, urged on behalf of the plaintiffs-respondents, that the former suit was not between the same parties and that the parties were not litigating under the same title. Now, the former suit was of a representative character and was instituted on behalf of all the Mahomedans interested in the alleged wakf property. The present suit is also of the same type. Plaintiffs in the two suits must, therefore, be held to be identical for the purposes of S. 11, Civil P. C. (cf. Expl. vi, S. 11, Civil P. C.). The contention that the defendants are not the same and are not litigating under the same title has also no force. It is true that the defendants Ali Hassan and others in the former suit were alleged to be trustees, while the defendants in the present suit are alleged to be trespassers. But the finding in the former suit was that the property in dispute was not wakf. It follows, therefore, that it was found that Ali Hassan and others were not in fact "trustees". Ali Hassan was litigating in the former suit as a private person, so far as the shops and houses now in suit are concerned, as he denied that these were wakf. The defendants in the present suit include two sons of Ali Hassan (defendants 6 and 7) as well as certain other persons to whom he sold some of the houses in dispute. These persons at any rate are certainly representatives of Ali Hassan for the purposes of S. 11, Civil P. C. Hence it seems clear that the decision in the previous suit operates as res judicata so far as these defendants are concerned.

It is true that, in the present suit, there are also some other defendants, who cannot be said to be "claiming under" Ali Hassan, e. g , defendants 1, 4, 9, 11, etc. These persons were not parties to the previous suit and hence the decision in the former suit regarding the shops and houses now in dispute cannot operate as res judicata under S. 11, Civil P. C , *qua* these defendants. But this fact will not, I think, affect the final decision in the circumstances of this case. For, when the decision in the previous suit as regards the shops and houses not being wakf property operates as res judicata and binds some of the defendants, the finding cannot be otherwise in respect of any other defendant. Waki according to Mahomedan law means permanent dedication of any property for religious, pious, or charitable purposes When property is dedicated by way of wakf, the ownership is deemed to be transferred from the dedicator to Almighty God and all proprietary rights of men are thenceforth extinguished in the property (vide para. 157, Mulla's Principles of Mahomedan Law, 6th edition). It follows from this that no person can have private rights of ownership in wakf property and conversely that if any person is found to have such rights in any property it could not be held to be wakf.

In the present instance, it has been found above that as a result of the decision in the former suit, the shops and houses in dispute cannot be held to be wakf so far as those of the defendants, who are representatives of Ali Hassan, are concerned. In other words, these latter must be held to be entitled to treat the shops and houses as their private property. Consequently, the property cannot be held to be "wakf" even as against the other defendants (The judgment then discussed the evidence and finding that the property was not wakf proceeded.) On the above findings, I would accept the appeal and dismiss the plaintiff's suit except as regards the two hujras. As to the latter, the declaration granted by the Senior Subordinate Judge will be maintained, but the relief as regards possession and mesne profits granted in favour of the mosque must be cancelled. In view of all the circumstances in connexion with the wakf I think the parties might be left to bear their own costs throughout.

Addison, J.—I agree.

N.K. *Appeal accepted.*

(2) [1891] 15 Bom. 89.
(3) [1920] 24 C. W. N. 223=54 I. C. 952.

A. I. R. 1928 Lahore 892

BHIDE, J.

Sunder Singh—Petitioner.

v.

Karam Singh—Respondent.

Civil Revn. Petn. No. 606 of 1927, Decided on 21st March 1928, from order of Sr. Sub-Judge, Lahore, D/- 16th November 1926.

(a) *Succession Act* (1925), *S. 376—Court can correct misdescription but not so as to change nature of debt.*

A Court can no doubt in its inherent jurisdiction correct any misdescription in a succession certificate but an amendment changing the nature of the debt cannot be allowed.

[P 892 C 2, 893 C 1]

(b) *Succession Act* (1925), *S. 378—Division of securities is beyond Court's power.*

The applicant's prayer to allot specific securities to him and detail them in the certificate amounts to division thereof and is beyond the province of a Court granting a succession certificate. [P 893 C 1]

(c) *Succession Act* (1925), *S. 372—Whether certificate as to applicant's share is legal is doubtful.*

It is doubtful whether the order of the Judge granting a succession certificate with respect to the applicant's share is in accordance with law.

[P 893 C 1]

Duni Chand Kapur—for Petitioner.

C. H. Carden Noad—for Respondent.

Judgment.—On the death of Captain Sardar Jiwan Singh, Sunder Singh, one of his sons, filed an application on behalf of himself and his minor brother named Karam Singh for a succession certificate in respect of a sum amounting to Rs. 50,000 deposited by his father in the Bank of Bengal (now Imperial Bank of India). Subsequently an objection having been raised on behalf of the minor brother the applicant confined his application to his own share in the aforesaid deposit and on 25th July 1920, he was granted a succession certificate in respect of Rs. 25,000 out of Rs. 50,000 in Pass Book Deposit with the Imperial Bank of India, Lahore. When Sunder Singh applied to the Bank it was discovered that the Bank really held Government promissory notes and War Bonds on behalf of the late Captain Sardar Jiwan Singh and there was only a sum of about Rs. 10,000 in the current account on account of the interest on the securities. The Bank refused to pay anything to the applicant unless he obtained a succession certificate in respect of the Government securities, etc., and also an order from Court about the distribution of the securities between the applicant and his brother. Sunder Singh then made an application to the Senior Subordinate Judge, Lahore, for amendment of the above certificate as required by the Bank, but the application was rejected. The learned Senior Subordinate Judge held that (I) the applicant must file a separate application in respect of the promissory notes and War Bonds, etc; (II) and that he had no jurisdiction to make any order about the division of the securities between the two brothers. Sunder Singh has applied for revision of this order.

The main point for decision is whether a succession certificate can be amended in the manner required by the applicant. The applicant's contention is that the description of the debt given in the original certificate was not correct and that this was due to the fact that he had not been able to obtain accurate information about the nature of the debt. This contention appears to be correct in so far as the Pass Book Deposit in the present case turns out to be only about Rs. 8,000 while the rest consists of promissory notes and securities. What is the proper remedy of the applicant in such circumstances? There is no doubt that he can get an extension of the certificate in respect of the promissory notes and War Bonds under S. 376, Indian Succession Act (corresponding to S. 10 of the old Succession Certificate Act) But the applicant wishes the description of the debt as given in the original certificate to be corrected. For this there appears to be no specific provision in the Act.

If the applicant applies for extension of the certificate, he will of course have to pay extra Court-fee and he will suffer loss owing to the fees which he has already paid in respect to the Pass Book Deposit. The description 'Pass Book Deposit' is not accurate; but it may be taken to cover the current account, for practical purposes. The applicant was apparently entitled to Rs 5,000 out of this deposit while he has paid Court-fees on Rs. 25,000, i. e., for Rs. 20,000 i. e., Rs. 400 more than he need have paid. This is apparently the reason why this application is being pressed. I am inclined to think that this Court could exercise its inherent power if all that was required was in reality correction of a misdescription; but the amend-

ment sought in the present instance in this case seems to go much further. It will appear from the application dated 31st October 1926, that the applicant prays the Court to correct the entry in Col. 4 of the succession certificate changing Pass Book Deposit to current account dues and amount due on security deposits as under (giving details of the securities) as the Court thinks proper should be transferred to the applicant's name. In other words, the applicant wishes the Court to allot specific securities to him and detail them in the certificate. The securities are of different dates and denominations, and division thereof is clearly beyond the province of a Court granting a succession certificate. I am, therefore, of opinion that the applicant's prayer cannot be granted. The applicant can seek the remedies suggested in the learned Senior Subordinate Judge's order; if so advised. I may note, however, that it is doubtful whether the the order of the learned Senior Subordinate Judge granting a succession certificate with respect to the applicant's share was in accordance with law. There is a conflict between the decision of the Allahabad and Calcutta High Courts on the point, vide inter alia, *Annapurna Dasya* v. *Nalini Mohan Das* (1) and *Sughra Begam* v. *Mohammad Mir Khan* (2), but the Allahabad decisions seem to have found favour with the learned Judges of the Punjab Chief Court who decided *Kishore Chand* v. *Nihal Devi* (3). The certificate alread granted has, however, not been challenged by any rival claimant and I need not discuss the point further as it is not necessary for the disposal of the application for amendment of the certificate.

I reject the application, but in view of all circumstances leave the parties to bear their costs.

R.K. *Application rejected.*

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(1) [1914] 42 Cal. 10=23 I. C. 556=18 C. W. N. 836.
(2) A. I. R. 1921 All. 221=43 All. 341.
(3) [1901] 70 P. R. 1904.

A. I. R. 1928 Lahore 893

ADDISON AND BHIDE, JJ.

Sardar Shah and *others*—Plaintiffs—Appellants.

v.

Mt. Sardar Begam and *others*—Defendants—Respondents.

First Appeal No. 264 of 1924, Decided on 19th June 1928, from decree of Sr. Sub-J., Lyallpur D/- 20th October 1923.

(a) *Custom (Punjab)—A gift of a portion of his estate by a Sayyad of the village Khai of Lyallpur District to his daughter in the presence of sons is valid.*

The custom amongst the Sayyads of Dipalpur tahsil is as follows: The father is competent to gift some of his land to his daughters during his lifetime without the consent of his collaterals or sons, while in the absence of sons he can gift the whole. Further, the father can gift his whole estate as his daughter's dower in the absence of sons and in the presence of sons he can grant a portion of his estate as her dower without the consent of anyone. This customary law is equally applicable to the Sayyads of the village Khai in Saundari tahsil of the Lyallpur District. [P 895 C 1]

(b) *Riwaj-i-am—Statement of special custom though unsupported by instances is prima facie proof of that custom—Onus of rebuttal is on the party disputing the correctness of the entry—Custom (Punjab).*

A statement in a Riwaj-i-am opposed to general custom though unsupported by instances possesses much evidentiary value. An entry therein of a special custom is prima facie proof of that custom and places the onus of rebuttal on the party disputing the correctness of the entry: 34 *P. R.* 1915; *A. I. R.* 1916 *P. C.* 129; *A. I. R.* 1927 *Lah.* 241; and *A. I. R.* 1927 *Lah.* 593; *Rel. on.* [P 895 C 2]

Jagan Nath Aggarwal and *Bhagat Ram Sawhney*—for Appellants.

Shiv Charan Das for *Abdul Qadar*. *Bal Kishan Mehra* for *Khurshid Zaman*—for Respondents.

Addison, J.—The plaintiffs are the minor sons of Haji Shah who, on 24th September 1909, gifted one-fourth of his ancestral holding in village Khai in the Lyallpur District to his unmarried sister Mt. Sahib Nishan, defendant 1, and another one-fourth to his two daughters, defendants 2 and 3, who were then unmarried though they married later. The daughters were by one wife and the sons by another. Haji Shah died some six years before the suit was instituted. According to the plaint, the parties are Sayyads who came from village Sher Garh in the Montgomery District and who follow customary law. It was claimed that Haji Shah had no power under cus-

tom to make these gifts. It was stated that the defendants were asked to surrender the land. Defendant 3 assented and returned to them her one-eighth share. She was, however, impleaded as a pro forma defendant in the present suit which the plaintiffs thereafter brought for recovery of the one-fourth share with the sister and of the one-eighth share with the other daughter. The contesting defendants pleaded that they were governed by Mahomedan law and that they depended for their livelihood not only on agriculture but on piri Muridi. They denied that they came from Sher Garh originally and stated that they had lived at village Khai from olden times. It was further claimed that, even if parties were governed by customary law, the gift of such a small area of land in favour of a daughter and an unmarried sister was permissible. On the pleadings only one issue arose, whether parties were governed by custom and, if so, what was the custom amongst them regarding the power of gift of a part of the ancestral property by a proprietor having male issue when the gift was made in favour of the daughters and a sister.

The trial Judge held: (1) that it was not proved that the parties came originally from Sher Garh; (2) that they followed the customs of their own village Khai and not Mahomedan law; (3) that under custom the gift to the daughter was warranted; but (4) that there was no power of gift in favour of the sister. He accordingly decreed possession of the sister's share of one-fourth of the holding, but dismissed the suit for possession of the one-eighth share of the daughter, defendant 2. Against this decision the sister and plaintiffs have preferred appeals.

After the institution of her appeal the sister died and no attempt has been made to bring her legal representatives on the record. In fact these representatives would appear to be the plaintiffs. The result is that the appeal of the sister has abated. That order has been made in her appeal. As regards the plaintiffs' appeal the application to bring the legal representatives of Mt. Sahib Nishan on the record was not brought within time, but she was merely a pro forma defendant, as she was not interested in that appeal which attacked only the finding regarding the daughter. Further, the appellants were themselves her legal representatives. For these reasons there was no necessity to bring her legal representatives on the record and consequently there was no abatement of this appeal

This was admitted by the learned counsel appearing for the daughter.

I agree with the trial Court that the evidence does not establish that Nadir Shah, who purchased this village and founded it at a time when it was waste land, came from Sher Garh. The pedigree table of Khai shows that he came from village Jhakkar in Tahsil Montgomery of the Montgomery District (Ex P. 8 at p. 23 of the paper-book). Haji Shah is a grandson of this Nadir Shah. In face of this document, the unsatisfactory oral evidence cannot be accepted. For example, plaintiffs' fourth witness admitted that Sher Garh Sayyads and Khai Sayyads meet as far back has Daud and not nearer and that he could not give the number of degrees. The Sher Garh Sayyads are Karmanis and and so are those of Khai but this does not mean that those at Khai came from Sher Garh. There are Karmanis in many other places in different districts, for example, Saidan Shah, Minchinabad (Bahawalpur State), Shah Satar (Multan District) Kotli Piranwali (Jhelum District), Lahore City, etc., To say that all these descended from one Sayad Daud, whose date has not been even fixed, does not establish the proposition contended for. The pedigree table, p. 7 is not proved, nor is it known from where it was taken. The pedigree-table, p. 9, has not been proved nor is it certified that it is a copy of the Shajra-nasab of Sher Garh village. It was prepared by a patwari of that village who has stated at the end of a note on the table that he had gone through the documents held by Rahmat Ali, hence the pedigree table was prepared and supplied to the appellant. This patwari did not appear in the witness-box. In these circumstances this document is not proved, nor does it establish that the Nadir Shah, mentioned in it, was the founder of Khai. Further the document, Ex. D 9, at p. 81 of the paper book gives the 14 villages to which Sayyads of Sher Garh, which is in the Dipalpur tahsil, of Montgomery, went to, and Khai is not one of them. In these circumstances I have no hesitation in holding with the

trial Court that it has not been proved that Nadir Shah came from Sher Garh.

Khai itself used to be in the Montgomery Tahsil of Montgomery District, though it is now in the Saundari Tahsil of Lyallpur District. In the Settlement of 1857, when Nadir Shah was the sole proprietor, he stated as regards the custom relating to alienation that he had full powers of alienation (Ex D. 4). In the settlement of 1872 it is recorded in the Riwaj-i-am of Tahsil Dipalpur (D. 9) that daughters do not succeed by inheritance, but that a proprietor could give a share to his daughter's issue equal to that of a son. The Sayyads of Sher Garh alone objected to this assertion of custom. No instances were given but as will appear later, this is not important. It was also stated that, though daughters were not heirs, they could be given the whole estate in the absence of male issue and instances of this were given. It is clear therefore that all the Sayyads of Dipalpur tahsil are governed by custom and that in it there is a very large power of alienation in favour of daughters amongst these Sayyads. Again, in the Riwaj-i-am of 1872 of Montgomery tahsil, in which Khai was then situated (D. 7), the custom amongst the Sayyad tribe is as follows: The father is competent to gift some of his land to his daughters during his lifetime without the consent of his collaterals or sons, while in the absence of sons he can gift the whole. Further, the father can gift his whole estate as his daughter's dower in the absence of sons and in the presence of sons he can grant a portion of his estate as her dower without the consent of anyone The statement of customary law, prepared by the revenue authorities is thus entirely in favour of a gift of a portion of his estate by a father to his daughter in the presence of sons. In the present case, defendant 2 has received 1¼ share out of some 18 or 20 squares and that is not excessive The oral evidence is not convincing and I have no doubt that the Riwaj-i-am, though no instances are given must prevail. The Riwaj-i-am of Montgomery tahsil (D. 7) is signed by three of the sons of Nadir Shah, namely, Fazal Shah, Zaildar, Hassan Bakhsh and Sayyad Muhammad lambardar, who was the father of Haji Shah.

It is now too late in the day to contend that a Riwaj-i-am without instances is of little evidentiary value. In circumstances similar to the present it was held in *Ata Mahomed Khan* v. *Jiwani* (1) that a mere entry of the custom in the Wajib-ul-arz without instances would be sufficient to shift the onus to near collaterals. Their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (2) laid down that in such cases the onus would be on the persons contesting the custom. It was held in *Labh Singh* v. *Mt. Mango* (3) that in view of the Judicial Committee's clear exposition of the law recorded in the case last mentioned it could not be said to be an established rule that a statement in a Riwaj-i-am opposed to general custom and unsupported by instances possessed little evidentiary value. An entry therein of a special custom was prima facie proof of that custom and placed the onus of rebuttal on the party disputing the correctness of the entry. I might add that the custom in the present case is not of a very special character as the district is Montgomery where custom is largely influenced by Mahomedan law and daughters are favoured to an extent unknown in the central districts of the Punjab. Lastly, the same principle was followed in *Labha Ram* v. *Raman* (4).

For the reasons given it is clear that the parties follow custom and that a gift, such as the present was, could be made under the custom applicable to the parties to a daughter by the father in the presence of male issue. I would dismiss the appeal with costs

Bhide, J.—I agree.

N.K. *Appeal dismissed.*

(1) [1915] 34 P. R, 1915 = 33 P. L. R. 1915 = 26 I. C. 492 = 2 P. W. R. 1915.
(2) A. I. R 1916 P.C. 129 = 44 Cal. 749 = 44 I. A. 89 = 45 P.R 1917.
(3) A. I. R. 1927 Lah. 241 = 8 Lah. 281.
(4) A. I. R. 1927 Lah. 593 = 9 Lah. 1.

A. I. R. 1928 Lahore 895

DALIP SINGH, J.

Diwan Singh—Plaintiff—Appellant.

v.

Ralla and *others*—Defendants—Respondents.

Civil Ref No 7 of 1928, Decided on 19th May 1928, made by the Assistant Collector, 1st Grade, Jullundur.

(a) *Punjab Tenancy Act* (16 *of* 1887)—*S.* 77 (3) *Cl.* (g)—*Scope—Suit by occupancy tenant for possession of land encroached upon by cosharer landlord—Suit lies in civil Court, S.* 77 (3), *Cl.* (g) *being no bar.*

Section 77 (3), Cl. (g) refers to suits brought by a tenant against the landlord and does not

refer to suits brought by a tenant against persons other than the landlord.

An occupancy tenant brought a suit against a co-sharer landlcrd for possessicn of land encroached upon by the latter.

Held : that the suit would lie in a civil Court because the defendant could not be said to be landlord of the plaintiff. [P 896 C 1, 2]

(*b*) *Punjab Tenancy Act* (16 *of* 1887), *S.* 100 —*Cases of doubtful jurisdiction may be tried by civil Courts unless parties raise the question and unless the point is absolutely settled by rulings of Punjab High Court—High Court can set the irregularity right.*

Under Punjab Tenancy Act the question cf jurisdiction is frequently of a very complicated nature and no possible harm is done by trying a suit of doubtful jurisdiction unless the parties raise the question of jurisdiction and unless the point is absolutely settled by rulings of the Punjab High Court, because under S. 100 the High Court can always order the decree to be recorded as a decree of whatever Court was in its opinion competent to try it.

[P 896 C 2]

Order.—This is a reference from the Court of the Assistant Collector, First Grade, Jullundur. The facts are as follows :

The plaintiff, alleging himself to be an occupancy tenant of certain land bearing Khasra No. 1345/248-249, area 4 kanals 11 marlas, sued for possession of 11 marlas out of the said land alleging that the defendant had taken possession of the same on a recent encroachment. It does not appear from the plaint that the defendant is the landlord of the plaintiff *qua* this land. However, from the written statement it appears that the plaintiff is an occupancy tenant under the defendant and others, and reference is made to para. 1 of the petition of plaint presumably to the *fard* mentioned in that paragraph. The *fard* shows that the plaintiff is an occupancy tenant under the defendant and others. The suit is, however, only against the defendant. The suit was filed in a civil Court which returned the plaint to the plaintiff for presentation to a competent Court. It was then presented to the Assistant Collector, who has referred the case on the ground that the present suit is brought under S. 77 (3), Cl. (g) of the Tenancy Act, against the landlord, and having been brought more than one year after the date of the dispossession the suit does not lie in a revenue Court.

It seems to me that S. 77 (3), Cl. (g), Tenancy Act, refers to suits brought by a tenant against the landlord and does not refer to suits brought by a tenant against persons other than the landlord. Now the landlord in this case, so far as I can make out, is not the defendant alone but the defendant and certain other people. If this is so the suit would lie in a civil Court because the defendant by himself cannot be said to be landlord of the plaintiff. If, on the other hand, *qua* this land the defendant is the sole landlord then the suit would lie in a revenue Court and the fact that it is barred by limitation in that Court has nothing to do with the question of jurisdiction. For the present, however, I hold that the suit lies in a civil Court subject to any findings that the Court may arrive at with reference to the above remarks. I point out to the civil Court that under this Act the question of jurisdiction is frequently of a very complicated nature and no possible harm is done by trying the suit because under S. 100 the High Court can always order the decree to be recorded as a decree of whatever Court was in its opinion competent to try it. Therefore, unless the parties raise the question of jurisdiction in cases under this Act and unless the point is absolutely settled by rulings of this Court, the Court should proceed to try the suit and dispose of it. It is extremely hard on the litigant that for 11 marlas of land he should be sent alternately by the civil Court to the revenue Court and by the revenue Court to this Court to determine which Court has jurisdiction. The case will be returned, therefore, to the Court of the Subordinate Judge, Phillour, for disposal on the merits.

N.K. *Case returned.*

A. I. R. 1928 Lahore 896

MARTINEAU, J.

Ghulam Muhammad—Plaintiff—Appellant.

v.

Fateh Khan and *others*—Defendants—Respondent.

Second Appeal No. 41 of 1926, Decided on 6th April 1926, from decree of Dist. Judge, Shahpur, D/- 21st August 1925.

(*a*) *Limitation Act, Art.* 142—*Plaintiff alleging lending of house—Defendant denying the same—Plaintiff's inability to prove it—*

Plaintiff must prove possession within 12 years.

Plaintiff sued for possession on the ground that he was the owner of a house which, he alleged, was lent to the defendant for temporary use. The latter denied the fact and the plaintiff was unable to prove it.

Held: that the plaintiff ought to have proved possession within 12 years of the suit and the onus was not on the defendant to prove adverse possession: 18 and 116 *P. R.* 1888 and *A. I. R.* 1922 *Lah.* 432, *Rel. on.*; 41 *All.* 669, *not Foll.*; *A. I. R.* 1916 *P. C.* 21, *Dist.* [P 897 C 2]

(b) *Adverse Possession—Vacant site.*

Possession of a vacant piece of land is presumed to follow title.

M. Saleem—for Appellant.

Mukand Lal Puri—for Respondents.

Judgment.—The plaintiff sued for possession of a house and a courtyard, alleging that he had lent the house five years before the suit to defendants 1 to 3 for their temporary use, and that they had recently taken forcible possession of the courtyard as well. The defendants denied these allegations and pleaded that they had been in possession of the property from the times of their ancestors. The trial Court gave the plaintiff a decree, but the lower appellate Court has dismissed the suit, finding that although the plaintiff was the owner of the house he had not proved that the defendants had borrowed it from him for their temporary use, and had also not proved his possession within 12 years before the institution of the suit.

The plaintiff has preferred a second appeal, and it is contended on his behalf that when it has been found that he is the owner of the property, and the case is one governed by Art. 144 and not by Art. 142, Sch. 1, Lim. Act, the onus is on the defendants to prove 12 years adverse possession, notwithstanding the plaintiff's failure to prove that the defendants were holding as licensees.

This contention is supported by *Jaichand* v. *Girwar Singh* (1), but a different view has been taken by this Court in *Tota* v. *Sakolia* (2), 116 *P. R.* 1888 and in *Duni* v. *Maleri Ram* (3). In *Tota* v. *Sakolia* (2), in which the plaintiff alleged that the defendants had been occupying the house in suit with his permission, it was held that the onus lay on the plaintiff to prove, not only his title, but also that the defendant's possession had either not been adverse at all or, if adverse, had not extended beyond the period within which he was entitled to sue for recovery of possession, and that until the plaintiff discharged that onus the defendant was entitled to rely upon his de facto possession as raising a legal presumption in his favour. So also in 116 *P. R.* 1888 it was held that the defendant could rely on his long possession as conferring on him an indisputable title which could not be displaced unless the plaintiff could prove, not only his original right of ownership, but also that the possession, which was apparently adverse was in reality permissive. Again in *Duni* v *Maleri Ram* (3), it was held that when the plaintiff sues for possession on the ground that he is the owner of the property, and the defendant holds under a lease, if the lease is denied and the plaintiff is unable to prove it, it is necessary for him to prove possession within 12 years of the suit, and the onus is not on the defendant to prove adverse possession.

It is contended for the appellant that such rulings have no authority in view of the decision of the Privy Council in *Secy. of State* v. *C. Rama Rao* (4), which was followed in *Jaichand* v. *Girwar Singh* (1). But that case was entirely different from the present one, as in the first place the persons in possession of the property were the plaintiffs, who were seeking to establish a title by adverse possession, and in the second place there was no allegation, as there is in the present case, that the possession was permissive. Their Lordships held merely that the onus of establishing title to property, by reason of possession for a certain requisite period lay upon the person asserting such possession. The decision in that case is no authority for the proposition that where the plaintiff alleges that the defendants' possession was permissive and fails to prove his allegation he is nevertheless entitled to a decree on the ground of his ownership unless the defendant is able to prove 12 years adverse possession. If the appellant's contention were to be accepted the anomalous result would follow that a person wishing to recover property of which he had been dispossessed could, by suppres-

(1) [1919] 41 All. 669=52 I. C. 366=17 A. L. J. 814.
(2) [1888] 18 P. R. 1888.
(3) A. I. R. 1922 Lah. 432.
(4) A. I. R. 1916 P. C. 21=39 Mad. 617=43 I. A. 192 (P. C.).

sing the fact of his dispossession and falsely alleging that the person in possession of the property had been occupying it with his permission, relieve himself of the burden of proving that he had been in possession within 12 years of the suit and throw on to the occupier the burden of proving 12 years adverse possession.

I hold, therefore, that, on the findings of the lower appellate Court, that the plaintiff had not proved either that the defendants had borrowed the house from him for their temporary residence or that he had been in possession within 12 years, the suit for possession of the house was rightly dismissed.

But the claim to the courtyard stands on a different footing, as the possession of the courtyard, which is a vacant piece of land, is presumed to follow title, and as the title is with the plaintiff it is for the defendants to prove that they had been in adverse possession of the courtyard for 12 years.

I remand the case to the trial Court under O. 41, R. 25, Civil P. C., for enquiry and finding on the question whether the defendants have been in adverse possession of the courtyard for 12 years. The Subordinate Judge should submit his finding through the District Judge, who should give his own finding on the issue.

N.K. *Case remanded.*

✻ A. I. R. 1928 Lahore 898

TEK CHAND, J.

Fazal Dad—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 269 of 1928, Decided on 12th June 1928, from order of Sess. Judge, Jhelum, D/- 22nd October 1927.

✻(a) *Penal Code, S. 498—Marriage voidable being performed during the girl's minority—Girl does not cease to be the wife of her husband—Non-consummation of marriage after she had obtained puberty is not sufficient to infer that she exercised the option.*

A girl whose marriage is voidable having been performed during her minority cannot be considered to have exercised the option and ceased to be the wife of her husband unless option has been exercised before the enticement and the mere fact that the marriage was not consummated after she had attained puberty and she had actually left her husband is not sufficient to infer that she exercised the option. [P 899 C 1]

✻(b) *Penal Code, S. 498—Accused of neighbouring village and of the same brotherhood as that of the girl—He may be presumed to have necessary knowledge that she is the lawful wife of her husband.*

A person charged under S. 498 who lives in a neighbouring village and belongs to the same brotherhood as that of the girl who is alleged to have been enticed by him must be presumed to have the necessary knowledge that she is the lawful wife of her husband. [P 899 C 1]

(c) *Penal Code, Ss. 363 and 498—Accused convicted under S. 498—Magistrate suo motu framing charge and convicting under S. 363 at the same trial—Complaint not disclosing that the girl is a minor—Other ingredients of S. 363 not disclosed in the evidence—Conviction under S. 363 cannot stand.*

Where it was not stated in the complaint that the girl alleged to be kidnapped was a minor, nor were other necessary ingredients of an offence under S. 363 disclosed in the evidence led by the prosecution, but the Magistrate suo motu framed an additional charge under that section and convicted the accused who is already convicted under S. 493 at the same trial.

Held: conviction under S. 363 cannot stand. [P 899 C 1]

Nand Lal—for Petitioner.

Shambu Lal Puri—for the Crown.

Judgment.—One Baz lodged a complaint under S. 498, I. P. C., against Fazal Dad petitioner alleging that he had enticed away his married wife Mt. Musahib Bano for the purpose of having illicit intercourse with her. After the evidence for the prosecution had been recorded, the trial Magistrate framed charges under Ss. 498 and 363, I. P. C., against him and ultimately convicted him of both offences, sentencing him to rigorous imprisonment for two years under each count, the sentences to run concurrently. The conviction and sentences were affirmed on appeal by the learned Sessions Judge.

On revision the first point urged is that the marriage of Mt. Musahib Bano with the complainant has not been proved. But there are clear findings of fact on this point by the Courts below which are supported by evidence and I cannot go behind them.

It is contended that the marriage of the girl with Baz, having been performed by her mother at a time when she was a minor, was voidable at her option, and as there is no proof of consummation after she had attained puberty and she had actually left the complainant, she must be considered to have exercised the option and had ceased to be his wife. But in order to sustain this argument there must

be repudiation of the marriage, before the abduction. In other words, the option should have been exercised before the enticement. There is, however, no allegation or proof of a prior repudiation, I must, therefore; hold that the marriage, though voidable, was subsisting at the time of the commission of the alleged offence.

The next point taken is that there is no finding of either of the Courts below that the petitioner knew or had reason to believe that Mt. Musahib Bano was the wife of Baz. It is, no doubt, true that neither the Magistrate nor the learned Sessions Judge has recorded any finding on this essential point, but I have examined the evidence and have no reason to doubt that the petitioner, who lives in a neighbouring village and belongs to the same brotherhood, had the necessary knowledge that the girl had been married to Baz. I hold, therefore, that all the necessary ingredients of an offence under S. 498 have been established. I think, however, that a sentence of two years' rigorous imprisonment is excessive. In my opinion the ends of justice will be met by reducing the sentence to rigorous imprisonment for one year.

As regards the conviction under S. 363, the first point to be noted is that it was not stated in the complaint that the girl was a minor nor were the other necessary ingredients disclosed in the evidence led by the prosecution. The learned Magistrate appears to have sue motu framed an additional charge under that section and proceeded to convict the petitioner thereon. After hearing Mr. Shambu Lal Puri for the complainant I am of opinion that the conviction of the petitioner under S. 363 cannot stand.

The result is that the petition for revision is accepted to this extent that the conviction and sentence under S. 363, I.P. C., are set aside but the conviction under S. 498, I. P. C., is maintained and the sentence under that section is reduced to rigorous imprisonment for a period of one year.

N.K. *Petition partly accepted.*

A. I. R. 1928 Lahore 899

ADDISON AND BHIDE, JJ.

Secy. of State—Defendant—Appellant.

v.

Dyal Mal-Gujar Mal and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2610 of 1925, Decided on 21st June 1928, from decree of Dist. Judge, Gurdaspur, D/- 7th July 1925.

(a) *Railways Act, S. 72—Risk-note signed on behalf of the consignor is duly executed.*

The requirements of the section are sufficiently complied with if it is proved that the executor signed the risk-note on behalf of the consignor and has authority to so sign: 20 *C. W. N.* 685, *Dist.* [P 900 C 1]

(b) *Railways Act. S.72—Risk-note G—Deviation from agreed route makes the risk-note invalid.*

When goods are consigned to be carried by any particular route, any deviation therefrom renders the risk note invalid: (1899) 1 *Q. B.* 309 and (1921) 3 *K.B.* 213, *Ref.* [P 900 C 1]

C. H. Carden Noad—for Appellant.

Nawal Kishore and *H. C. Kumar*—for Respondents.

Bhide, J.—This was a suit for recovery of Rs. 1,757-14-0, as damages on account of loss of a consignment of 1000. gross match boxes consigned to the plaintiff at Batala by a firm named Abdul Ali-Ibrahim from Bombay. The consignment was sent under risk-note G. The trial Court hald that the defendant railway was protected by the risk-note and was not liable for any damages. On appeal, the learned District Judge found that the risk-note was not duly executed and reversing the decision of the trial Court granted the plaintiff the decree prayed for. From this decision a second appeal has been filed on behalf of the defendant railway.

The main contention of the learned Government Advocate on behalf of the appellant was that the risk-note was duly executed. It appears that Ali Bhai Haptullah, who was an agent of the Bombay firm authorized to sign on its behalf and who delivered the goods to the railway at Bombay, instead of signing his own name and adding that he was signing on behalf of the firm wrote the name of the firm i. e. "Abdul Ali-Ibrahim" on the risk-note The learned District Judge has held on the authority of *Mahabasha* v. *Secy. of State* (1) that this was a defect which rendered the

(1) [1916] 20 O. W. N. 685=32 I. C. 393.

risk note void. The facts of that case were no doubt somewhat similar; but this case can, I think, be distinguished on the ground, that evidence has been produced in the present case to show that Ali Bhai Haptullah was authorised to sign and did actually sign the risk-note on behalf of the consignor. Ali Bhai Haptullah himself has appeared in the witness-box and made a statement to this effect and his evidence is corroborated by the two attesting witnesses to the risk-note. It does not appear from the record whether any such evidence was produced in *Mahabasha* v. *Secy. of State* (1) The learned Judges who decided that case remarked as follows:

> When the law says 'signed' it means the writing of the name of the person who signs it either by his own hand or by the hand of an agent who must be disclosed and have authority.

In the present instance the signature was made by an agent and it appears from the evidence that the fact that Ali Bhai Haptullah was an agent of the consignor and was signing the risk-note on his behalf and was authorized so to do was disclosed at the time the risk-note was executed. S. 72, Railways Act, lays down that the risk-note should be

> signed by or on behalf of the person sending or delivering to the Railway administration the animals or goods.

It seems to me that the requirements of the section were sufficiently complied with in the present case inasmuch as it has been proved that Ali Bhai Haptullah did sign the risk-note on behalf of the consignor.

However, there is another point on which I think this appeal must fail. It appears from the judgment of the learned District Judge that the railway receipt provided for conveyance of the consignment via Sabarmati and Kot Kapura, whereas as a matter of fact the goods were sent via Ludhiana and were destroyed by fire at the latter place. There is ample authority for the contention raised on behalf of the respondent that when goods are consigned to be carried by any particular route any deviation therefrom renders the risk-note invalid: see inter alia (1899) 1 *Q. B.* 309 and (1921) 3 *K. B.* 213. This contention was not raised in the Court below, but the facts on which it is based are apparent on the face of the record. No explanation has been offered as regards the deviation of the route. The loss admittedly took place at Ludhiana, which was not on the route agreed upon between the parties. In these circumstances it seems to me that the railway cannot be protected by the risk-note.

The learned District Judge has found that the railway did not take as much care of the goods as they ought to have done as bailees. The plaintiff, is, therefore, clearly entitled to the decree passed in his favour. I would, therefore, dismiss the appeal, but in view of all the circumstances leave the parties to bear their own costs.

Addison, J.—I agree.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 900

ZAFAR ALI AND JAI LAL, JJ.

Surain Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 268 of 1927, Decided on 15th June 1928, from order of Sess. Judge, Shahpur, D/- 4th February 1928.

Penal Code, S. 99—Right of private defence.

A person on whom lathi blows were being showered is justified in striking the assaulter with a spear and he does not exceed his right of self-defence. [P 901 C 1]

Mahtab Singh—for Appellant.

Des Raj Sawhney—for the Crown.

Judgment.—In this case five men were committed to the Court of Session for trial on charges under Ss. 302 and 326 read with Ss. 149 and 148, I. P. C. The learned Sessions Judge entirely disbelieved the prosecution version and came to the conclusion that the three out of the five men were not even present at the fight, and that it was a fight between two men on the one side, namely, Narain Singh and Surain Singh accused, and two on the other, namely, Gujjar Singh, deceased, and Mela Singh. He further found that Narain Singh and Surain Singh each recieved 15 blows with a blunt weapon, and that they were justified in the exercise of the right of private defence to attack Gujjar Singh and Mela Singh, who were the aggressors. He acquitted Narain Singh, accused, who had inflicted only one injury with a blunt weapon, but he convicted Surain Singh under S. 304-1, I. P. C., holding that he

had exceeded his right of private defence inasmuch as he inflicted four incised wounds. On this point the remarks of the learned Sessions Judge may be quoted here. He says:

I have no doubt that the right of private defence in this case was clearly exceeded by Surain Singh. He had no business to give as many as four cuts including one in the abdomen to Gujjar Singh thereby killing him. After all he was being beaten with sticks. Perhaps he was justified in giving two cuts to Mela Singh in the back as he did. That would have been quite sufficient to disarm both Gujjar Singh and Mela Singh. Even if he would have caused grievous hurts to both of them with the spear that he happened to have at that time, I would have thought he was acting within his right of self defence. But surely to cause as many as six cuts with a spear each deep enough, clearly shows that he was exceeding his proper limit and was striking revengefully.

The Public Prosecutor who appears for the Crown is unable to support this argument of the learned Sessions Judge and he frankly concedes that the man upon whom according to the finding of the learned Sessions Judge lathi blows were being showered was justified in striking with a spear and that he did not exceed his right of private defence. In the words of the learned Sessions Judge:

Narain Singh and Surain Singh had been well beaten by Gujjar Singh and Mela Singh, before the more dangerous weapon was brought into use.

We accept the Public Prosecutor's view of the matter and accepting the appeal we acquit Surain Singh and direct that he be released forthwith.

N.K. *Appeal allowed.*

A. I. R. 1928 Lahore 901

BHIDE, J.

Ram Chand — Judgment-debtor—Appellant.

v.

Bank of Upper India, Ltd., Simla—Respondent.

Miscellaneous First Appeal No. 2647 of 1927, Decided on 6th February 1928, from an order of Sr. Sub-J., Simla, D/- 19th August 1927.

Contract Act, S. 61—Debt carrying interest—Receipt of money without definite appropriation on either side—Money is to be first applied in paymant of interest—Principle applies also to money paid in Court in satisfaction of debt.

When a debt is due, which carries interest and moneys are received without definite appropriation on the one side or the other, the ordinary rule is that the money is first applied in payment of interest and then, when that is satisfied, in payment of capital. The fact that money is paid in Court in satisfaction of the debt does not make any difference so far as the above principle is concerned : *A. I. R.* 1922 *P. C.* 26, *Rel. on.* [P 901 C 2]

Nawal Kishore—for Appellant.

Muhammmad Amin Khan—for Respondent.

Judgment*—By virtue of a decree passed in a mortgage-suit a sum of Rs. 1,18,443-14-0 was payable to the plaintiff with interest at six per cent. per annum till realization. The defendant made repayments on various dates, which were appropriated by the plaintiff, first, towards the payment of costs and interest and the balance was deducted from the principal on each occasion. The defendant's contention was that the calculations should have been made as follows : principal and interest due up to date to be added up and then all repayments with rebate thereon from the date of payment at the same rate to be added up and the total of the latter to be deducted from the former. The difference between the two calculations admittedly comes to about Rs. 8,000. The lower Court held that the method of accounting followed by the plaintiff was a proper one and in conformity with the usual practice, and directed that that system should be adopted in enforcing the execution. From this decision the present appeal has been filed.

It is contended for the appellant that the plaintiff was not entitled to adopt the method of calculation referred to above. No argument, however, has been advanced as to why this method should be considered to be opposed to law or equity. On the other hand, *Nemichand* v. *Radha Kishen* (1) has been cited on behalf of the respondent which laid down that when a debt is due which carries interest and moneys are received without definite appropriation on the one side or the other, the rule which is well established in ordinary cases is that the money is first applied in payment of interest and then, when that is satisfied in payment of capital. On behalf of the appellant it is urged that the money was in the present instance paid in Court in

*[L. P. A. No. 79 was rejectedcn 21st March 1928 by Shadi Lal, C. J. & Broadway, J.]

(1) A. I. R. 1922 P. C. 26=48 Cal. 839 (P.C.)

satisfaction of a mortgage-debt, but I do not see why that should make any difference so far as the principle laid down by the Privy Council in the above judgment is concerned. There seems to me nothing in the decree requiring calculations to be made in the manner proposed by the appellant.

I must, therefore, dismiss this appeal with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 902

BHIDE, J.

Gurmukh Singh — Plaintiff — Appellant.

v.

Mt. Harbans Kuar and *others*—Defendants—Respondents.

Second Appeal No. 1409 of 1927, Decided on 13th September 1928, from decree of District Judge, Rawalpindi, D/- 9th March 1927.

(a) *Restitution of Conjugal Rights—Wife of seven years—Husband of 54 years—Marriage not consummated—Restitution should be refused.*

A girl *H* was married to *G* during her minority when she was about seven, *G* being 54 years of age. The marriage had never been consummated. In a suit for restitution of conjugal rights, *H* was allowed freedom of choice and was not compelled by a decree of Court to live with *G*.

Held : that the discretion was properly exercised by the Court : 187 *P. W. R.* 1918, *Foll.* ; 67 *P. W. R.* 1918, *Dist.* [P 903 C 1]

(b) *Hindu Law—Marriage—Wife cannot be compelled to go to her husband.*

While Hindu Law lays down the duty of the wife of implicit obedience to her husband, it does not provide any such procedure as compulsion by Courts to force her to return to him against her will : *A. I. R.* 1927 *Bom.* 264, *Foll.* [P 903 C 1]

Shamair Chand—for Appellant.

Amar Nath Chona—for Respondents.

Judgment.—This was a suit for restitution of conjugal rights. The trial Court decreed the suit but on appeal the learned District Judge dismissed it. The plaintiff has come up in second appeal. It is conceded by Mr. Shamair Chand on behalf of the appellant that Courts have a discretion in the matter of granting restitution, but it was contended that the discretion in this case has not been exercised properly. The material findings on which the decision of the learned District Judge was based were that the defendant Mt. Harbans Kaur was married to the plaintiff during her minority when she was about seven ; that the plaintiff being at least about 54 the marriage was an ill-assorted one, that the defendant had never lived with the plaintiff and that the marriage had not been consummated. Following the rule laid down in *Kalawanti* v. *Bukhan* (1), he held that the defendant should be allowed freedom of choice in such circumstances and not compelled by a decree of Court to live with the plaintiff.

The learned counsel for the appellant was not able to distinguish the above ruling from the present case, but he relied on *Niaz Ali* v. *Said Jan* (2), and urged that Courts are not justified in refusing restitution except on grounds such as cruelty, etc., which would entitle a wife to refuse to live with her husband. The question of the effect of the minority of a girl in a case like the present one when she has been married to a man over 50 years of age, did not, however, arise in that case. In fact, it was found in that case that the defendant had married the plaintiff voluntarily. The ruling relied on by the learned District Judge gives a wider scope to judicial discretion in such matters. The ruling, so far as I am aware, has not been overruled or dissented from as yet and coming from an eminent Judge of the Punjab Chief Court like Sir Donald Johnstone is entitled to weight. The learned Judge not only refused restitution in the particular case but remarked that it was the practice of the Chief Court to refuse restitution in case where a girl is married during minority and refuses to live with her husband before consummation had taken place. His remarks were as follows :

> It seems to me also that the girl must have been under the age of puberty at the time of marriage and this in itself was the main reason why the girl did not accompany her husband to his house. Now the girl having arrived at puberty refuses to consummate the marriage. In these circumstances this Court ordinarily allows the girl freedom of choice. It seems to me, therefore, that in the peculiar circumstances of the case the plaintiff was not entitled to a decree at all.

The present case is, if anything, stronger, because, here there is the additional

(1) [1912] 187 P. W. R. 1912=17 I. C. 254=215 P. L. R. 1912.

(2) [1918] 67 P. W. R. 1918=46 I. C. 112.

consideration that the girl was married to a man aged about 50 when she was aged about seven. It is admitted that the marriage was by way of "exchange." Evidently the interests of the girl were ignored.

The learned counsel next contended that the decision of the learned District Judge was opposed to the principles of Hindu law. But it has been pointed out in *Bai Jivi* v. *Narasingh Lal Bhai* (3) that while Hindu law lays down the duty of the wife of implicit obedience to her husband, it does not provide any procedure such as compulsion by Courts to force her to return to him against her will. The remedy by way of restitution of conjugal rights has, as a matter of fact, been borrowed from English law.

In view of all the facts of the present case I do not see sufficient justification for my interference in second appeal with the discretion exercised by the lower appellate Court. I accordingly dismiss the appeal but leave the parties to bear their own costs in the circumstances of the case.

W.S.D./R.K. *Appeal dismissed.*

(3) A. I. R. 1927 Bom. 264=51 Bom. 329.

A. I. R. 1928 Lahore 903

AGHA HAIDAR, J.

Tulsi—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 305 of 1928, Decided on 20th April 1928, from an order of Addl. Dist. Magistrate, Delhi, D/- 19th January 1928.

Evidence Act, S. 118—Child as a witness—Court should first test his intellectual capacity by putting some simple questions—Brief proceeding should be recorded to that effect—Child if found unable to perceive a particular incident for proof of which he is summoned should not be examined as a witness.

Before examining a child of tender years as a witness, a Court should satisfy itself that the child is sufficiently intellectually developed to comprehend what he has seen and to give an intelligent account of it to the Court, by testing his intellectual capacity, by putting a few and simple and ordinary questions to him and the Court should record a brief proceeding so that the appellate Court may feel satisfied as to the capacity of the child to give evidence. If the Court is of opinion that by reason of tender years and defective or immature understanding the child could not have perceived the particular incident to prove which he is produced as a witness, the Court should not only refrain from administering the oath to him but should also decline to examine him as a witness: 38 *All.* 49 and 11 *C. W. N.* 51, *Ref.* [P 903 C 1, P 904 C 1]

Judgment.—Tulsi alias Abdul Karim has been convicted under S. 380 read with S. 75, I. P. C, and sentenced to seven years' rigorous imprisonment, including three months' solitary confinement. Action under S. 565, Criminal P. C., has also been ordered to be taken for a period of three years. He has appealed from the jail in which he is confined.

The facts are very clear and need not be stated in detail as the judgment of the Magistrate is fairly full. Mt. Nani is a sweeper woman. On 2nd January 1928, she had left her house in the afternoon at about 3, leaving behind her niece Mt. Taro (P. W. 2), a girl aged about five years old. As Mt. Nani returned about 5 o'clock she found the accused in her house with a bundle of clothes and two copper vessels in his hands. She raised an alarm and caught hold of the accused. The accused tried to run away but the woman did not let him go. One Shafiq-ud-Din (P. W. 3) happened to be passing by the house of Mt. Nani and had noticed that the accused was in the house carrying a bundle of clothes and two copper vessels. As soon as he heard the alarm he went inside the house and found that the accused had been caught by Mt. Nani. A boy named Muhammad Ahmad (P. W. 5) also happened to be passing by when this incident took place. When he heard this noise he too went inside the house of Mt. Nani and found the accused with the articles of clothing and the copper vessels in his hands. There cannot be any manner of doubt that the evidence given by these witnesses is true and proves the guilt of the accused beyond doubt.

There is one matter to which I wish to invite the attention of the learned Magistrate. He has recorded the statement of Mt. Taro, aged 5, on solemn affirmation. The provisions of S. 118, Evidence Act, are important in this connexion. Before examining a child of tender years as a witness a Court should satisfy itself that the child is sufficiently intellectually developed to comprehend what he has seen and to give an intelligent account of it to the Court. If the Court is of opinion that by reason of

tender years and defective or immature understanding the child could not have perceived the particular incident to prove which he is produced as a witnesa, the Court should not only refrain from administering the oath to him but should, also decline to examine him as a witness: [vide *Dhani Ram* v. *Emperor* (1) also *Sheik Fakir* v. *Emperor* (2)]. On the other hand if the child, though of tender years, is sufficiently intelligent to understand the questions put to him and to give rational answers to those questions then his capacity to give evidence is on the same footing as that of any other adult. But in such cases it would be desirable if the Court, before examining the child as a witness, test his intellectual capacity by putting a few simple and ordinary questions to him and to record a brief proceeding so that the appellate Court may feel satisfied as to the capacity of the child to give evidence.

However, in examining the evidence in the present case, I have not attached any importance to the evidence of Mt. Taro, as I find that the evidence of the remaining witnesses is sufficiently strong and cogent to bring the charge home to the accused.

As to the question of sentence the accused has got four convictions against him and his last conviction was under S. 380 when he was sentenced to 2½ years rigorous imprisonment. I think that the sentence of seven years rigorous imprisonment with three months solitary confinement is too severe. I reduce the sentence to one of four years' rigorous imprisonment. The order under S. 565, Criminal P. C. would stand.

N.K. *Sentence reduced.*

(1) [1916] 38 All. 49=31 I. C. 1005=13 A. L. J. 1072.
(2) [1907] 11 C. W. N. 51.

A. I. R. 1928 Lahore 904

SHADI LAL, C. J. AND BROADWAY, J.

Shibba Mal and *another*—Plaintiffs—Appellants.

v.

Rup Narain—Defendant—Respondent.

Letters Patent Appeal No. 196 of 1927, Decided on 13th April 1928, from order of Dalip Singh, Judge, D/- 14th November 1927, in Civil Misc. Appeal No. 2763 of 1927.

(a) *Letters Patent (Lahore), Cl. 10—Order restricting the passing of a final decree is a judgment.*

An order passed in an appeal from preliminary decree restraining the trial Court from passing a final decree during the pendency of the appeal amounts to a "judgment" within the meaning of Cl. 10 : *A. I. R.* 1922 *Lah.* 185, *Foll.* ; *A. I. R.* 1925 *P. C.* 155, *Ref.* [P 905 C 2]

(b) *Civil P. C., O. 34, R. 5—Final decree.*

The mere fact that an appeal from a preliminary decree is pending in the appellate Court does not preclude the trial Court from passing a final decree : *A. I. R.* 1926 *All.* 291, *Ref.* [P 906 C 1]

Moti Sagar and *Bishan Narain* — for Appellants.

Kishan Dayal and *Bhawani Singh Puri*—for Respondent.

Shadi Lal, C. J.—On the 2nd August 1927, the Subordinate Judge of Delhi granted a preliminary decree for sale on a mortgage effected by the defendant in favour of the plaintiffs. From that decree the defendant preferred an appeal to the High Court, which has not yet been decided. He also made an application that further proceedings in pursuance of the decree be stayed pending the decision of the appeal. This application was granted by Dalip Singh J., and against the order passed by him the plaintiffs have preferred the present appeal under Cl. 10, Letters Patent.

Mr. Kishan Dayal for the defendant-respondent raises the preliminary objection that the order of the learned Judge restraining the trial Court from passing a final decree during the pendency of the appeal does not amount to a "judgment" within the meaning of the aforesaid clause. In support of his contention the learned counsel cites a judgment of the Privy Council in *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (1). We are told that that judgment, though delivered in March 1925, has not been reported in any authorized report, and that it is printed in the 49th volume of the Madras Law Journal at p. 25 et seq. The report of the case shows that a scheme for the management of a temple in the district of Ahmedabad was confirmed by the Privy Council, and that the managing committee constituted in pursuance of that scheme was empowered to frame certain rules, which with some modifications were sanctioned by the District Judge. Certain persons appealed from

(1) A.I.R. 1925 P.C. 155.

the order of sanction to the High Court, and the High Court treating the order as one passed under S. 47, Civil P. C., heard and determined the appeal. It also granted a certificate to the appellants under S. 110, Civil P. C., that the case was a fit one for appeal to His Majesty in Council. The Judicial Committee of the Privy Council held that the sanction given by the District Judge to the rules did not amount to an order under S. 47, Civil P. C., and that no appeal lay to the High Court from the order granting sanction. Their Lordships, after stating that there was no right of appeal to His Majesty in Council from the judgment of the High Court or from the decree which was drawn up, except on the sole ground that the judgment or the decree was incompetent, observed that the term "judgment" in the Letters Patent of the High Court means in civil cases "a decree and not a judgment in the ordinary sense." They then pointed out that the appeal to His Majesty in Council should not have been admitted, but nevertheless accepted the appeal and set aside the order of the High Court.

Now, the learned counsel on both sides are unable to explain why their Lordships of the Privy Council, after holding that no appeal was competent, not only heard the appeal but accepted it. Mr. Kishan Dayal placed his reliance upon the solitary sentence in the judgment of the Privy Council, which says that the term "judgment" in the Letters Patent of the High Court means in civil cases "a decree and not a judgment in the ordinary sense," and urges that no appeal lies under Cl. 10 from an adjudication unless it amounts to a "decree" as defined by S. 2, Civil P. C. This contention runs counter to the view of all the High Courts in India, which have never placed such a narrow construction upon the term "judgment." It must be remembered that their Lordships of the Privy Council were dealing with Cl. 39, Letters Patent of the Bombay High Court, which provides for an appeal to the Privy Council from a "final judgment, decree or order," and that the clause which gives the right of appeal from a single Judge to a Division Bench makes no mention of the word "final." The Privy Council apparently intended to point out that the word "judgment" as used in Cl. 39 is not to be taken in the sense in which that expression is used in the Civil Procedure Code; where a distinction is drawn between a judgment and a decree. The observations relied upon by Mr. Kishen Dayal may not be free from ambiguity; but there can be no doubt that the expression "judgment" as used in Cl. 10, Letters Patent cannot be held to be synonymous with the word "decree" and that there is no warrant for curtailing the scope of that clause in the manner suggested by him. Indeed, it has been expressly decided by a Division Bench of this Court in *The Firm-Badri Das Janki Das* v. *Mathanmal* (2), that an order rejecting an application for staying further proceedings in pursuance of a preliminary decree amounts to a "judgment." In view of this authority, which is admitted to be on all fours with the present case, the preliminary objection must be overruled.

Coming now to the merits, I am not prepared to endorse the proposition that as soon as an appeal from a preliminary decree has been preferred, the trial Court becomes functus officio and has no authority to pass a final decree. It is true that the terminus a quo for the period of limitation prescribed for an application to make a final decree is the date of the preliminary decree made by the appellate Court and not the date of the dsoree of the original Court, which has merged in that of the appellate Court. There is, however, no authority beyond an unreported judgment of the Allahabad High Court in *Lalman* v. *Shiam Singh* (3) for the contention that when an appeal has been preferred from a preliminary decree, a final decree can be passed only after the preliminary decree has been confirmed or affirmed by the appellate Court.

It is to be observed that there is a divergence of opinion among the High Courts on the question of whether an appeal against the preliminary decree can be heard when a final decree has in the meanwhile been passed but no appeal has been brought against it. Now, if the final decree passed during the pendency of an appeal from the preliminary decree is altogether ultra vires, then such an invalid document should be altogether ignored and it could not constitute a bar to the hearing of the appeal against the preliminary decree. In that case there

(2) A.I.R. 1922 Lah. 185.
(3) A.I.R. 1926 All. 291.

should be no difference of opinion on the question stated above.

While I hold that the mere fact that an appeal from a preliminary decree is pending in this Court does not preclude the trial Court from passing a final decree, I consider that there is no adequate ground for interfering with the discretion of the single Judge who has stayed further proceedings to be taken in pursuance of the preliminary decree.

The affidavit made by the appellants, however, shows that the immovable property in the town of Delhi is depreciating in value, and that if the interest on the amount decreed by the trial Judge accumulates during the period of the pendency of the appeal in this Court, the claim of the mortgagees may not be fully satisfied by the sale of the mortgaged property. The mortgagor should, therefore, be put on terms, and I accordingly allow the appeal so far as to make the order of the single Judge conditional upon the judgment-debtor furnishing satisfactory security for the payment of the amount by which the price realized by the sale of the property may fall short of the sum found to be due to the decree-holders.

I leave the parties to bear their own costs in this Court.

Broadway, J.—I concur.

A.L./R.K. *Appeal partly allowed.*

A. I. R. 1928 Lahore 906

AGHA HAIDAR, J.

Ditta—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 212 of 1928, Decided on 26th April 1928, from order of Sess. Judge, Multan, D/- 17th December 1927.

Penal Code, S. 201—Trial of a person for principal offence of which he was acquitted is no bar to his conviction under S. 201.

When an accused person has been acquitted of a charge of committing a crime, the fact that he had been suspected and tried of the principal offence would not prevent his conviction under S. 201, if there is clear proof that he has caused the evidence to disappear in order to screen some unknown offender from legal punishment: 6 *P. R.* 1902 *Cr.*; 1 *P. R.* 1904 *Cr.*; 46 *Cal.* 427; *A. I. R.* 1926 *All.* 737; *A. I. R.* 1923 *Bom.* 262; 1 *L B. R.* 316; and *A. I. R.* 1925 *P. C.* 130. (*P.C.*); *Foll.*: 22 *Cal.* 638; 3 *C.L.J.* 333; and *A.I.R.* 1925 *Nag.* 407; *Diss. from.*; *A. I. R.* 1926 *Lah.* 209, *Dist.* [P 907 C 2]

Muhammad Alam—for Appellant.

Muhammad Akbar for *Govt. Advocate*—for the Crown.

Judgment—Ditta has been convicted under S. 201, I.P.C and sentenced to seven years' rigorous imprisonment. He has filed an appeal to this Court. Ditta was originally charged under S. 302, I. P. C., but the Sessions Judge has held that the offence under S. 302, I. P. C. has not been proved, and, therefore, he acquitted the appellant of the charge of murder. He has, however, convicted him under S. 201 I. P. C., on the ground that at his instance certain discoveries had been made and that the appellant is, therefore, guilty of having caused the evidence of the commission of the offence of murder to disappear, with the intention of screening the offender.

The learned counsel did not seriously contest the findings arrived at by the learned Judge on the evidence in this case. He made some feeble attempts to throw doubt upon the evidence of the discovery of the articles, namely, the kuppis and the knife, but he realized his difficulty and very properly gave up this line of argument. It may, therefore, be taken that so far as the findings of the learned Sessions Judge in regard to the evidence for the prosecution are concerned they have not been challenged. The judgment of the learned Sessions Judge is very full and, therefore, the facts of the case need not be recapitulated at any great length. For purposes of the present appeal it is only necessary to say that one Khillu Ram left his native village in the morning for the purchase of ghee. He did not return in the evening. The accused Ditta, who had also gone on a similar errand, however, along with another person, returned to the village. Khillu Ram had carried two kuppis with him which were loaded on a donkey. A search was made for Khillu Ram but no trace of him could be found. On the following day the body of Khillu Ram, was discovered at some distance from the ravine which he and the accused had crossed the day before. The kuppis were discovered in a pond at some distance from its bank at the instance of the appellant. In the same manner a knife with which the murder is alleged to have been committed was also found buried in the house of the accused. The Sessions Judge held that it was quite possible on

the evidence produced by the prosecution that the murder was committed either by the accused himself or by the accused and his companion who returned with him on the day in question, or it was committed by the accused's companion alone. He, therefore, held that the accused cannot be held guilty of the murder. On the evidence he was, however, satisfied that it was established that the accused produced the kuppis belonging to the deceased and the knife with which the murder was committed. He also believed the evidence, and I think rightly, that the accused stated at the time when he produced these articles that it was he who had hidden them in various places from which they were discovered. They were undoubtedly evidence connected with the murder. On these findings the Sessions Judge convicted the accused under S. 201, I. P. C.

Dr. Muhammad Alam argued that as the accused person was the murderer himself, therefore, he could not be charged under S. 201, I. P. C., and convicted of an offence under it. The fallacy in his argument is that he takes it for granted that the appellant was the murderer of Khillu Ram. As a matter of fact, the Sessions Judge has acquitted the appellant of the charge of murder. The learned counsel relied upon the case of *Torap Ali* v. *Queen-Empress* (1) in support of his arguments. That case undoubtedly lays down that when certain accused persons are charged with murder, and also with the offence of causing the disappearance of the corpse of the deceased with the intention of screening the murderer from punishment, and they are ultimately acquitted of the charge of murder on the ground that it was impossible upon the evidence to say which of them caused the death of the deceased their conviction under S. 201 was illegal. This case seems to have been followed in *Sumanta Dhupi* v. *Emperor* (2). A similar view was taken by the learned Single Judge in a Nagpur case, *Kudaon* v. *Emperor* (3). But the current of decisions so far the Punjab Chief Court is concerned is uniform and is decidedly against the contention put forward by the appellant. In *Nasru* v. *Emperor* (4) it was held by a Bench of two learned Judges that where there is clear and independent proof that any person has caused evidence to disappear in order to screen some person or persons unknown, the mere fact that he had been suspected or even tried and acquitted of the principal crime, would not in itself prevent his conviction under S. 201, I. P. C. In another case, *Bucha* v. *Emperor* (5), another Bench of the learned Judges held, after discussing a number of cases on the subject, including the case of *Torap Ali* v *Queen-Empress* (1) that when an accused person has been acquitted of a charge of committing a crime the fact that he had been suspected and tried of the principal offence would not prevent his conviction under S. 201, if there is clear proof that he has caused the evidence to disappear in order to screen some unknown offender from legal punishment. With this statement of law I entirely agree.

I may further point out that in case of *Teprenissa* v. *Emperor* (6) a Bench of two learned Judges held that where, notwithstanding circumstances of grave suspicion, it is impossible on the record, as it stands, to hold that a person is the murderer, or one of the murderers, his conviction under S. 201 is not vitiated by the existence of such circumstances. The learned Judges have tried to distinguish the case of *Toray Ali* v. *Queen-Empress* (1). The case of *Emperor* v. *Har Piari* (7) is also against the contention put forward on behalf of the appellant. *Bucha* v. *Emperor* (5) was cited with approval by a Bench of two learned Judges of the Bombay High Court in *Hanmappa Rudrappa* v. *Emperor* (8). To the same effect is a decision *Aung Kyaw Zan* v. *Crown* (9) where three learned Judges held that though S. 201, I. P. C.. does not apply to a person who is proved or admitted to be the principal offender, the mere fact that the accused is probably or possibly the principle offender does not prevent his conviction under S. 201, I. P. C, for causing disappearance of evidence of the

(1) [1895] 22 Cal. 638.
(2) [1916] 23 C. L. J. 393=32 I. C. 132=20 C. W. N. 166.
(3) A. I. R. 1925 Nag. 407=21 N. L. R. 86.
(4) [1902] 6 P. R. 1902 Cr.=85 P. L. R. 1902.
(5) [1904] 1 P. R. 1904 Cr.=30 P. L. R. 1904.
(6) [1919] 46 Cal. 427=47 I. C. 275=19 Cr. L. J. 903.
(7) A. I. R. 1926 All. 737=49 All. 57.
(8) A. I. R. 1923 Bom. 262.
(9) [1904] 1 L. B. R. 316.

offence. The learned counsel relied upon a case of the Lahore High Court, *Ahmad* v. *Emperor* (10). This case, however, has nothing whatever to do with the contention urged by the learned counsel. There it was held that a person who has been found guilty and convicted of an offence under S. 302 could not at the same time be charged with and convicted of an offence under S. 201. This case, therefore, has no bearing whatsoever upon the point raised by the appellant's counsel.

Lastly, the learned counsel says that the original charge was one under S. 302, I. P. C., and that the trial and conviction of the appellant by the Sessions Judge was illegal as no formal charge had been framed in respect of an offence under S. 201, I. P. C. Having regard to the Privy Council ruling in *Begu* v. *Emperor* (11) it is too late in the day to raise this contention seriously. I overrule it.

In my opinion the conviction of the appellant under S. 201 was appropriate and the sentence of seven years imprisonment, which the learned Sessions Judge has passed upon him is by no means excessive and cannot be disturbed.

I, therefore, dismiss the appeal.

N.K. *Appeal dismissed.*

(10) A. I. R. 1926 Lah, 209.
(11) A. I. R. 1925 P. C. 130=6 Lah. 226=52 I. A. 191 (P.C.).

A. I. R. 1928 Lahore 908

DALIP SINGH, J.

Mt. Chinti—Plaintiff.

v.

Nathu and *others*—Defendants.

Civil Reference No. 9 of 1928, Decided on 18th May 1928, made by Dist. Judge, Jullundur, D/- 8th February 1928.

(a) *Punjab Tenancy Act* (16 *of* 1887), *S.* 77 (3) (n)—*A suit envolving the question whether a sale of a right to realize rent by one person to another is valid is triable by a civil Court.*

A suit involving the question whether the sale of a right to realize rent by one person to another is valid or not is triable by a civil Court and S. 77 (3) (n) does not bar such a suit because the question whether the relationship of landlord and tenant subsists between the parties or not, does not arise. [P 909 C 1]

(b) *Punjab Tenancy Act* (16 *of* 1887), *S.* 100 —*Case of doubtful jurisdiction may be tried by civil Courts unless parties raise the question—High Court can register the decree if necessary as of the right Court.*

In cases under the Punjab Tenancy Act the question of jurisdiction is often an extremely complicated one. It is better for the Court in matters of doubt, unless the parties insist, to proceed with the case to give a decree. A decree so given, if subsequently held by High Court to have been given by a Court without jurisdiction, can be registered as a decree of the corresponding Court on the revenue side. [P 909 C 1]

Order.—These two connected suits, Nos. 883 and 888 of 1927 (Civil References Nos. 9 and 11 of 1928) have been referred by the learned Subordinate Judge, through the learned District Judge, Jullundur, to this Court for decision whether the civil or the revenue Courts should take cognizance of them.

The facts are that Mt. Chinti brought a suit for recovery of Rs. 146-2-0 on account of rent of 1/3rd share of land measuring 29 kanals 17 marlas as well as three other cases of a similar nature. She claims to have got a sale-deed from Dwarka Das on 22nd December 1926, of his 1/3rd share in this land together with his right to recover the rent of his share due by the various defendants. One defendant Atra pleaded that the land in respect of the rent whereof the suit had been brought had been sold to him and his brothers thirteen years ago, that Dwarka Das obtained an ex-parte decree in respect of 1/3rd share of the land (it is not stated against whom) but that he did not obtain formal possession thereof and that the said Dwarka Das had no right to realize rent from the defendants because the relationship of landlord and tenant did not subsist. Upon this the Assistant Collector, First Grade, held that the question in the case was whether the sale-deed in respect of the realization of rent was valid and that the evidence, oral and documentary, produced by the plaintiff did not show that Dwarka Das, vendor, had a right to realize rent for the harvest in question from the defendants or that the said sale-deed was valid. He, therefore, thought that the plaintiff, in the first place, should bring a civil suit and prove the sale-deed relating to the realization of the rent to be valid and thereafter she could bring cases in the revenue Courts. All the four suits were consequently stayed and consigned to the record room until the above point was disposed of as the causes of action and the facts of all the four

cases were held to be the same. The plaintiff was granted one month's time for filing a civil suit. The plaintiff, accordingly, brought two civil suits for a declaration to the effect that the sale-deed about the realization of rent executed by Dwarka Das in favour of the plaintiff is valid and that the plaintiff can realize the rent.

The learned Subordinate Judge has referred the case on the ground that the question involved is whether the relationship of landlord and tenant subsists between the parties or not and, therefore he was doubtful whether the question set forth above was triable by the civil Court. He does not state what sections of the Punjab Tenancy Act have caused any doubt in his mind and I would point out that in cases under the Punjab Tenancy Act the question of jurisdiction is often an extremely complicated and difficult one. It is better for the Court in matters of doubt, unless the parties insist to proceed with the case, to give a decree, as a decree so given, if subsequently held by this Court to have been given by a Court without jurisdiction, can be registered as a decree of the corresponding Court on the revenue side. However, in the present case I fail to see that any particular section of the Punjab Tenancy Act bars this suit because the question is whether the sale of a right to realize rent by one person to another is valid or not. This has nothing to do with S. 77, Tenancy Act. Once it is found by the Court or not found, as the case may be, that the relationship of landlord and tenant subsists between the parties, a suit for rent would, no doubt, fall under S. 77 (3) (n), but that is a matter which will not arise in the present case. I, therefore, hold that the present suit is triable by the civil Court which wil proceed to try it accordingly.

N.K. *Order accordingly.*

A. I. R. 1928 Lahore 909

DALIP SINGH, J.

Emperor—Petitioner.

v.

Mt. Jannat—Accused—Respondent.

Criminal Revn. No. 587 of 1928, Decided on 12th May 1928, reported by the Dist. Magistrate, Mianwali, D/- 12th March 1928.

Criminal P. C., S. 29-B—A Magistrate other than a District Magistrate has no power to try a juvenile challaned under Railways Act, S. 130.

In view of provisions of S. 29-B of Criminal P. C., a Magistrate other than a District Magistrate has no jurisdiction to try an offence under S. 130 of Railways Act: 43 *Bom.* 888 *Diss. from.* [P 909 C 2]

J. L. Kapur for *Govt. Advocate*—for the Crown.

Muhammad Amin—for Respondent.

Order.—Mt. Jannat, the five years old daughter of Jumma, sweeper, employed at Shah Alam railway station, was challaned under S. 130, Railways Act. She was acquitted by the Magistrate, First Class, at Bhakkar, who held that there was no proof against the accused. The proceedings have been forwarded for revision by the learned District Magistrate on the ground that S. 130, Railways Act, is triable by a S. 30 Magistrate because the offence really falls under S. 126.

Against this *Emperor* v. *Dhondya Dudya* (1) is clear authority. That ruling goes on to hold that the offence is triable by any Magistrate because of Sch. 2, Criminal P. C. I am unable, however, to follow the reasoning of their Lordships on this point because the offence under S. 130 is punishable neither with imprisonment for less than one year nor with fine. The proceedings, however, would be void under S. 29-B of the new Criminal P. C., to which counsel for the Crown has called my attention. Under this section as far as I can see at present only the District Magistrate would have been empowered to try this offence. However, I have been through the evidence and there is certainly nothing to connect the accused with the offence charged. I, therefore, refuse to order a re-trial. I accept the reference so far as to quash all the proceedings as being without jurisdiction.

N.K. *Reference accepted.*

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(1) [1919) 43 Bom. 888=52 I.C. 667=21 Bom. L. R. 768.

A. I. R. 1928 Lahore 910

JAI LAL, J.

Piara Ram and *another*—Plaintiffs—Appellants.

v.

Sohawa and *others*—Defendants—Respondents.

Second Appeal No. 2156 of 1927, Decided on 27th February 1928, from decree of Dist. Judge, Mianwali, D/- 10th May 1927.

(a) *Civil P. C., O. 21, R. 95—Burden of proof that formalities required by law were not complied with at the time of giving formal possession is on the defendant and not on plaintiff, presumption of those having been observed being in latter's favour—Evidence Act, S. 114.*

It must be assumed that a process, issued by the Court and accepted by the Court as having been duly served, was served in the manner provided by law and with all the formalities laid down for the service thereof. Therefore, the burden of proving that the formalities required by law were not complied with at the time when formal possession was given to the plaintiff is on the defendant and not on the plaintiff. [P 910 C 2]

(b) *Civil P. C., S. 47—Execution proceedings—Orders are deemed to have been passed in the presence of parties—Objection to irregularity of such proceedings can only be taken either before the executing Court itself or by way of appeal from the order of the Court.*

All orders passed in execution proceedings are deemed to have been passed in the presence of the parties to the proceedings whether they are actually present in the Court or not and it must be assumed that they had notice of such proceedings. Therefore any objection to the irregularity of such proceedings can be taken in the manner provided by law either before the executing Court itself or by way of appeal from the order of that Court: 5 *Cal.* 584, *Rel. on.* and 2 *L. L. J.* 563, *Ref.* [P 911 C 1]

(c) *Limitation Act, Art. 144—Formal possession of property in previous suit duly given—Fresh denial of his title to that property gives him a fresh cause of action to establish such right.*

Where a decree in a former suit giving formal possession to plaintiff has been duly executed, any fresh invasion or denial of his title to that property gives him a fresh cause of action to establish such right. [P 911 C 1]

Nanak Chand—for Appellants.

N. C. Mehra and *S. R. Laul*—for Respondents.

Judgment.*—This is a second appeal against the decree of the District Judge of Mianwali, whereby he dismissed the plaintiff's suit, The plaintiff and the defendants are joint owners of certain lands. It appears that in the revenue records, the holding of the plaintiff was recorded to be 34 kanals and 7 marlas less than what according to him it should have been. Consequently, the plaintiff instituted a suit, for joint possession of 34 kanals 7 marlas of land and obtained a decree on 16th October 1927. This decree was executed by him and symbolical possession of 34 kanals and 7 marlas of land was given to him by the Court as a result of the execution proceedings and such proceedings were duly consigned to the record room with a note that the decree had been satisfied.

It appears that when the plaintiff attempted to have a mutation of the land effected in his favour in the revenue records an objection was raised by the defendants, judgment-debtors, in the suit already referred to that the plaintiff was not entitled to the land decreed in his favour, and the revenue authorities declined to effect a mutation of names in favour of the plaintiff. The plaintiff thereupon instituted a fresh suit for joint possession of the same land and this suit has been dismissed by the trial Court and on appeal by the District Judge, namely on the ground that the execution proceedings in the previous suit were defective inasmuch as the provisions of law as to the delivery of possession were not complied with by the executing Court because a copy of the warrant of possession was not affixed in some conspicuous place on the property and there was no proclamation by beat of drum.

The judgment of the District Judge shows that there was an order by the executing Court that these formalities should be complied with but the learned Judge holds that there is no evidence that this order was complied with. It has also been held that the judgment-debtor was not actually present when the possession of the joint khata is alleged to have been given to the plaintiff in the execution proceedings.

Now it seems to me that the burden of proving that the formalities required by law were not complied with at the time when formal possession was given to the plaintiff was on the defendant and not on the plaintiff. It must be assumed that a process issued by the Court, which has been accepted by the Court, as having been duly served, was served in the manner provided by law and with all the

[* L. P. A. No 97 rejected on 11th May 1928 by Shadi Lal, C. J. and Broadway, J.]

formalities laid down for the service thereof. The judgment of the District Judge, therefore, cannot be maintained on that ground alone because it proceeds on the assumption that the burden was on the plaintiff to prove that all the requirements of law had been complied with.

I am further of opinion that the order of the executing Court holding that possession of the property in suit had been given to the decree-holder is binding on the parties to the execution proceedings, that is to say, the decree-holder and the judgment-debtors, and it is not open to either of them to question the correctness of that order on the ground of any irregularity in procedure except by way of appeal to the Court competent to hear appeals from the orders of the executing Court. All orders passed in such proceedings are deemed to have been passed in the presence of the parties to the proceedings whether they are actually present before the Court or not and it must be assumed that they had notice of such proceedings. Therefore any objection to the irregularity of such proceedings could be taken in the manner provided by law either before the executing Court itself or by way of appeal from the order of that Court. This view receives support from the observations made by the learned Chief Justice in *Juggobandhu Mukerjee* v. *Ram Chunder Bysack* (1) who on p. 588, made the following remark:

> As, in contemplation of law, both parties must be considered as being present at the time when the delivery is made, we consider that as against the defendant, the delivery thus given must be deemed equivalent to actual possession. As against third parties, of course, this symbolical possession (as it is called) would be of no avail; because they are no parties to the proceeding. But if the defendant should after this again dispossess the plaintiff by receiving the rents and profits, we think that the plaintiff would have 12 years for such dispossession to bring another suit: see also a judgment of this Court reported as *Jahuri Lal* v. *Peman* (2).

In my view, therefore, as between the parties, it must be held that the decree in the former suit had been duly executed and the plaintiff put in symbolical possession of the property in suit and consequently any fresh invasion or denial of his title to the property gave him a fresh cause of action to establish such right.

(1) [1880] 5 Cal. 584=5 C. L. R. 548 (F.B.).
(2) [1920] 2 L. L. J. 568.

The view of the learned District Judge, therefore, that as the decree was not duly executed it had become incapable of execution by lapse of time and consequently no fresh suit lay is not correct. I accept this appeal and decree the plaintiff's suit with costs throughout.

N.K. *Appeal accepted.*

A. I. R. 1928 Lahore 911

BHIDE, J.

Hardayal Mal — Defendant — Appellant.

v.

Mulk Raj and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 2751 of 1927, Decided on 13th September 1928, from order of Addl. Dist. Judge., Ferozepore, D/- 29th July 1927.

Hindu Law—Joint family—Son in Punjab is entitled to claim joint possession with father —Custom (Panjab).

In the Punjab a son is entitled to sue at any rate, for joint possession of the family property, although he is not entitled to claim partition of such property during the lifetime of his father : *A. I. R.* 1923 *Lah.* 255, *Foll:* 105 *P. R.* 1917, *Ref.*: 85 *P. R.* 1915, *Rel on.*

[P 912 C 1]

J. N. Bhandari—for Appellant.
Brij Lal—for Respondent.

Judgment—The parties to this case are high caste Hindus and are admittedly governed by Hindu law. The suit was by a son to contest an alienation of ancestral property by father. Originally the plaintiff asked for a declaration that the alienation was null and void and should not affect his rights. Later on, an application was made for permission to add a prayer for possession. Time was given for the purpose, but the amendment was not carried out. The trial Court then came to the conclusion that the plaintiff was bound to sue for consequential relief in the shape of possession and as this was not done the declaratory suit was not maintainable. The suit was accordingly dismissed. From this decision the plaintiff appealed to the District Judge and the Judge has held that in the Punjab a son is not entitled to sue for possession of the family property during the lifetime of the father. The appeal was accordingly accepted and the the suit remanded for

disposal on merits. The defendant-vendee has now come up in second appeal and the contention of the learned counsel for him is that the decision of the learned District Judge is not correct and that even in the Punjab a son is entitled to sue at any rate for "joint possession" of the family property although he is not entitled to claim partition of such property during the lifetime of his father. He has cited in support of this argument *Amir* v. *Malik Khan Chand* (1) which appears to be clearly in his favour.

The learned District Judge has held that the theory of a son being born with a share in the joint family property does not apply in the Punjab and hence he cannot sue for possession of the joint property during the lifetime of his father. It was, however, pointed out by a Division Bench of the Punjab Chief Court in *Narpat Rai* v. *Devi Das* (2) that the dictum that the theory of a son being born with share in the joint property did not hold good in the Punjab was much too wide and although it appeared in some early rulings of the Chief Court, it could not be held to be authoritative. It is true that in the Punjab a son cannot enforce partition of his share during the lifetime of his father, but it would appear from the Full Bench ruling *Hari Kishan* v. *Chandu Lal.* (3) that this is only due to this particular rule of Hindu law being modified by custom. The mere fact that a son cannot enforce partition of his share does not, therefore, justify the conclusion that he has no share in the family property during the lifetime of his father or that he is not even entitled to claim joint possession of the family property along with the other cosharers.

Following the view taken by a Division Bench of this Court in *Amar* v. *Malik Kahan Chand* (1) I accept the appeal and restore the order of the trial Court. In view of the conflict of authority on the law point involved I leave the parties to bear their costs thoughout.

W.S.D /R.K. *Appeal accepted.*

(1) A. I. R. 1923 Lah. 255.
(2) [1915] 85 P. R. 1915=31 I. C. 634=358 P. W. R. 1915.
(3) [1917] 105 P. R. 1917=43 I. C. 667 (F.B.)

A. I. R. 1928 Lahore 912

BHIDE, J.

Sham Singh—Petitioner.

v.

Mt. Tharri—Oppo site Party.

Civil Petn. No. 213 of 1928, Decided on 4th May 1928, for stay of execution proceedings.

Civil P. C., S. 151—*High Court can order stay of proceedings under Guardians and Wards Act.*

High Court has inherent power to pass an order, to stay proceedings under the Guardians and Wards Act, and can disallow the transfer of the custody of the minor to the guardian appointed by the lower Court pending the decision of the appeal to the High Court: 3 *C. L. J.* 29, *Rel. on.* [P 912 C 2]

Ram Chand Manchanda—for Petitioner.

Akbar Ali—for Respondent.

Order.—A preliminary objection is raised on behalf of the respondent that this Court has no power to stay proceedings under the Guardians and Wards Act. But as held in *Panchanan Singha Roy* v. *Dwarka Nath Roy* (1) this appellate Court has inherent power to pass such an order which is merely ancillary to the power of hearing the appeal.

In view of the facts of the case, it seems to me desirable that the custody of the minor should not be allowed to be transferred pending decision of the Court. I understand the case is already fixed for the 14th of this month and shall, in the ordinary course, be decided soon.

The order as to stay of proceedings pending decision of the appeal is made absolute, subject to the appellant filing security of Rs. 1,000, with one surety for production of the minor before this or the lower Court when required. The security should be filed within one week (i. e., on or before the 11th instant.)

N.K. *Proceedings stayed.*

(1) [1906] 3 C. L. J. 29.

Advocate High Court Jammu & Kashmir

A. I. R. 1928 Lahore 913

ADDISON AND DALIP SINGH, JJ.

Gaman—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 589 of 1928, Decided on 2nd August 1928, from order of Sess. Judge, Jhelum, D/- 16th May 1928.

(a) *Criminal P. C., S. 154—First information report cannot be used to contradict other persons —Evidence Act, Ss. 157 and 145.*

A first information report can only be used to corroborate or contradict under the provisions of Ss. 157 and 145, Evidence Act, the person who makes it. It cannot be used as substantive evidence to contradict other persons: *A. I. R. 1928 Lah. 17, Foll.* [P 914 C 1]

(b) *Criminal P. C., S. 154—First information report—Details not necessary — It should be sufficient to induce the police to start investigation.*

There is nothing in law to the effect that a first information report must give every detail or any detail. It should be sufficient to induce the police to leave the police station and investigate the affair. [P 914 C 1]

(c) *Penal Code, S. 302—Murder not deliberate —Accused not of turbulent class—Punishment was reduced to transportation for life.*

Where the murder was not a deliberate one but occurred suddenly after mutual abuse, and the accused who did not belong to a turbulent class took up on the spur of the moment the weapon and killed the deceased with it, a sentence of transportation for life was substituted for the death sentence. [P 914 C 2]

F. K. Byrne—for Appellant.

C. H. Carden Noad—for the Crown.

Addison, J.—Gaman, a Kumhar, has been sentenced to death under S. 302, I. P. C., for the murder of Salihon, another Kumhar of the same village, on 9th September 1927. He has appealed and the reference by the Sessions Judge regarding confirmation of the death sentence is also before us.

Three other persons were committed to the Sessions Court along with the appellant, but were acquitted principally on the ground that the medical evidence did not bear out what the witnesses alleged regarding the part played by these three men. These three persons were Bahabal and his two sons Jallu and Maulu. The appellant Gaman is the nephew of Bahabal.

According to the medical evidence there were two severe incised wounds on the head which caused Salihon's death. There was also a contused mark on the upper third of the right arm which could have been caused by a blunt weapon or by a fall. The first information report was made at the police station at 4 p. m. on the same day on which the attack upon the deceased took place. The time of this attack was noon. Rahman is the paternal uncle of the wife of the deceased. He went to the police station to report. What he told the police is in agreement with his evidence in Court. He added that Fazla Chowkidar, Mirza Jat and many others witnessed the occurrence.

There is good evidence to show that Maulu who has been acquitted was employed as a sepi by Mirza, witness, but was dismissed by him some two or three months before the attack. Instead of Maulu, Mirza then employed Salihon, and this fact appears to have been resented by Maulu's family. The Sessions Judge was, however, unable to believe that this motive could have been the root cause of the trouble. In the Punjab I have frequently noticed that much slighter motives than this have led to many a murder.

The immediate cause for the attack is given by Mt. Fatima, the wife of the deceased. She has deposed that she and her husband were going about collecting earthen vessels for the marriage of a Kashmiri in the village. When they passed the house of Jallu they saw the four persons who were tried sitting there. Gaman, appellant, asked her husband what business he had to go past their house. This led to abuse. Gaman got up, chased her husband and struck him with an axe. The other three persons struck him with dangs on the head. When this was going on she was standing in a doorway. This explanation is supported to some extent by Fazla who is the chowkidar of the village. He heard the deceased being abused by Gaman and the abuse being returned He saw the pursuit of the deceased by the four persons and he saw Gaman strike the deceased upon the head with an axe while the others struck him with dangs. Sharfa, dhobi, Muradi, weaver, Mirza Jat, Fazla Masalli, chowkidar, and Rahman, who made the first information report, have all given more or less the same story. The witnesses, except Rahman and Mt. Fatima, are of different castes from the deceased and the appellant, and there is no reason of any kind why they should

give false evidence. No enmity or grudge is alleged.

The Sessions Judge, however, has held that Mt. Fatima could not have been there and he has, therefore, found that the immediate cause of the attack cannot be ascertained as she alone says what exactly it was. The Sessions Judge has admitted that the first information report is not substantive evidence. He has however, rejected the statement of Mt. Fatima, though she herself and all the eyewitnesses have stated that she was present at the scene of the occurrence on the ground that her name is not given by Rahman in the first information report in spite of the fact that he has said that the first information report is not substantive evidence. This means that he has used it as substantive evidence. As laid down in *Emperor* v. *Ibrahim* (1) which was brought to his notice at the trial and which he was bound to follow, a first information report can only be used to corroborate or contradict, under the provisions of Ss. 157 and 145, Evidence Act, the person who made it. It cannot be used as substantive evidence to contradict other persons. It is difficult to understand how the omission or act of one person can be held to discredit other witnesses. In any case Rahman stated that Fazla, Mirza and others were present. Further, Rahman has explained why he did not specially name Mt. Fatima and his explanation is reasonable. Lastly, it is not necessary that every detail should be given in the first information report. The first information report is merely a statement made to the police, which is not substantive evidence but which can be used to corroborate or contradict the maker of it at the trial. There is nothing in law to the effect that it must give every detail or any detail. It should merely be a statement sufficient to induce the police to leave the police station and investigate the affair. I have gone into the matter in some detail as in spite of *Emperor* v. *Ibrahim* (1), published in the authorized reports, this Sessions Judge has not yet understood what is the law on the subject.

I have no hesitation in accepting the evidence of Mt. Fatima, and it clearly establishes the immediate cause of the attack. The evidence of the eyewitnesses shows that it was the appellant Gaman who after abusing the deceased attacked him with an axe and killed him. In spite of the medical evidence there is no reason to disbelieve the eyewitnesses that the three persons who were acquitted were also present, and took some small part in the affair, e. g., there was one lathi mark on the arm of the deceased. Other lathi blows might have fallen upon the turban, or they might have left no mark. It is obvious that the appellant first struck the deceased with his axe and that the part taken by the other three persons present was insignificant. There is nothing to indicate that they knew that Gaman would kill the deceased in this sudden attack.

There is also no reason to doubt the evidence as to the production of the blood-stained axe by the appellant. It has been explained that it was not thought necessary to send it to the Chemical Examiner for analysis of the blood. The Sessions Judge considered that the evidence as to the axe must be false as the axe was not sent to the Chemical Examiner. There is nothing on the record to discredit the evidence, which I accept. It appears to me that it would have been a work of supererogation to have sent the axe to the Chemical Examiner in this case.

There is no doubt of the appellant's guilt. Exception 4 to S. 300, I. P. C., has no application. The only point in the appellant's favour is that the murder was not a deliberate one but occurred suddenly after mutual abuse. The appellant took up on the spur of the moment the weapon and killed the deceased with it. In these circumstances and also because the class to which the parties belong cannot be said to be a turbulent one, I would accept the appeal to the extent of substituting a sentence of transportation for life for the death sentence, that is, I would not confirm the death sentence but would impose the lesser penalty for murder.

Dalip Singh, J.—I agree.

W.S./R.K. *Sentence reduced.*

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(1) A. I. R. 1928 Lah. 17=8 Lah. 605.

* A. I. R. 1928 Lahore 915

ADDISON, J.

Hanu Ram and *another*—Defendants—Appellants.

v.

Dhanna Singh-Diwan Singh—Plaintiffs—Respondents.

First Appeal No. 2056 of 1927, Decided on 23rd January 1928, from an order of the 1st Cl. Sr. Sub. Judge, Jhang, D/- 14th April 1927.

** (a) Civil P. C., Sch. 2, para. 16—Dispute of partners referred to arbitrator—Two partners compromising their claim—Other partners consenting—Arbitrators can go into the question whether compromise took place and have power to give award in its terms.*

Where in a dispute of certain partners referred to arbitrators, two partners compromise their claims inter se and other partners accept the compromise, the arbitrators can go into the question whether such compromise took place, and if they find the compromise valid, they have power to give a decree in terms of that compromise and the award so given will be binding on all the partners. [P 916 C 1]

(b) Civil P. C., Sch. 2, paras. 12 and 14 (a)—Duty of Court.

If the Court considers that the arbitrators giving award in a case have gone beyond the scope of their authority and have determined a matter not referred to arbitration, it is its duty to take action under para. 12 or 14. [P 916 C 2]

Har Gopal and *Mukand Lal Puri*—for Appellants.

A. R. Kapur—for Respondents.

Judgment.—*On the 8th September 1924, Diwan Singh, Hanu Ram and Asa Nand on behalf of their respective firms referred a dispute which they had in connexion with the working of a factory to the arbitration of two persons. Diwan Singh in the name of his firm applied on the 28th May 1925, under para. 17, Sch. 2, Civil P. C., for the agreement to be filed in Court. This was submitted to by Hanu Ram and Asa Nand. The agreement was accordingly filed in Court and the arbitrators requested to file their award. One of the arbitrators was removed and another put in his place at a later stage of the proceedings. Ultimately the arbitrators filed their award. Only the petitioner Diwan Singh on behalf of his firm objected to it. All the objections were overruled except the second. As regards the second objection the Subordinate Judge, First Class, held that the arbitrators had gone beyond the scope of the agreement in holding that Asa Nand was given up by Diwan Singh and that Diwan Singh had become liable to pay whatever was due on behalf of Asa Nand. For that reason he refused to pass judgment in accordance with the award and dismissed the application. Against this decision the two others interested in the award have preferred this appeal.

It was not contended before me that the decision of the Court below was wrong as regards any of the other objections. This means that the only point before me is whether the petition has been properly dismissed on the second objection. The objection was as follows:

The proceedings of the Court, dated 11th November 1926, releasing Asa Nand were unauthorized. Therefore, in consequence of the absence of Asa Nand and the fact that he took no further part in the case all the proceedings before the arbitrators were void and unauthorized.

At this stage it is necessary to give a brief account of what happened before the arbitrators.

Subsequent to the reference to the arbitrators Diwan Singh, who was the original petitioner and also the only objector to the award, put in an application to the Court on the 9th November 1925, that he had settled with Asa Nand and had become responsible for him and that his name should be struck off the list of defendants. He made a similar application before the arbitrators at the same time. The Court, however, passed no orders on these applications. On the 5th January 1926, Hanu Ram also put in an application to the Court that the plaintiff was not competent to give up Asa Nand. On this also the Court passed no order. Then on the 28th November 1926, Diwan Singh made a similar statement before the arbitrators to the effect that he had settled with Asa Nand and he went on to say that whatever profit and loss there was in the factory in favour of or against Asa Nand he had to get the profit and would stand the loss. On the same date Hanu Ram, who was not a party to the compromise between Diwan Singh and Asa Nand, stated that he would be content with what was decreed to him against Diwan Singh only. Asa Nand also then stated that he had settled with Diwan

* [Letters Patent Appeal No. 65 rejected on 28th March 1928 by Shadi Lal, C. J. and Broadway, J.]

Singh in the above terms. After all this had happened on the same day Diwan Singh made a further statement that he had not given up Asa Nand, nor was he willing to do so, though he admitted that he had taken Rs. 2,950 from Asa Nand. He explained, however, that this was done simply to show that there was a profit in the business and not a loss. This explanation is against the clear tenor of the receipt which is to the effect that he had taken that sum and would be responsible for whatever was due from Asa Nand. Accordingly the arbitrators framed an issue on the point as follows :

> Whether the plaintiff, i. e., Diwan Singh, has not settled with Asa Nand and is Asa Nand now liable to give him account of what is due from him, and whether Diwan Singh can now make this objection when he has given up Asa Nand by his own application dated 9th November 1925.

The arbitrators went into this question and held that Diwan Singh had given up Asa Nand and that he was responsible for whatever was due to Hanu Ram from Asa Nand. They found that Rs. 4,183 were due to Hanu Ram from Asa Nand and Rs. 1,170 from Diwan Singh to Hanu Ram. In consequence of their finding as to the compromise between Diwan Singh and Asa Nand they held that the firm Dhanna Singh-Diwan Singh was liable to pay Rs. 5,353 to Hanu Ram and that a decree for that amount should be passed against Diwan Singh in Hanu Ram's favour.

On the above facts it seems to me that the arbitrators acted within the scope of their authority. It is always possible for two partners to compromise their claims inter se though that compromise would not necessarily bind the other partners. The third partner in this case, namely, Hanu Ram, stated on the 18th November 1926, that he had no objection to a decree being given in his favour against Diwan Singh if Asa Nand was found to owe him anything so that he accepted the arrangement. In these circumstances there was obviously a valid compromise between Diwan Singh and Asa Nand which was accepted by Hanu Ram and the arbitrators had clearly power to give the award in the form they did.

The above is sufficient to dispose of this appeal, but I must also refer to the argument on behalf of the appellant to the effect that objection 2 did not relate to the question that the arbitrators had gone beyond the scope of their authority and that it was, therefore, incompetent for the Court to allow this question to be raised. I think that this contention is sound. Objection 2 relates to the proceedings of the Court dated 11th November releasing Asa Nand and states that they were *bila ikhtiar*. Now the Court did not release Asa Nand. It passed no orders on the application but left the matter to be dealt with by the arbitrators. The second part of objection 2 is to the effect that in consequence of the action of the Court Asa Nand did not attend and all the proceedings before the arbitrators were void and *bila ikhtiar*. Asa Nand, however, did attend the proceedings. It seems to me clear, therefore, that objection 2 does not relate to the fact that the arbitrators went beyond the scope of their jurisdiction and no new objection to the award could be put in after the 10 days fixed by law. For this reason also this appeal must be accepted.

In any case, if the Court considered that the arbitrators went beyond the scope of their authority and determined a matter not referred to arbitration it was its duty (see Mulla's Civil Procedure Code, p. 1104, 8th Edn.) to take action under p. 12 or para. 14 (a) of Sch. 2, Civil P. C. It had the award before it which showed that Asa Nand owed Hanu Ram so much and Diwan Singh so much. If it considered that the matter of the compromise to the effect that Diwan Singh would be liable for Asa Nand because he had received Rs. 2,950 from Asa Nand, could be separated from the rest of the award without remitting the award to the arbitrators, it should have taken action under Cl. 12 (a) above referred to and given Hanu Ram a decree against the two persons to the extent of the amounts found due by them. If, however, it thought that the award should go back to the arbitrators because this portion could not be separated from the rest of the award by reason of the fact that Diwan Singh had accepted Rs. 2,950 from Asa Nand it could have sent the award back to the arbitrators for their re-consideration under para. 14 (a) of Sch. 2. There was no reason to

refuse at that stage to file the award in Court.

For the reasons given in the first part of this judgment I accept this appeal with costs throughout and order the award to be filed in Court under para. 21 of Sch. 2, Civil P. C. I also pronounce judgment in accordance with the award and direct that upon the judgment so pronounced a decree shall follow.

N.K. *Appeal allowed.*

A. I. R. 1928 Lahore 917

JOHNSTONE, J.

Haku—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 600 of 1928, Decided on 15th September 1928, from order of Addl. Dist. Magistrate, Hoshiarpur, D/- 24th April 1928.

Penal Code, S. 304 (2)—Death caused by shock due to blows inflicted to drive away evil spirits —Offence falls under S. 302 (2).

Where the accused inflicted many blows on the body of the deceased, and also used kicks in order to drive away an evil spirit, and thereby caused the death the accused is guilty under S. 304 (2), 1 *U.B.R. Penal Code* 1, *Dist.*; 3 *U. B. R.* 54, *Foll.* [P 917 C 2]

Hakumat Rai—for Appellant.

Abdul Rashid—for the Crown.

Judgment.—Most of the facts alleged by the prosecution in the case are admitted by the learned counsel for the appellant to have occurred. That is to say it is not denied that Mt. Paro met her death as the result of injuries inflicted on her at the house of Mt. Naro on 17th January 1928, at Nangal Kalan in the Hoshiarpur District.

The facts are these: Mt. Naro has a shrine in her house and people visit that house and play as being "possessed" by spirits. Mt. Paro came there and began swaying about in front of the shrine. The appellant asked her who she was and she replied that she was a churail from the Mathiana pond. It is in evidence that the remedy applied for such "possessed" persons is to beat them. For the purpose of casting out the evil spirit a chimta (fire tong) was first employed. That proving unsuccessful, recourse was had to a sangal (chain used for flagellation). Many blows were inflicted and kicking was also resorted to. The result of all this was that Mt. Paro, a young woman of "strong stout and well-nourished" body (in the words of the Civil Surgeon of Hoshiarpur) died of shock.

Fortunately tragedies of this kind are rare, but there are some reported cases in the law reports to which my attention has been drawn. Before alluding to them, however, I shall briefly dispose of one or two matters raised by the appellant's counsel. It was urged in the first place that the deceased's father was present at the time, and even that her husband was present. Evidence to that fact was given by Mt. Naro the owner of the shrine, and one other witness, but the father and husband deny that they were present and I have no hesitation in accepting their denial as true. The other matter urged was that the appellant merely resorted to the ordinary procedure in such cases and thought honestly that he was doing the right thing in beating the deceased.

Reliance was placed on the case *Nga Po Kyaw* v. *Emperor* (1). In that case a girl had suffered for some years and was taken to a place like the one in this case, in order to be cured. She consented to the treatment and it was held in consequence that the offence committed was one under S. 304-A, I. P. C. The law on the subject was considered in *Nga Po Tha* v. *Emperor* (2), and a line of distinction was drawn between cases of consent, as in *Nga Po Kyaw's* case (1), and cases where no consent was given. It was held that in the latter type of case the offence committed, if death resulted, was under S. 304, part 2, I. P. C. In the appeal before me there was no question of consent and I can find no evidence to that effect. The deceased did not come to be "treated." It is not explained how the deceased's hysteria, if such it was, began; and there is no use to enquire into that matter. The fact remains that the appellants inflicted many blows. The medical evidence gives a long list beginning with nine irregular bruises on the left side of the chest and abdomen; then there were bruises on the left cheek, upper lip, left elbow and right side of the chest. In a case of this kind I consider that the principle laid down in *Ngo Po Tha's* case (2) should be followed and I maintain the conviction under S. 304, part 2.

(1) [1902-03] 1 U. B. R. P. C. 1.
(2) [1918] 3 U. B. R. 54=44 I. C. 679=19 Cr. L. J. 375.

I. P. C. The sentence imposed by the Additional District Magistrate is five years' rigorous imprisonmant. It has been contended that the sentence is too severe, but I am not prepared to interfere. It is eminently desirable that tragedies of this nature should not be repeated, and to give a lenient sentence could only encourage others in the belief that the offence is a venial one.

The appeal is dismissed.

W.S./R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 918

JAI LAL, J.

Mahna Singh — Judgment-debtor— Appellant.

v.

Salig Ram and *another*—Decree-holder and Auction-purchaser—Respondents.

Misc. First Appeal No. 3132 of 1927, Decided on 23rd April 1928, from order of Sr. Sub-Judge, Amritsar, D/- 24th November 1927.

Civil P. C., O. 21, R. 90—It is not necessary to enter income of property in proclamation sale —Sale of property for less than its market value is no ground for setting aside the sale unless there is any material irregularity in conducting or publishing sale—Civil P. C., O. 21, R. 66 (2).

There is no provision in the Civil Procedure Code in making it necessary to mention the income of the property in the proclamation of sale and failure to do so does not amount to a material irregularity in conducting or publishing or the sale. Unless there has been any material irregularity in publishing or conducting the sale, the mere fact that the property has been sold for less than its market value is not a sufficient ground to set aside the sale. [P 918 C 2]

Dev Raj Sawhney—for Appellant.

Jagan Nath Aggarwal, D. C. Ralli and *H. C. Kumar* for *J. G. Sethi*— for Respondents.

Judgment.—* In execution of a decree a theatre and certain shops attached thereto, belonging to the judgment-debtor were sold and purchased by the respondent for Rs. 1,30,000. The judgment-debtor objected to the sale on the ground of material irregularity in publishing and conducting the same and consequent loss to him.

The Senior Subordinate Judge has disallowed these objections and confirmed the sale.

This is an appeal by the judgment-debtor. The learned counsel for the appellant has not been able to show that there has been any material irregularity in publishing or conducting this sale. His objection is that the income of the property was not mentioned in the proclamation of sale ; but it appears that the proclamation was prepared in the presence of the judgment-debtor and he did not supply the requisite information. No provision of the Civil Procedure Code has been cited under which this information was to be entered in the proclamation of sale and if the judgment-debtor thought that in his interest, it was necessary to supply this information, he ought to have moved the Court to insert it in the proclamation. I do not think that under the circumstances there is any real grievance on this score.

It is then alleged that the proclamation of sale was not affixed to the property sold nor was there any beat of drum. There is definite evidence supported by reports of the officials concerned that all these formalities were complied with, and I am not prepared to accept as conclusive the statements of some respectable witnesses which are to the effect that they did not see any proclamation of sale or hear any beat of drum. I agree with the conclusion of the Senior Subordinate Judge that there has been no irregularity in publishing or conducting this sale.

It is not necessary for me to give a definite finding on the second point involved whether the property has, as a matter of fact, been sold for less than its market value, but this appears to be the case as the witnesses have given evidence that the property is worth more than what it has fetched ; but the other condition necessary to set aside the sale not having been complied with, the Court below was justified in confirming it.

The sale was fully advertised by means of hand bills distributed in the town of Amritsar. There is no force in the contention of the judgment-debtor that proclamation should have been made in big towns like Bombay or Calcutta. If he considered that such a course was necessary, he should have moved the executing Court before the sale took place or should have himself taken steps to publish

[* Latters Patent Appeal dismissed on 22nd June 1928 by Shadi Lal, C.J., and Broadway, J.]

the sale in those places. He did nothing of this sort, and I am unable to see that he has any real grievance in the matter. I dismiss the appeal with costs.

N.K. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 919

HARRISON AND DALIP SINGH, JJ.

Debi Sahai-Gulzari Mal of Delhi — Defendants—Petitioners.

v.

Basheshar Lal-Bansi Dhar—Plaintiffs —Respondents.

Civil Misc. Petn. (for review) No. 458 of 1927, Decided on 27th February 1928, from judgment of Harrison and Dalip Singh, JJ., D/- 1st June 1927, in Civil Appeal No. 2440 of 1923.

* *Civil P. C., O. 47, R. 1 — Ground for review.*

Where a Court fails to apply the law to the facts found and when such an error is apparent on the face of the record, it can be made a ground for a review. Failure of the Court to apply the law of limitation to the facts found is an error apparent on the face of the record : *A. I. R.* 1922 *P. C.* 112, *Dist.* [P 919 C 2]

Sardha Ram—for Petitioners.

Jagan Nath Aggarwal — for Respondents.

Harrison, J.—An application has been made for review of a judgment in appeal *Basheshar Lal-Bansi Dhar* v. *Debi Sahai-Gulzari Mal* decided on 1st June 1927. The parties to that case had dealings in piecegoods, and it was admitted throughout that the defendant firm had failed to deliver 15 bales to the plaintiff firm. The only question in dispute was that of the shipments to which these bales belonged. The decision of the trial Court was that 13 should have been of the January shipment and two of the February and damages were granted amounting to Rs. 727-5-6. After hearing the appeal we decided that 9 of the bales fell into the February shipment and 6 into the April. After calculating the rates we increased the damages and allowed a total of Rs. 1,250 as against Rs. 727-5-6.

The ground, on which the review has been presented is that there has been an error on the face of the record in that we failed to apply the natural result of our own finding and to hold that so far as the February shipment was concerned the suit was barred by time, and it is urged that such an error can be agitated on review. Counsel for the plaintiff respondent relies on *Chhaju* v. *Neki* (1) where it was held that a Court has no power to order a review upon the ground that the decision was wrong on the merits. That ruling dealt entirely or almost entirely with the third heading under which review is competent namely, "for any other sufficient reason," and it is expressly stated at p. 133 that the first two grounds described in O. 47, R. 1, did not apply to that case. Here it is simply a question of deciding whether the present case falls under the second and whether, as alleged, there has been a mistake or error apparent on the face of the record.

Counsel for the plaintiff contends that a mistake of law does not come within the scope of these words. This is not quite clear, but anyhow it is, we think, rightly contended by the other side that this is not a question of mistake of law for it is not urged that of two possible views the wrong was taken. The error complained of is that the decision having been given the consequences or results of that decision were overlooked and thus the defendants lost the fruits of their victory or partial victory. It is true that counsel for the defendants never raised this question of limitation and, indeed, on his own showing he could have objected to the whole of the decree passed against him by the trial Court on this ground alone ; but as pointed out by him, he was primarily concerned with establishing the incidence of the distribution over the various shipments. Even so, he should, we think, have pointed out that the consequence of a decision which merely modified the view taken by the trial Court without accepting in toto the position put forward by him would be that the claim for an increase in the damages for the February shipment was barred by limitation. The question, therefore, is whether the failure of the Court to apply the Law of Limitation to the facts found, is an error apparent on the face of the record this being not an error of law so much as a failure to apply the law. We are of opinion that it is and that such an error when committed by the Court, and when apparent on

(1) A. I. R. 1922 P. C. 112=3 Lah. 127=49 I. A. 144 (P.C.).

the face of the record, can be made the ground for a review. We have offered counsel for the plaintiff an opportunity of a further hearing, but he concedes that once the review is admitted, the mistake is obvious and the petitioner is entitled to have it corrected. We accordingly disallow the amount of increase allowed on account of February shipment, i. e., Rs. 377. The amount of the increase to which the plaintiff-appellant was entitled is Rs. 155.

Counsel applies under S. 152, Civil P. C., to have the decree corrected, the calculation being wrong even on the amount allowed by us originally. We order accordingly. The necessary corrections are to be made in the amounts allowed for stamp and counsel's fee. Under the circumstances of the case we direct that the parties shall bear their own costs of this review.

N.K. *Order accordingly.*

A. I. R. 1928 Lahore 920

TEK CHAND, J.

Emperor—Petitioner.

v.

Bahawali—Accused—Respondent.

Criminal Revn. Petn. No. 974 of 1928, Decided on 22nd September 1928, from order of 1st Cl. Mag , Gujranwala, D/- 30th March 1928.

Criminal P. C., S. 562—S. 562 is not applicable to a person tried under Penal Code, S. 307.

As one of the alternative punishments for an offence under S 307, Penal Code, is transportation for life, it is obvious that S. 562 is not applicable, and the accused must be sentenced to rigorous imprisonment and fine. [P 920 C 2]

Anant Ram Khosla—for the Crown.

Jawahar Singh Dhillon—for Respondent.

Judgment. — The respondent Bahawali, barber of Mauza Thatha Manak was tried and convicted by Lala Shankar Das Luthera, Magistrate, 1st Class (with enhanced powers) Gujranwala, of an offence under S. 307, I. P. C. In view of the fact that he was a young man, 15 or 16 years of age, the learned Magistrate directed shat he be released under S. 562, Criminal P. C. on furnishing security for Rs. 1,000 with one surety to keep the peace and to be of good behaviour for three years. The required security was duly furnished.

The Crown has preferred a petition for revision to this Court urging that S. 562, Criminal P. C., does not apply to an offence under S. 307, I. P. C., where hurt had actually been caused, and praying that on the findings of the Magistrate a substantial sentence of imprisonment and fine be passed in accordance with law.

The respondent has appeared in person and is also represented by counsel. He has contested the findings of fact arrived at by the learned Magistrate. But after examining the record I find myself in complete agreement with his view of the evidence. It appears that the respondent proposed marriage to Mt. Bakht Bibi, who is the widowed daughter-in-law of his uncle Nawab (P. W. 1) and is also his father'a sister's daughter. She, however, rejected the proposal. Having been put out by her refusal the respondent on the 28th February 1928 came to Nawab's house armed with a chopper and inflicted three blows upon Mt. Bakht Bibi, on the neck, the shoulder and the right side of the back, breaking the rib underneath. The medical witness P. W. 7 was of opinion that the injuries Nos. 1 and 3 were grievous and No. 2 was simple. The victim Mt. Bakht Bibi remained in the hospital for more than 20 days.

It is no doubt true that Mt, Bakht Bibi, when examined at a late stage of the case, stated that her assailant was one Shahu and not the respondent. But there is no doubt that she is now trying to save the respondent, under pressure from her relations. After carefully examining the record I am of opinion that the conviction under S. 307, I. P. C., is fully justified.

As one of the alternative punishments for such an offence is transportation for life, it is obvious that S 562, Criminal P. C., is inapplicable and the respondent must be sentenced to rigorous imprisonment and fine The respondent gave his age in the lower Court as 15 or 16 years. He appeared before me and seems to be a little older.

Having regard to the serious nature of the attack and also making due allowance for his youth, I am of opinion that the ends of justice will be met by sentencing him to rigorous imprisonment for six months and fine of Rs. 50 or in default further rigorous imprisonment for one month. I order accordingly.

W.S./R.K. *Order accordingly.*

A. I. R. 1928 Lahore 921

JAI LAL, J.

Ganda Mal and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 815 of 1928. Decided on 11th May 1928, from an order of Sess. Judge, Attock, D/- 10th April 1928.

Criminal trial—Evidence—Expert evidence—Opinion recorded in a civil suit—Such opinion is not substantive evidence—Accused not having opportunity to cross-examine expert—It is doubtful whether such opinion is admissible at the criminal trial—Evidence Act, S. 45.

The opinion of an expert which is admissible against an accused is the opinion given by him at the trial. Opinion given for the purposes of a previous suit is not substantive evidence and when the accused has not the opportunity to cross-examine the expert regarding that opinion its evidential value is very little. [P 922 C 1]

It is doubtful whether the opinion of an expert recorded for the purposes of a civil suit though proved in a oriminal case is sdmissible at all at the latter trial: *A. I. R.* 1923 *Lah.* 622, *Ref.* [P 922 C 2]

Kishen Dayal—for Petitioners.

Shambu Lal for *Govt. Advocate*—for the Crown.

Judgment.—This is a petition for the revision of the order of the Sessions Judge of Attock upholding the convictions of the petitioners Ganda Mal and Kishen Chand.

It appears that Ganda Mal instituted a suit against one Mt. Misri and another for the recovery of the amount alleged to be due to him on an alleged balance struck in his book for Rs. 32. The defendant Mt. Misri denied that she had thumb-marked the book entry in question. The suit was finally dismissed by the Subordinate Judge, who held the entry to be "fictitious." On an application being made by Mt. Misri to file a complaint against Ganda Mal and his witness Kishen Chand, who had appeared at the trial of the civil suit to depose to the genuineness of the entry, the Subordinate Judge declined to file the complaint. The District Judge on appeal, however, directed that a complaint be filed. Consequently both Ganda Mal and Kishen Chand were tried and convicted by a Magistrate of the First Class, the former under Ss. 467, 471, I.P.C., and the latter under Ss. 471, 109, I. P. C., and the Sessions Judge has dismissed their appeal.

The only point that needed determination was whether the book entry alleged to have been signed by Mt. Misri was a forged document and the only evidence produced on this question by the prosecution is the testimony of Mt. Misri and Lala Diwan Chand of the Finger Print Bureau of Phillaur.

So far as Mt. Misri is concerned she definitely stated that the thumb-impression in question was not hers. She even denied that she ever had any dealings with Ganda Mal. In order to disprove her statement the accused produced some witnesses who alleged that she had put her thumb impressions on various entries in Ganda Mal's books on other occasions. The evidence of these witnesses has not been considered to be reliable by the learned Sessions Judge. Lala Diwan Chand was asked to express an opinion whether the thumb-impression with regard to which evidence had been given by these witnesses tallied with the admitted thumb-impression of Mt. Misri. He stated that three of such thumb-impressions were totally blurred and undecipherable, and, therefore, incapable of comparison. With regard to one of them he stated that it was not clear enough for definite identification, but showed some points of similarity.

Again Mt. Misri stated in cross-examination that no demand in respect of the amount claimed by Ganda Mal had been made from her before the suit was instituted. The Subordinate Judge, who tried the civil suit, however, proved that she had admitted before him that a demand in writing had been made from her before the institution of the suit. The learned Sessions Judge considers that these matters are insignificant and do not materially affect the evidence of Mt. Misri. With these conclusions I am unable to agree.

The case depends almost entirely on the direct evidence of Mt. Misri and if it is found that she had not told the truth in some respects it will be very difficult to base a conviction on her testimony, which is not corroborated by other evidence. The learned Sessions Judge has correctly remarked, apart from the above consideration, that the evidence of Mt. Misri ought not to be accepted without corroboration. Now the corroboration relied upon by the learned Judge is the testimony of Lala Diwan Chand.

It appears that the thumb-impression in question which is marked as Ex. P-1 was sent to the Finger Print Bureau at Phillaur along with the thumb-impression of Mt. Misri taken in Court (Ex.P-2) for comparison and the opinion given by Lala Diwan Chand was that they did not tally. He was not, however, examined as a witness in the civil cases and consequently his opinion was held to be inadmissible in that case. But Lala Diwan Chand was examined as a witness in the criminal case and it transpired at the trial that the thumb-impression on Ex.P-1 had been defaced by the placing of country ink over it. The learned Sessions Judge makes the following remarks with regard to the responsibility for obliterating this impression:

> Who obliterated the marks, or for what reason is not proved or even suggested by the evidence on the record; and no presumption can be made safely upon the subject.

In other words the learned Sessions Judge does not hold the accused responsible for the condition in which the thumb-impression was when produced at the trial of the accused. Lala Diwan Chand was naturally unable to give any opinion whether under the circumstances Exs. P-1 and P-2 as produced at the trial tallied with each other. He, however, deposed that in the civil suit he had given an opinion and at that time the thumb-impressions were capable of comparison and his opinion then was that they did not tally with each other.

Now this opinion of Lala Diwan Chand could not be subjected to cross-examination at the trial owing to the condition in which the thumb impression on Ex.P-1 was. Even if I held that such an opinion is admissible in evidence the value to be attached thereto must be very little.

It was held in *Jassu Ram* v. *Emperor* (1) that an opinion given by an expert in almost similar circumstances was inadmissible and I am inclined to agree with that view. The opinion which is admissible against the accused is the opinion given by the expert at the trial. The opinion formed by him before the trial is merely to facilitate the comparison by him of the thumb-impressions in Court and to express a definite opinion at that time may be used for the purposes of corroboration or contradiction of his evidence at the trial. It is not substantive evidence. It is doubtful, therefore, if the opinion recorded for the purposes of the civil suit, though proved in the criminal case, was under the circumstances, admissible at all. But in any case I am definitely of opinion that as the accused had not the opportunity to test his opinion by cross-examination owing to the condition of the thumb-impression the value of such opinion must be held to be very little.

Having regard to the fact that Mt. Misri herself has not told the whole truth with regard to her dealings with Ganda Mal and the corroborative evidence, if admissible, is not conclusive, I think this is not a case in which the conviction of the petitioners can be maintained.

I accept this petition and set aside the convictions of Ganda Mal and Kishen Chand, and giving them the benefit of the doubt, acquit them and direct that they be released from jail forthwith.

N.K. *Petition accepted.*

(1) A. I. R. 1923 Lah. 622=4 Lah. 246.

A. I. R. 1928 Lahore 922

TEK CHAND AND BHIDE, JJ.

Rahman and *others*—Defendants—Appellants.

v.

Sai and *another*—Plaintiffs—Respondents.

First Appeal No. 2223 of 1924, Decided on 2nd February 1928, from the decree of the Senior Sub-Judge, Gujrat, D/- 21st July 1924.

Landlord and tenant—Rights in the shamilat not accessory to the land—Rights do not pass to the alienee to the former.

As the rights of a proprietor in the shamilat are not a mere accessory to the land held by him an alienation of the latter does not ipso facto convey any rights in the former to the alienee. 115 *P. R.* 1894; 113 *P. R.* 1901; 75 *P. W. R.* 1910; 2 and 3 *P. R.* 1917; *A. I. R.* 1921 *Lah.* 263; *A.I.R.* 1925 *Lah.* 105; and *A. I. R.* 1923 *Lah.* 350; *Foll.* 10 *P. R.* 1894, *Dist.* [P 923 C 1]

Anant Ram and *F. K. Byrne*—for Appellants.

Nanak Chand and *Devi Dayal*—for Respondents.

Tek Chand, J.—The plaintiffs' father Dadu owned one-half share in Dall Pathananwali. In 1892 he made an oral gift of one-third of this share (1/6th of the whole) to his wife's brother Jiwan, father of the defendants. In the muta-

tion proceedings (Ex. P. 2) no mention was made whether the gift conveyed the share in the shamilat appertaining to the portion of khewat land gifted. On a partition of the shamilat 180 kanals was allotted to the defendants and in 1920 mutation was duly effected in favour of the defendants. In 1923 the plaintiffs who are the sons of the donor instituted the present suit for possession of this land alleging that the gift of 1892 comprised merely the 1-6th portion in the khata of Dall Pathananwali and that the donee was not entitled to the appurtenant shamilat. The suit has been decreed and the defendants appeal.

It is urged that the onus of proving that the gift in question comprised the proportionate share of the shamilat was wrongly placed by the lower Court on the defendants. In our opinion this contention is devoid of all force. It was laid down by Sir Meredyth Plowden in *Fazal Shah* v. *Sikandar Ali* (1) that:

> In the case of a deed of gift where by a share in certain land in a village is gifted to a person, the onus of proving that the deed carries with it, as accessory thereto, a proportionate share of shamilat lies, when the deed is silent upon the subject, upon the person who asserts that the gift operates to grant more than it purports to grant.

It may now be taken as settled law that as the right of a proprietor in the shamilat are not a mere accessory to the land held by him, an alienation of the latter does not ipso facto convey any rights in the former to the alienee. See inter alia *Ram Das* v. *Amir Shah* (2), *Ahmad* v. *Ahmad* (3), *Sultan Ahmad* v. *Parsa Ram* (4), *Saleh* v. *Bakhtawar* (5), *Shankar Das* v. *Mali* (6), *Shahadat* v. *Ganesh Das* (7) and *A. I. R.* 1923 *Lahore* 350. In support of his contention Mr. Anant Ram relied principally upon *Prem Chand* v. *Sardara* (8) but that ruling was not followed in *Ram Das* v. *Amir Shah* (2) and has been expressly dissented from in *Saleh* v. *Bakhtawar* (5). It is noteworthy that an earlier ruling of the Chief Court *Maluk Singh* v. *Mahomad* (9) in which the contrary view had been taken was not referred to in *Prem Chand* v. *Sardara* (8). We are of opinion, that there is no presumption in favour of the shamilat land having been gifted and the onus was rightly laid on the defendants. To discharge this onus the defendants produced two witnesses but their evidence is worthless and was not relied on by counsel.

We have carefully examined the mutation proceedings and they leave no doubt in our mind that the donor had no intention of giving to the donee anything more than one-sixth of the khewat holding of Dall Pathananwali. The donor is recorded as having stated before the deputy superintendent that what he had gifted to the donee was "one-sixth share of the entire khata"; and that he had put the donee in possession of the land gifted. The shamilat land was admittedly banjar at that time and it is not alleged that the donee got possession of it.

We are, therefore, of opinion that the plaintiffs' suit was rightly decreed by the lower Court.

The appeal fails and is dismissed with costs.

N.K. *Appeal dismissed.*

(1) [1894] 115 P. R. 1894.
(2) [1901] 113 P. R. 1901=24 P. L. R. 1902.
(3) [1910] 75 P. W. R. 1910=6 I. C. 1003.
(4) [1917] 2 P. R. 1917=36 I. C. 634.
(5) [1917] 3 P. R. 1917=36 I. C. 601.
(6) A. I. R. 1921 Lah. 263.
(7) A. I. R. 1925 Lah. 105.
(8) [1894] 10 P. R. 1894.
(9) [1889] 65 P. R. 1889.

A. I. R. 1928 Lahore 923

TEK CHAND, J.

Sheo Karan and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 60 of 1928, Decided on 11th May 1928, from order of 1st Class Magistrate, Hissar, D/- 23rd December 1927.

(a) Criminal trial—Companion cases—Use of evidence in one case, in the other is illegal.

A and *B* who were differently charged were tried at two separate trials by one Magistrate. The evidence in the two cases was recorded separately but the Magistrate disposed of both the cases by writing one judgment and while discussing the guilt and innocence of the accused in each case, freely relied on the evidence which was led in the cross-case making it impossible to separate as against each accused the legal evidence against him from what had been improperly used as such.

Held: that the procedure adopted was irregular and the conviction based on the judgment of this kind was illegal : *A. I. R.* 1927 *P. C.* 26, *Rel. on.* [P 924 C 2]

(b) *Oriminal trial—First information report.*

Use of the first information report as if it were substantive evidence is illegal. [P 924 C 2]

Shamair Chand—for Appellants.

Nawal Kishore for *Govt. Advocate*—for the Crown.

Judgment.—The appellants in Criminal Appeal No. 60 of 1928 and appellants in Criminal Appeal No. 218 of 1928 were tried at two separate trials by Chaudhri Jai Narain Singh, Magistrate, 1st Class, (with enhanced\powers) Hissar, the former having been charged under S. 304/147 and the latter under S. 325/147, 149, I. P. C. The evidence in the two cases was recorded separately, but the learned Magistrate "with a view to avoid unnecessary repetition" thought it convenient to dispose of them in one judgment. In his judgment, however, he has while discussing the guilt or innocence of the accused in each case, freely relied on the evidence which was led in the cross-case. A perusal of his judgment indicates that he has treated the evidence in the two cases as if it was evidence on one record and has so mixed up the depositions of the witnesses that it is impossible to say how far the conviction of the appellants in each case is based upon what is legal evidence against them. The procedure adopted by the lower Court in thus mixing up the evidence and disposing of both the cases in one judgment is contrary to the provisions of the Code and is calculated to defeat the very object which the legislature had in view in directing that the accused in cross-cases of this kind should be tried separately. This practice has been condemned by their Lordships of the Privy Council in *Madat Khan* v. *Emperor* (1).

Counsel for appellants in both appeals urge that their respective clients have been materially prejudiced by the procedure adopted by the lower Court and that injustice has been done to them. Mr. Nawal Kishore, who appears on behalf of the Crown, is not prepared to deny the correctness of the contention on behalf of the appellants in the two cases. I have been carefully through the judgment to see if it is possible to separate, as against each appellant, the legal evidence against him from what has been improperly used as such, but have come to the conclusion that on the judgment as written it is impossible to do so. The result is that the conviction of the appellants in each case based on a judgment of this kind is illegal and must be set aside and both the cases remitted to Chaudhri Jai Narain Singh, Magistrate, (who is still attached to the Hissar District) to re-hear arguments and to write separate judgments in the two cases with direction that he shall judge of the guilt or innocence of each appellant on the evidence produced against him in the case in which he was charged, carefully avoiding any reference to the evidence recorded in the cross-case. The Magistrate shall fix a very early date for the purpose and decide the cases without any undue delay.

It appears from the judgment that the learned Magistrate has used the first information report, as if it were substantive evidence in the case. It should be borne in mind that such use of the first information report is contrary to law and the Magistrate would be well-advised if he studies the recent reported cases of the Lahore High Court on the point.

For the foregoing reasons I accept this appeal, set aside the conviction and sentences passed against the appellants and remit the cases to the learned trial Magistrate for disposal in reference to the foregoing remarks.

N.K. *Conviction set aside..*

(1) A. I. R. 1927 P. C. 26=8 Lah. 193.

A. I. R. 1928 Lahore 924

BROADWAY AND JAI LAL, JJ.

Noor Ilahi-Maqbul Ilahi—Defendants—Appellants.

v.

R. J. Wood and Co.—Plaintiffs — Respondents.

Second Appeal No. 150 of 1925, Decided on 24th November 1927, from decree of Dist. Judge, Delhi, D/- 3rd January 1925.

Civil P. C., S. 100—*Abandonment of a particular design depends on intention and is a question of fact.*

The reply on the question whether a person has abandoned a particular trade-mark, is based on intention and is clearly a question of fact, and a Court of second appeal is precluded from examining the same. [P 925 C 1]

Muhammad Iqbal—for Appellants.

Raj Narain and *Mehr Chand Mahajan*—for Respondents.

Broadway, J.—The following issue was sent down by a Division Bench of this Court for decision :—

Have the plaintiffs abandoned the Cotillon design as a trade-mark for yarn ?

After recording evidence and hearing counsel, the learned District Judge has reported that he finds that cotton yarn and cotton piece-goods are goods of the same description, and that, as cotton piece-goods have been regularly imported with this particular Cotillon design thereon, no question of abandonment really arises. He has, however, also come to a finding that, assuming that cotton piece-goods and cotton yarn were not goods of the same description, no abandonment has been established The reply on the second question is based on intention which is clearly a question of fact, which as a Court of second appeal we are precluded from examining

It was urged, however, that the conclusion arrived at with regard to the cotton piece goods and cotton yarn being goods of the same description was wrong and that at least a further remand should be ordered. Having regard to the issue that was sent down for trial, I do not think that any further remand is called for. What the learned District Judge has done is to hold that the piece-goods and yarn being goods of the same description, the question of abandonment did not arise at all. On the question of abandonment itself he came to a definite finding and by that finding we are bound.

I would, therefore, dismiss this appeal with costs.

Jai Lal, J.—I agree.

R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 925

BROADWAY AND AGHA HAIDAR, JJ.

Bhagtu—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 416 of 1928, Decided on 19th June 1928, from order of Addl. Sess. Judge, Amritsar, D/- 17th March 1928.

Criminal trial—Evidence — Identification from voice in pitch dark is not alone sufficient to convict a person.

It is very difficult to identify a person in a pitch dark night merely by the modulations of his voice and it is risky to convict a person merely on such identification. [P 926 C 2]

Ram Lal Anand and *Parkash Chand* for *Ram Lal*—for Appellant.

Desh Raj Sawhney—for the Crown.

Judgment.—The appellant, Bhagtu, has been sentenced to death by the Additional Sessions Judge of Amritsar under S. 302, I. P. C., for having caused the death of one Inder Singh. He has appealed to this Court, and the record is also before us under S. 374, Criminal P. C., for the confirmation of the death penalty.

The facts of the case may be briefly stated as follows :

The deceased Inder Singh, who was a lambardar was severely beaten on the evening of the 28th July 1927, i. e., somewhere between 9 and 10 p. m. He died on 30th July 1927, in hospital without re-gaining consciousness. The first information report was lodged on 31st July 1927, at the Kathunangal police Station, and on the same date the post-mortem examination of the body of Inder Singh was performed. Inder Singh received terrible injuries, and, according to the medical evidence, there were no less than twenty marks of those injuries on his body.

A number of persons were challaned by the police, but we are concerned only with Bhagtu who has been convicted and sentenced as already stated.

The story of the prosecution is that there was enmity between Inder Singh and two other persons, namely, Kishen Singh and Bawa Singh, and that these two persons opened negotiations with Bhagtu who also had some grievance against Inder Singh. It is said that Kishen Singh and Bawa Singh offered Bhagtu Rs. 600 as remuneration if he could bring about the murder of Inder Singh. According to the prosecution, Bhagtu got together a number of his associates on the evening of 28th July 1927, after he had been given information by Bawa Singh and Kishen Singh that Inder Singh was due to return home late in the evening from Amritsar where he had gone on some business. The party proceeded to the railway station, and, after meeting one or two strangers, came upon Inder Singh who at the time happened to be accompanied by Bur Singh (P. W. No. 9) and Santa Singh (P. W. No. 7). Inder Singh's party was accosted by Bhagtu who was the leader of the alleged gang of murderers and there was exchange of

abuse. The story for the prosecution goes on to say that Bhagtu and his companions made a violent attack upon Inder Singh and his party. Santa Singh at once ran away and took shelter in the railway station which was not very far off. Bur Singh (P. W. 9) received some injuries and fell down in some earth pits, while Inder Singh was rendered unconscious as a result of the injuries that he received.

The case really turns up on the evidence of one Baru who has turned approver (P. W. No. 6) and the corroboration, if any which he receives from the statement of Santa Singh and to a certain extent from the evidence of a woman named Mt. Rakhi (P. W. No. 10). Bur Singh frankly admitted that he did not recognize any one among the assailants. Bur Singh has given evidence in support of the story for the prosecution as already narrated above.

The sole question is whether the evidence given by Baru the approver, receives corroboration in material particulars by any other evidence on the record. So far as Mt. Rakhi is concerned her statement is that she visited the house of Bhagtu in the evening, a few hours before the occurrence. She says that she went to demand the price of some oil-seed which she had sold to Bhagtu's wife, and that, while she was there, she saw certain of the accused persons who were discussing the murder of Inder Singh within her hearing. Her evidence was rightly rejected by the learned Additional Sessions Judge, and we are fully satisfied that he was right in the course that he followed.

Now remains the question of Santa Singh's evidence. He says that, while he was running away, he recognized Bhagtu and two other persons, with whom we are not concerned, by their voices. Now if this statement was to be believed then it would not be necessary at all to consider the evidence of Baru, the approver, because that alone would be direct evidence of the complicity of Bhagtu in the murder of Inder Singh. But there are difficulties in the way of prosecution before it can induce this Court to accept the evidence of Santa Singh. Santa Singh, immediately, after the attack of Inder Singh's party commenced, ran away to the railway station for protection, and it does not appear that he mentioned the names of these three persons, whom he has named now, to any one of the railway employees at the railway station, as some of the assailants of Inder Singh. Immediately after the attack he met Banta Singh, lambardar who deposes that he does not know if Santa Singh made any statement to this effect. Besides, to recognize a person in a pitch dark night, as the night in question undoubtedly was, merely by the modulations of his voice is a very risky experiment, and, even if Santa Singh's statement be accepted for what it is worth, it is very difficult to say that this evidence amounts to material corroboration of the testimony of the approver, Baru. In our opinion, Santa Singh does not seem to be a reliable witness and his evidence does not put the case on behalf of the prosecution beyond reasonable doubt. Furthermore, it is possible that Santa Singh might have made an honest mistake when, terror-stricken, he turned tail and fled to the railway station.

Under these circumstances we are not satisfied that the evidence relied upon by the Additional Sessions Judge is sufficient to justify the conviction of Bhagtu for the murder of Inder Singh. We, therefore, allow the appeal of Bhagtu, set aside his conviction and sentence and order that he may be released forthwith.

N.K. *Appeal allowed.*

A. I. R. 1928 Lahore 926

ADDISON, J.

Emperor—Complainant—Petitioner.

v.

Khairati Lal—Accused—Respondent.

Criminal Revn. No. 809 of 1927, Decided on 14th January 1928, made by Sess. Judge, Delhi

Criminal P. C., Ss. 439 and 562—Offence of embezzlement—Sentence of imprisonment should generally be given—Accused convicted under S. 408, Penal Code, given the benefit of S. 562, Criminal P. C.—Lapse of considerable time—High Court refused to interfere in revision—Penal Code, S. 408.

Where a person was convicted under S. 408, Penal Code and was given the benefit of S. 562, Criminal P. C, by the trial Court and by the time the case went to the High Court in revision, considerable time had passed.

Held : that though usually imprisonment should be given in cases of embeszlement, it was not proper to interfere with the Magistrate's discretion after such a length of time : *A. I. R.* 1925 *Oudh* 673; 19 *P. W. R* 1910; *A. I. R.* 1925 *Bom.* 192; and *A. I. R.* 1926 *Sind* 101; *Rel. on.* [P 928 C 2]

Raj Krishna—for the Crown.

Moti Sagar—for Respondent.

Facts.—The respondent Khairati Lal, while acting as cashier and accountant in the Delhi branch of the firm of Messrs. Sulzer Bruderer & Co. committed criminal breach of trust in respect of a sum of Rs. 3,949-0-0. Actually, the shortage was Rs. 6,141-0-0 but for the purposes of a single trial the Magistrate charged the respondent in respect of Rs. 3,949 only.

Order of Reference.

The question of sentence was considered by the trial Magistrate who wrote :

The offence under S. 408, I. P. C. is not compoundable and the executing of a pronote by the accused and creating a civil liability on himself does not absolve him of the criminal liabiltty. However, the intention of the prosecution can be inferred from such proceedings. Mr. Stark detected the deficiency on 11th July, entered into a civil contract, received a sum of Rs. 41-0-0 by way of part payment and allowed the accused to continue to handle cash and hold charge of godown up till the 28th August 1926, the day of accused's arrest. All these factors go to show that Mr. Stark did not want anything else from accused but the replenishing of the money found short. Accused is a young man and a first offender. He has lost a good job the like of which he cannot have again. He is described by Mr. Stark himself as a high caste Hindu and of a respectable family. Mr. Stark's negligence in not checking the accounts even once and his loose control over his staff tempted the unlucky accused to misappropriate the money, the responsibility of which he readily took upon himself by executing Ex. P. C. pronote and acting upon it by repaying Rs. 41-0-0 towards it. From this I cannot but conclude that accused's intention to misappropriate the money was temporary. He was responsible for the cash in his charge. He has kept the fair cash account very faithfully and has done no fabrication. All this goes to show that accused was feeling his responsibility and was inclined to admit the misappropriation, if detected before he had made up the deficiency. To his ill-luck some thing prevailed upon Mr. Stark and moved him to launch the present prosecution on 28th August, one and a half month afterwards. I am afraid jail punishment will not have any beneficial effect on the accused because his association with criminals will create criminal tendencies in him. Jail which looks very dreadful to persons of respectable families will no more appear as such to them if once they have been there and associated with criminals whom they cannot avoid. For these reasons I do not propose to send the accused to jail but apply the principle of locus penitentiae to him, and order that he shall be released under S. 562, Criminal P. C., on probation of good conduct on his entering into a bond in a sum of Rs. 5,000 with one surety in order to appear and receive sentence when called upon to do so during a period of two years from this date and in the meantime to keep the peace and be of good behaviour.

There is hardly a word of this with which I agree, except where mere facts are mentioned. To speak of "Mr. Stark's negligence in not checking the accounts even once and his loose control over his staff" as tempting "the unlucky accused to misappropriate the money" is, I maintain, to look at the affair from the wrong point of view. The very fact that the appellant was at once the cashier and the accountant made it all the more incumbent on him to keep a careful watch in the interests of his employers, from whom he gained his livelihood. The executing of the pronote cannot be described as a virtuous act on his part. The Magistrate again, is wrong in concluding that the "accused's intention to misappropriate the money was temporary". I have shown in my judgment in the criminal appeal that the appellant indulged in a prolonged and systematic career of embezzlement, appropriating more and more as time went on and concealing the shortage by false entries whenever he had to hand over charge before going on leave. The fact that Mr. Stark gave him a locus penitentiae has nothing to do with the administration of criminal justice. Mr. Stark was merely compounding a felony, and it cannot with reason be described as the appellant's ill-luck that Mr. Stark should have eventually decided to prosecute.

Khairati Lal is a Brahman, 36 years old. He is described as being of good family. He is a first offender. The Magistrate styles him as a young man, but that is hardly accurate. Even if his birth and status be taken into consideration, it is, I maintain, an abuse of the provisions of S. 562, Criminal P. C., that a crime of this magnitude, extending over so long a period and committed with deliberation and guile, should be treated in the way that it has been treated by the Magistrate. I would press strongly for a substantive term of imprisonment, with or without fine, and I forward the records to the Hon'ble Judges of the High Court for order.

Order of the High Court.—Khairati Lal, a Brahman of Delhi, aged about 36 years, was convicted under S. 408, I.P C., of embezzling Rs. 3,949 while acting as a cashier and accountant of the Delhi branch of a piece goods firm. For reasons given by the Magistrate he was released under S. 562, Criminal P.C., on probation of good conduct on entering into a bond of Rs. 5,000 with one surety for

two years. The learned Sessions Judge has dismissed his appeal and has referred the case to this Court for enhancement of the sentence, as in his opinion in this case a substantive term of imprisonment, with or without fine, was necessary.

Khairati Lal joined the firm about 1921. He seems to have started his defalcations in December 1924 and he embezzled the amount mentioned in the charge between that date and October 1925. After the latter date the defalcations continued. They were detected on 11th July 1926. The fair cash book was properly kept but the rough cash book was not in order. Both were kept by Khairati Lal. It was owing to carelessness on the part of manager in not comparing the cash book with the cash balance that the defalcations were possible. When the manager on 11th July 1926, first detected the offence he evidently did not desire to prosecute Khairati Lal. Instead of doing so he got a promissory note for the amount and Kharati Lal in fact repaid Rs. 41 as the first instalment. On 28th August 1925 the manager changed his mind and instituted criminal proceedings. The trial lasted from September 1926 to 22nd February 1927. It was thus nearly a year ago when the order under S. 562, Criminal P. C., was passed.

The learned counsel appearing for Khairati Lal did not contest the finding of the Courts below that he was guilty, but he urged that the discretion vested in the Magistrate should not be set aside at this length of time even though I was of opinion that this was a case in which a sentence of imprisonment should have been passed. It was held in *A. I. R.* 1925 *Oudh* 673 that it was not a sufficient ground for interference on revision that a person given the benefit of the section in question was discovered later to be a previous convict. In *Abdul* v. *Emperor* (1), the Punjab Chief Court refused to interfere with an order passed under S. 562, in the case of a conviction under S. 457, I. P. C., which was an offence of a serious nature, though at that time S. 457 did not fall within S. 562. In *A. I. R.* 1925 *Bom.* 192, a servant who had stolen gold and silver ornaments and who had been convicted under S. 381, I. P. C., was given the benefit of this section and the High Court refused to interfere. The maxium sentence under S. 381 is the same as under S. 408, namely, seven years, while these offences are of a similar nature.

In my opinion this was a serious case. Khairati Lal was in a position of trust and failed therein. The defalcations went over a fairly long period. Nevertheless S. 562 certainly applied in every respect except the circumstances in which the offence was committed. Though these circumstances were such that imprisonment, might well have been given I do not think that it would be proper to interfere with the Magistrate's discretion at this length of time. It would not be in the interests of justice to send him to jail now. The Sind Judicial Commissioners [*Emperor* v. *Mathro* (2),] refused to interfere in a case somewhat similar to the present except that in the case before them a great part of the stolen property had been recovered at the instance of the accused, a consideration which they took into account. In this case it is obvious that Khairati Lal wished to repay and started to do so. He also gave a promissory note which was accepted in the first instance. Taking all the above circumstances into consideration though I agree that usually imprisonment should be given in cases of embezzlement, I must decline to interfere in the present case and I direct the records to be returned. The revision petition put in on behalf of Khairati Lal was not pressed and is dismissed.

N.K *Order accordingly.*

(1) [1910] 19 P. W. R. 1910 Cr.=6 I. C. 639=11 Cr. L. J. 389.

(2) A. I. R. 1926 Sind 101=20 S. L. R. 7.

A I. R. 1928 Lahore 928

TEK CHAND, J.

Lal—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1154 of 1928, Decided on 5th October 1928, from order of Dist. Magistrate, Ludhiana, D/- 21st May 1928.

Criminal P. C., S. 109—*Person convicted under S.* 411, *Penal Code—He cannot be proceeded against for the same incident under S.* 109.

Where a petitioner has already been tried and convicted of an offence under S. 411, Penal Code. in respect of any particular incident, he cannot be proceeded against for the same incident also under S. 109, Criminal P. C. The person having already been punished for his

act, and there being no other evidence against him, proceedings under S. 109, Criminal P. C., are not justified. [P 929 C 1]

Shuja-ud-Din—for Petitioner.

Judgment.—The facts as found by the learned District Magistrate, are that the petitioner along with one Ganda Singh, was travelling at a high speed on a camel in a village in the Ludhiana District. A head-constable and certain other persons, who happened to be there, stopped the petitioner and his companion and made enquiries from them as to who they were. They being unable to give satisfactory replies to the questions put to them as to their identity, the police arrested them under S 54, Criminal P. C. Subsequently it transpired that the camel was stolen property and the petitioner and his companion were prosecuted under S. 411. I. P. C. and duly convicted. Against his conviction under S. 411, the petitioner preferred a petition for revision to this Court which was dismissed in limine.

Simultaneously with the above proceedings the police started a case under S. 109, Criminal P C., against the petitioner, and the learned trial Magistrate bound over the petitioner for a period of one year in the sum of Rs. 1,000. On appeal the District Magistrate maintained the order reducing the amount of security to Rs 300. From this order the petitioner has preferred this petition for revision to this Court.

A perusal of the police report and the evidence produced in support thereof indicates that the only act urged against the petitioner is the incident mentioned above, namely, his riding the stolen camel with Ganda Singh and being unable to give a satisfactory account of himself when challenged by the police. The question is whether, in view of the fact that the petitioner has already been tried and convicted of an offence under S. 411, I. P. C. in respect of this very incident, he should have been proceeded against also under S. 109, Criminal P. C. In my opinion, S. 109, Criminal P. C., was not intended to cover a case of this kind. The petitioner having already been punished for his act, and there being no other evidence against him, proceedings under S, 109, Criminal P. C., are not justified. The petition for revision is accordingly accepted and the order of the lower Court putting the petitioner on security cancelled.

R.K. *Revision allowed.*

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* A. I. R. 1928 Lahore 929

SHADI LAL, C. J., AND DALIP SINGH, J.

Sarupa and *others*—Plaintiffs—Appellants.

v.

Khem Lal and *others*—Defendants—Respondents.

Second Appeal No. 1649 of 1923, Decided on 14th June 1928, from decree of Dist. Judge, Karnal, D/- 16th April 1923.

* *Civil P. C., S. 11—Res judicata—Competency of the Court to try a suit must refer to jurisdiction of Court when first suit was brought and not when subsequent suit is actually brought.*

The reasonable construction of the words "in a Court competent to try such subsequent suit" as used in S. 11, Civil P. C., is that they must refer to the jurisdiction of the Court at the time when the first suit was brought, that is to say, if the Court, which tried the first suit, was competent to try the subsequent suit, if then brought, the decision of such Court would operate as res judicata although on a subsequent date by a rise in the value of the property the said Court has ceased to be a proper Court, so far as the pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that very property. [P 930 C 1]

Shamair Chand and *Qabul Chand*—for Appellants.

Nanwan Mal and *Hem Raj Mahajan*—for Respondents.

Judgment.—The village Risalu in the Karnal District is divided into four panas, namely, Pana Bhoj Raj, Pana Indo, Pana Khem Chand and Pana Keshu. The plaintiffs, who are proprietors in Pana Bhoj Raj, have brought the present action for the partition of the village abadi, alleging that they are entitled to 13½ shares out of 42 shares. The Courts below have concurred in holding that the dispute, as to the shares, to which the members of the various panas were entitled, was decided in a previous litigation; and according to that decision the proprietors of the Pana Bhoj Raj could get only nine shares out of 42 shares.

It appears that the previous suit was decided by a Munsif of the First Class who, it is contended, could not take cognizance of the present suit in consequence of the value of the property being more than Rs. 1,000, the pecuniary limit

of jurisdiction of a Munsif of the First Class. It is, however, clear that the matter directly and substantially in issue in both the suits was the same, and the mere fact that the property has since risen in value does not prevent the operation of the rule of res judicata. As laid down by the Calcutta High Court in *Gopi Nath* v. *Bhagwat Prashad* (1), the reasonable construction of the words "in a Court competent to try such subsequent suit", as used in S. 11, Civil P. C., is that they must refer to the jurisdiction of the Court at the time when the first suit was brought, that is to say, if the Court, which tried the first suit, was competent to try the subsequent suit if then brought, the decision of such Court would operate as res judicata although on a subsequent date by a rise in the value of the property the said Court has ceased to be a proper Court, so far as the pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that very property. Any other construction would reduce the rule of res judicata to an absurdity. Indeed, Mr. Shamair Chand for the appellants concedes that the decision in the previous suit must be held to be binding upon the parties. The proprietors of Pana Bhoj Raj cannot, therefore, get more than nine shares out of 42 shares in the village abadi; and, as the village common land, which is susceptible of partition, has not been completely partitioned, the plaintiffs are entitled to get their share of the property separated from that of the rest of the proprietory body.

The Courts below have dismissed the suit without giving any reason, such as would debar the plaintiffs from getting a partition of such area of the land as was held to be their property according to the previous decision. It is possible that some of the proprietors of Pana Bhoj Raj have already obtained possession on partition of the land to which they were entitled, but upon the record as it stands we are unable to say that none of the plaintiffs are now entitled to claim partition. Nor do the facts on the record enable us to determine the question whether Ramji Lal, who died during the pendency of the suit, was a necessary party and whether the failure of the plaintiffs to implead his legal representatives within the prescribed period has resulted in the abatement of the suit.

We are accordingly constrained to accept the appeal and remit the suit to the trial Court for re-decision with reference to the foregoing remarks. The costs incurred by the parties so far shall be costs in the cause.

A.L /R.K. *Appeal accepted.*

(1) [1884] 10 Cal. 697.

A. I. R. 1928 Lahore 930

BHIDE, J.

Muhammad Din and *another*—Defendants—Appellants.

v.

Nur Ahmad and *others*—Plaintiffs and Defendant—Respondents.

Second Appeal No. 108 of 1928, Decided on 14th April 1928, from decree of Dist. Judge, Jhelum, D/- 20th October 1927.

Civil P. C., S. 100 — *Inference drawn from the deed and from other evidence as to the intention of parties to a transaction is a question of fact and no second appeal lies.*

Where the question involved (e. g. whether a certain transaction amounts to a sale or a mortgage) is not simply of the proper construction of a document but of inference to be drawn from the deed and from other evidence as to the intention of the parties to the transfer, it is one of fact and cannot be challenged in second appeal: 45 *P. R.* 1895, *Ref.*; 120 *P. L. R.* 1916 and 16 *P. R.* 1907, *Rel. on.* [P 931 C 1]

Muhammad Iqbal—for Appellants.

Mohsin Shah and *Muhammad Sharif*—for Respondents.

Judgment.*—This was a pre-emption suit with respect to the mortgage of a house which the plaintiffs alleged to be in reality a sale. The Courts below have found the transaction to be a sale and have granted a decree. The defendants have filed a second appeal. A preliminary objection is raised on behalf of the respondents that the finding of the Courts below that the transaction in question was a sale and not a mortgage is one of fact and cannot be challenged in second appeal. The learned counsel for the appellants, on the other hand, contends that the question is one of law and cites *Tikaya Ram* v. *Dharam Chand* (1). A different view has been, however, taken in subsequent rulings, see, inter alia, *Ahmad Khan* v. *Alam Khan* (2) and *Sunder*

* [No. Letters Patent Appeal was filed from this judgment.]

(1) [1895] 45 P.R. 1895,

(2) [1916] 120 P.L.R. 1916=37 I.C. 297=115 P.W.R. 1916.

Das v. *Dhanpat Rai* (3). The question involved in the present case is not simply of the proper construction of a document but of inference to be drawn from the deed and from other evidence as to the intention of the parties to the transfer. It is true that the oral evidence has not been relied on but the learned District Judge has taken into consideration the past conduct of the parties relating to the transaction, the market price of the house, etc., in arriving at his conclusion that the transaction was a sale. It was contended further that the learned District Judge should have found that the parties intended at the time when they entered into the transaction that the property should be sold. This point has, however, not been overlooked by the learned District Judge who has referred in this connexion to *Bishen Singh* v. *Paro* (4). The finding of the learned District Judge though not explicit in this respect is, in my opinion, tantamount to saying that the parties did intend to enter into a transaction of sale and not of a mortgage. I accordingly hold that the finding is one of fact and cannot be challenged in second appeal.

I dismiss the appeal with costs.

A.L./R.K. *Appeal dismissed.*

(3) [1907] 16 P.R. 1907=127 P.W.R. 1907=104 P.L.R. 1908.

(4) [1905] 19 P.R. 1905=35 P.W.R. 1905=78 P.L.R. 1905.

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* A. I. R. 1928 Lahore 931

COLDSTREAM, J.

Prem Nath and *others* — Defendants—Appellants.

v.

Bana Mal—Plaintiff—Respondent.

Second Appeal No. 203 of 1928, Decided on 16th June 1928, from decree of Dist. Judge, Gurdaspur, D/- 18th December 1927.

* *Civil P. C., O. 20, R. 11 — An order refusing payment of decree by instalments is not appealable.*

An order passed under R. 11 refusing the payment of decree by instalments is to be regarded as a matter separate from the decree and no appeal lies against such an order : *7 L. B. R. 71, Foll. ; A. I. R. 1922 Lah. 355, Dist.*

[P 931 C 2]

Shamair Chand and *Qabul Chand*—for Appellants.

A. R. Kapur—for Respondent.

Judgment *—The appellant Mahant Ajudhia Nath and Mahant Prem Nath were sued by the respondents in the Court of the Sub-Judge, Second Class, Gurdaspur, who passed a decree against them for Rs. 1,348-7-0 refusing to pass an order allowing payment of decree to be made by instalments. Ajudhia Nath and Prem Nath appealed to the District Judge at Gurdaspur against the refusal of the trial Court to allow payment by instalments. The learned District Judge following *Mohamed Ibrahim* v. *Subbiah Pandaram* (1), a ruling by a Division Bench of the Lower Burma Chief Court, held that no appeal lay against the order refusing payment by instalments, as it formed no part of the decree and had been passed under the provisions of O. 20, R. 11, Civil P. C., and that the Code does not provide for an appeal against an order passed under that rule.

Against this judgment Prem Nath and Ajudhia Nath have come to this Court with a second appeal.

Mr. Shamair Chand who has argued the appeal is unable to cite any authority of any Indian Court in support of his contention that the order appealed against is incorrect in law. It is true that he can point to judgments such as *Bhup Chand* v. *Udhe Ram* (2), in which an appeal has been entertained against an order allowing the payment of a decree by instalments. But it is obvious that an order of the latter kind must be incorporated in the decree and form part of it, and appeal will lie against that decree. It seems to me that the language of O. 20, R. 11, Civil P. C., has been intentionally so worded as to make it clear that an order passed under that rule is to be regarded as a matter separate from the decree unless deliberately incorporated by the Court in the decree it passed. My conclusion is that the judgment appealed against is correct and I accordingly dismiss this appeal with costs.

A.L./R.K. *Appeal dismissed.*

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* [No. Letters Patent Appeal was filed from this judgment].

(1) [1913] 7 L.B.R. 71=20 I.C. 673=6 Bur. L.T. 133.

(2) A.I.R. 1922 Lah. 355.

A. I. R. 1928 Lahore 932

SHADI LAL, C. J. AND JOHNSTONE, J.

Kanshi Ram—Plaintiff—Appellant.

v.

Mt. Chet Kuar and *others* —Defendants —Respondents.

Second Appeal No. 2203 of 1923, Decided on 1st May 1928, from decree of Dist. Judge, Jhang, D/- 2nd May 1923.

Limitation Act, Art. 125—*Widow of person having both mortgagor's and mortgagee's rights allowing herself to be redeemed by non-reversioners — Transaction amounts to alienation within Art.* 125.

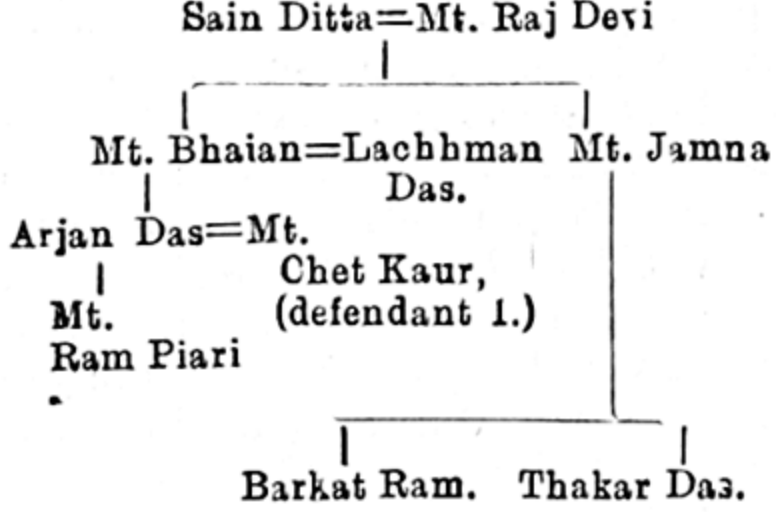
A proprietor of a house which was mortgaged by his predecessor inherited the mortgagee's right also. After his death, his widow allowed the property to be redeemed by persons who were not reversioners.

Held: that the transaction effected by the widow must be treated as an alienation for the purpose of Art 125. [P 932 C 2]

Nanak Chand—for Appellant.

Fakir Chand—for Respondents.

Shadi Lal, C. J.—The following pedigree-table illustrates the facts of this case;



The dispute between the parties relates to a house which originally belonged to Sain Ditta. After his death, his widow Mt. Raj Devi granted a mortgage of the property to her son-in-law, Lachhman Das, on 24th August 1879. In 1885 some of the reversioners of Sain Ditta sold the equity of redemption of the house to one Ganga Ram whose son transferred it on 19th June 1915, to defendants 3 and 4. On the same date the vendees redeemed the property by paying the amount due on the mortgage to Mt. Chet Kuar, the widow of Arjan Das, and obtained possession of it.

The plaintiff, who is a cousin of Arjan Das, has brought the present action impeaching the transaction effected between Mt. Chet Kaur and defendants 3 and 4 and asks for a declaration that the transaction be declared to be void as against him. The Courts below have concurred in holding that the suit is governed by the period of limitation prescribed by Art. 120, Lim. Act, and is consequently barred by time

It appears that, on the death of Mt. Raj Devi, the landed property of her husband was allotted to his daughter Mt. Jamna, and that the house was awarded to Mt. Bhaian. On Mt. Bhaian's death Arjan Das became the proprietor of the house, being the daughter's son of Sain Ditta and the mortgagee rights which he had inherited from his father Lachhman Das, were extinguished. The succession to the estate is, therefore, to be traced from Arjan Das, and there can be no doubt that Sain Ditta's reversioners were not entitled to the property and that defendants 3 and 4, who claim to be their successors-in-interest, had no right to redeem the house from Arjan Das's widow, Mt. Chet Kaur. Mt. Chet Kaur's act in surrendering the house to defendants 3 and 4 amounted to an alienation within the meaning of Art. 125, Sch. 1, Lim. Act. It has been held by the Allahabad High Court in *Sheo Singh* v. *Jeoni* (1) that a widow's act in confessing judgment in a collusive suit brought against her, whereby the plaintiff obtained a decree for possession, is an alienation within the contemplation of that article.

Following the judgment in *Sheo Singh* v. *Jeoni* (1) we hold that the transaction effected by Mt. Chet Kaur on 19th June 1915, must be treated as an alienation for the purpose of Art. 125. The present action was brought on 15th October 1921; and it is, therefore, clear, that. if Art. 120 governs the suit, it is barred by limitation. It is, however, contended by Mr. Nanak Chand that the action comes within the purview of Art. 125, which applies to a suit brought during the life of a Hindu female by a person, who if the female died at the date of the institution of the suit, would be entitled to the possession of the land, to have an alienation of such land made by the female declared to be void except for her life. Now, the plaintiff, who is a cousin of Arjan Das, is certainly his heir, and would be entitled to the property on the death of his widow, Mt. Chet Kaur, if her daughter Mt. Ram Piari is dead. On the other hand, if Mt. Ram Piari was alive at the date of the institution of the suit, then Art. 125 would not apply,

(1) [1897] 19 All. 524=(1897) A.W.N. 141.

and the suit would be barred by time under Art. 120. The Courts below have not determined the issue of whether Mt. Ram Piari was alive on 15th October 1921, when the suit was instituted and the affidavits filed by the parties are conflicting and do not afford us any assistance in deciding the question. We are, therefore, constrained to remit the issue to the trial Judge with the direction that he should record all the evidence which the parties may wish to produce and return the evidence through the District Judge to this Court together with his finding thereon and the reasons therefor.

Johnstone, J.—I concur.

R.K. *Case remanded.*

A. I. R. 1928 Lahore 933

FFORDE AND JAI LAL, JJ.

Wadhawa Singh and *others*—Plaintiffs—Appellants.

v.

Partap Singh and *others*—Defendants—Respondents.

First Appeal No 821 of 1924, Decided on 20th September 1923, from decree of Sr. Sub-Judge, Sheikupura, D/- 17th December 1923

Civil P. C., O. 6, R. 17—Plaintiff making a definite statement and case proceeding for trial—Amendment resulting in totally different case should not be allowed, especially at a late stage.

The general principle governing amendments is that where a party has made a definite statement upon which the case has gone to trial, leave to amend should not be granted if the effect of the amendment would be that the plaintiff would be making a totally different case to the case pleaded, more especially where an application for amendment is made at a late stage of the proceedings: 11 *M. I. A.* 487, *Dist.* [P 934 C 1]

Where plaintiffs had every opportunity to amend their pleadings when the significance of their statements became apparent in the course of the arguments before the trial Judge and the amendment if allowed required the defendant to produce a mass of evidence to meet the amended case,

Held: that the amendment should be disallowed. [P 934 C 2]

G. C. Naurang and *Mehr Chand Mahajan*—for Appellants.

Moti Sagar, W. Chandra Dutt and *Fagir Chand*—for Respondents.

Fforde, J.—The facts of this case are shortly these:

On 7th September 1888, Mt. Akki, widow of Jaimal Singh, sold certain parcels of land by two registered sale-deeds to the predecessors-in-title of the present defendants. Mt. Akki died some time in April of 1917, and on 3rd April 1923, the reversioners of Jaimal Singh brought a suit for possession of the land sold by Mt Akki on the ground that the sales were ineffective as against the reversioners. In this suit they made the successors in-title of the original vendees defendants.

The suit has been dismissed on the ground that it is barred by limitation under the provisions of Art. 2, Schedule to the Punjab Limitation (Custom) Act 1 of 1920 which provides that a suit for possession of ancestral property which has been alienated, on the ground that the alienation is not binding on the plaintiff according to the custom, cannot be brought after a period of six years from the date of the registration of the deed provided alienation is by a registered deed

Dr. Naurang for the plaintiffs has asked that the plaint be allowed to be amended. In the plaint the plaintiffs pleaded that the land in suit is ancestral. Para. 4 of the plaint is as follows:

The aforesaid land is the plaintiffs' ancestral land and Mt. Akki had no right to sell the same. The sale was without valid necessity, consideration and right and is null and void as against the plaintiffs.

In para. 5 of the plaint the plaintiffs pleaded:

even if the land in dispute is not proved to be ancestral land of the plaintiffs, still Mt. Akki, widow of Jaimal Singh, had no right, according to law and custom, to sell the said land because she was in possession for her lifetime and because the sale was without valid necessity and consideration.

There is no doubt at all on these pleadings that the plaintiffs definitely alleged the land to be ancestral land and para. 5 merely amounts to a plea that admitting for the purposes of this plea, but no further otherwise, that the land is not ancestral, even in that event Mt. Akki had no right to alienate it.

The defendants in paragraph of the jewab dawa plead as follows:

Paragraph 4 with the exception that the land in suit is the plaintiffs' ancestral land is denied.

In other words, the plaintiffs' plea that the land was ancestral is admitted by the defendants and accordingly there was no necessity of any issue upon that point

It is true that in the replication the plaintiffs put in a somewhat ambiguous plea in these terms:

> The sale upon which the defendants depend. is not such a sale which was made by a full proprietor and was in respect of ancestral immovable property and without cancellation of which the plaintiffs cannot bring a suit for possession of the land in question.

There has been a good deal of discussion as to whether the vernacular of the replication has the same meaning as the translation. We are inclined to think that the intention of the Urdu paragraph was the same as appears in the translation, but it does not seem to me to be very material at this stage. The parties had by plaint and defence agreed as to the land being ancestral. At any rate, it was upon this basis that the suit was tried and upon this basis that arguments were addressed to the trial Court. Dr. Naurang says that the plaintiffs' statement that the land was ancestral was made in error, and he urges that this Court should now amend the plaint by permitting the plaintiffs to now say that the land was not in fact ancestral and that the case be then sent for an issue on the nature of the land to be tried.

A good deal of authority has been cited by the learned counsel for the plaintiffs as to the cases in which amendment should be permitted. 11 *M. I. A.* 487 has been cited in which their Lordships of the Privy .Council stated that amongst ignorant agriculturists strict rules of pleadings should not be enforced. These observations could hardly be applied to the present case as the pleading in question was signed by counsel who could hardly be held to come within that description. The general principle governing amendments is that where a party has made a definite statement upon which the case has gone to trial, leave to amend should not be granted if the effect of the amendment would be that the plaintiff would be making a totally different case to the case pleaded, more especially where an application for amendment is made at a late stage of the proceedings.

The rule of English pleading is referred to in Bullen and Leak's Precedents of Pleadings in these terms:

> Leave to amend may be refused where at the trial or hearing the party seeks to alter the whole nature .of his case by an unexpected amendment which may require futher evidence to be adduced by his opponents.

There is no doubt in the present case that if this amendment were allowed a mass of evidence would have to be produced by the defendants to show what the nature of the land in suit is. Moreover, in the present case the plaintiffs had every opportunity to amend their pleadings when the significance of their statements became apparent in the course of the arguments before the learned trial Judge. The arguments there were directed to this question of limitation, and the character of the land was an essential element in the discussion. I am strongly of opinion that in this case it would be unfair to the defendants to allow the plaint to be amended as requested by Dr. Naurang. This application must, therefore, be refused.

So far as the point of limitation is concerned, I think there can be no doubt that the suit is barred by Act 1 of 1920, and in fact this is hardly contested. In these circumstances, being in agreement with the decision of the learned trial Judge, I see no alternative but to dismiss the appeal with costs.

Jai Lal, J.—I agree.

R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 934

DALIP SINGH, J.

Thakar Singh and *others* — Second Party—Appellants.

v.

Arya Pritinidhi Sabha, Punjab and *others*—First Party—Respondents.

Misc. First Appeal No. 897 of 1927, Decided on 8th May 1928, from order of Dist. Judge, Gurdaspur, D/- 9th December 1926.

Will—Revocation—Dispcsal of part property given in will does not amount to revocation of will—Succession Act (1925), *S.* 70.

Where a testator makes various gifts during his lifetime of the part of the property included in the will made by him, the giving away of such property does not amount to revocation of the will. [P 935 C 2]

Mohammad Amin for *Mohammad Shah Nawaz*—for Appellants.

Fakir Chand for *Badri Dass*—for Respondents.

Judgment.*—This is an appeal from Probate of the Will granted by the learned District Judge of one Sardar

*[No Letters Patent Appeal has been filed from this judgment].

Sochet Singh who was murdered on 12th November 1925. Two of his collaterals were convicted and sentenced to death for this murder.

Sardar Sochet Singh had no widow or children and his nearest collaterals were in the 7th degree. Mutation on his death was sanctioned in favour of his brother's widow Sardarni Har Kaur. She died on 12th March 1926, and the will was then discovered by Amar Singh and Shiv Singh, relatives of Mt. Har Kaur. They state that they found the will in a locked box after the death of Mt. Har Kaur and they handed the will to the Deputy Commissioner on 6th May 1926. The residuary legatee under the will is the Arya Priti Nidhi Sabha, and the Sabha has petitioned for Probate. The respondents are collaterals who raised various objections; but the only two points argued before me in appeal are:

(1) that it is not proved that the will in question was made by the late Sardar Sochet Singh; and

(2) that if made, it was revoked by him.

As regards the first point, counsel contends that no expert witness has proved the handwriting of the late Sardar. The evidence consists of the statement of Kaka who was actually present when the will was made and who alleges that it bears his thumb-mark. He says that the Sardar wrote the whole document in his presence one night about the time of the influenza epidemic. The Sardar enjoined Kaka not to tell any one about the will as the Sardar was afraid of his collaterals. Three persons, Munshi Ram, Pandit Chhaju Ram and Harbans Singh, P. Ws. 10, 11 and 12, have sworn that the handwriting is the handwriting of Sardar Sochet Singh which they knew. The learned District Judge has relied on this evidence, and I see no reason to doubt it.

The learned counsel has also contended that if the Sardar had made this will, he would have told some responsible officials of the Arya Samaj. I see no force in this contention. Secondly, that being an Arya he would not have gifted any portion of the land to a Mahomedan because Aryas and Mussalmans are always at enmity. There is no force in this contention, there being not the slightest evidence to support it. Thirdly, that Kaka knew about the will but did not claim the Rs 5 per month that were left to him under the will. Kaka explains that he was afraid to do so, because he feared for his life at the hands of the collaterals, and seeing that the Sardar was murdered by the collaterals it seems to be a reasonable explanation. Fourthly, it was contended that the Sardar would have deposited the will with the Deputy Commissioner or some other responsible official. There is no force in this contention either. I, therefore, hold that the will was executed by the late Sardar Sochet Singh.

It is next contended that the Sardar made various gifts during his lifetime after the alleged date of the will, and that this shows that he revoked the will. No authority is cited for this proposition nor does it seem to be sound law.

I, therefore, dismiss the appeal with costs.

A.L./R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 935

SHADI LAL, C. J., AND JOHNSTONE, J.

Sher Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 442 of 1928, Decided on 26th September 1928, from order of Dist. Magistrate, Kangra, D/- 29th February 1928.

Penal Code, Ss. 420 and 417—Person inducing another to give on credit certain articles but not intending to pay for them is guilty under S. 420 and not S. 417.

Where a person by falsely pretending to be a pensioned Subedar, intentionally deceives the complainant and dishonestly induces the complainant to let him have on credit certain articles for which he did not intend to pay, is guilty under S. 420 and not under S. 417.

[P 935 C 2, P 936 C 1,2]

D. R. Sawhney—for the Crown.

Shadi Lal, C. J.—The evidence for the prosecution, which has been believed by the trial Magistrate as well as by the learned Judge who has referred this appeal to the Division Bench, leaves no doubt whatsoever that the prisoner Sher Singh, by falsely pretending to be a pensioned Subedar, intentionally deceived the complainant and dishonestly induced him to let the prisoner have on credit certain articles for which he did not

intend to pay. The prisoner is, therefore, clearly guilty of the offence of cheating, and the only question on which we are invited to pronounce our opinion is whether he should be punished under S. 417 or S. 420, I. P. C. The matter is important because, while the latter section prescribes a punishment of imprisonment for a term which may extend to seven years, the former makes the offence punishable with imprisonment of only one year and does not, therefore, bring the case within the ambit of S. 75, I. P. C., which empowers the Court to inflict an enhanced punishment upon a previous convict.

It will be observed that S. 415, I P. C., merely defines the offence of cheating, but in order to ascertain the punishment for the offence, we must have recourse to the other sections of the Code. Now, we find that S. 417 contains a general provision which prescribes punishment for the offence of cheating generally, while S. 420 punishes that species of cheating which is accompanied with a transfer of property. The latter kind of cheating is an offence of an aggravated character, and the culprit is consequently liable to a severe punishment.

Section 420, I. P. C., being a special provision, must be treated as an exception to the general rule enacted by S. 417. Similarly S. 418 and S. 419 prescribe penalty for other kinds of aggravated cheating. There is, therefore, no conflict between S 417, which must be confined to cases of simple cheating, and Ss. 418, 419 and 420 which punish cheating of a serious nature. If a case comes within the purview of one of these three sections, the offender must receive the punishment prescribed by it, and he cannot claim that he should receive the lesser punishment provided for by S. 417, I. P. C. It must be remembered that cheating is not the only offence for which different punishments are ordained according to the gravity of the offence committed by the accused. A perusal of S. 378 and other sections following it makes it clear that, while simple theft is punishable under S. 379, theft of an aggravated character is punishable under S. 380, S. 381, or S. 382, if the offence satisfies the requirements of any of these three sections. Another example of the crime, for which a graded punishment is laid down by the Code is dacoity, vide S. 395, I. P. C., (simple dacoity), S. 396, I. P C., (dacoity with murder), and S. 397, (dacoity with an attempt to cause death or grievous hurt).

In the present case the appellant undoubtedly obtained property by cheating, and he was consequently punishable under S. 420, I. P. C. The sentence imposed upon him by the learned District Magistrate is not open to any objection either on the ground of illegality or of severity. The appeal preferred by him is accordingly dismissed.

Johnstone, J.—I agree.

R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 936

JAI LAL, J.

Amir-ud-Din—Defendant—Appellant.

v.

Mt. Khairi and *another*—Plaintiff and Defendant—Respondent.

Second Appeal No. 2618 of 1927, Decided on 10th April 1928. from a decree of Dist. Judge, Jullunder, D/- 30th May 1927.

Civil P. C , S. 47—Property not covered by decree given in possession of decree-holder in execution of his decree—Separate suit for recovery of such property is barred—Remedy is to make application under S. 47.

Section 47 bars a suit for recovery of property by a judgment-debtor, although the property in suit is not covered by the decree in execution of which possession has been actually given to the decree-holder. His remedy to recover the property is by way of an application under S. 47: 1 *Lah. L. J.* 230, *Foll.*

[P 937 C 1]

Niaz Muhammad—for Appellant.

Muhammad Alam—for Respondent 1.

Judgment *—The appellant obtained a decree for possession of immovable property against the respondent. In execution of that decree possession was actually given to the decree-holder of three fields which had not been decreed in his favour. The present suit was instituted by the judgment-debtor for possession of those three fields. The District Judge has found that the land in suit was not covered by the decree in execution of which possession was actually given to the decree-holder. He has, however, found that as a matter of fact possession was so given. The trial Court

[* No Letters Patent Appeal was filed from this judgment.]

dismissed the suit. The District Judge however, on appeal has decreed it merely on the ground that the land in suit was not covered by the decree.

This decree of the District Judge is attacked in this second appeal on the ground that under S 47, Civil P. C., the respondent was not entitled to institute a suit for recovery of the property from the decree-holder possession whereof had admittedly been given to the latter in execution of the decree. I hold that S. 47 clearly bars the present suit *Sharfu* v. *Mir Khan* (1) is an authority in support of that proposition.

The respondent then asked me to convert this suit into an application under S. 47, Civil P. C. Having regard, however, to the fact that the present suit was instituted in a different Court to that in which the execution proceedings took place, I have decided not to adopt this course. I leave it to the plaintiff, if so advised, to apply to the competent Court under S. 47, Civil P. C. It will then be for that Court to decide whether benefit should be given to the plaintiff of the provisions of S. 5, Lim Act owing to the pendency of the suit out of which this appeal has arisen.

I accept this appeal, set aside the decree of the District Judge and dismiss the plaintiff's suit but leave the parties to bear their own costs.

A.L./R.K. *Appeal allowed.*

(1) [1919] 1 L. L. J. 230.

* A. I. R. 1928 Lahore 937

BHIDE, J.

Ralia and *others* — Defendants—Appellants.

v.

Bodh Raj and *others*—Plaintiffs—Respondents.

Second Appeal No. 438 of 1928, Decided on 20th September 1928, from decree of the Sr. Sub-Judge, Hoshiarpur, D/- 30th September 1927.

* (a) *Registration Act, S.* 17—*Lease for indefinite period does not require registration.*

A lease for an indefinite period does not require registration if it is not in express terms for a period exceeding one year : 97 *P. R.* 1915 and *A. I. R.* 1922 *Lah.* 43, *Foll.*; 3 *L L. J.* 14, *Dist.* [P 938 C 1]

(b) *Transfer of Property Act, S.* 111 (*g*)—*Mere right to eject without any act of landlord does not cause forfeiture.*

The mere fact that the landlord has a right to eject a tenant for non-payment of rent cannot cause a forfeiture of the tenancy unless and until the landlord chose to exercise that right. [P 938 C 1]

(c) *Transfer of Property Act, S.* 111 (*g*)—*Non-payment of rent—Landlord and tenant.*

Mere non-payment of rent for a long period does not terminate a tenancy. [P 938 C 1]

(d) *Transfer of Property Act, S.* 111—*Lease not for fixed period—Death of tenant does not terminate tenancy.*

Even where a lease is not for a fixed period, it does not come to an end by the death of the tenant but devolves on his heirs. [P 938 C 2]

Muhammad Monir—for Appellants.

Mehr Chand Mahajan—for Respondents.

Judgment.—This second appeal arises out of a suit by a landlord to eject his tenants and for recovery of arrears of rent. The suit was dismissed by the trial Court but decreed on appeal by the District Judge The material findings of the learned District Judge were : (i) the tenancy was for an indefinite period and the lease of the year 1890 by which it was created, did not require registration, (ii) that the landlord had a right to eject the tenant in the case of non-payment of rent, but the right had not been exercised and hence the tenancy had not been determined although no rent had been paid for a long period and (iii) that the death of the original tenant who executed the lease of 1890 did not determine the tenancy and that the status of his legal representatives the present defendants was also that of tenants. The learned counsel for the appellants has challenged the correctness of these findings. He has argued in the first place that the lease being for an indefinite period required registration. He has cited *Karim Bakhsh-Taj-ud-din* v. *Natha Singh* (1) and *Mania* v. *Lallubhai* (2) in support of this contention. The former ruling is distinguishable from *Umar Bakhsh* v. *Baldeo Singh* (3) on which the learned District Judge has relied. The latter ruling appears to me to be in point. In *Karim Bakhsh Taj-ud-din* v. *Natha Singh* (1) the landlord had no right to eject the tenant so long as he paid his rent monthly. In the present instance, all that the lease says, is that the landlord will be entitled to eject the tenant in the case of non-pay-

(1) [1920] 3 L. L. J. 14.
(2) [1900] 2 Bom. L. R. 488.
(3) [1915] 97 P. R. 1915=32 I. C. 35=193 P. W. R. 1915.

ment of rent. It does not appear to me to follow from the wording of the lease that the tenant could not be ejected on any ground at all so long as he paid his monthly rent. The other ruling relied upon by the learned counsel is a very brief one. It seems to be opposed to the view taken in *Umar Bakhsh* v. *Baldeo Singh* (3). The view taken by the learned District Judge is also supported by a ruling of this Court *Attra* v. *Mangal Singh* (4) in which a lease containing similar terms was held to be not compulsorily registrable under S. 17, Registration Act. I accordingly agree with the learned District Judge that the lease was for an indefinite period but did not require registration, as it was not in express terms for a period exceeding one year.

On the above finding it is unnecessary to discuss various authorities cited by the learned counsel which only apply to leases for a fixed period. It is well-established that mere non-payment of rent for a long period does not terminate a tenancy. No other circumstances sufficient to establish determination of the tenancy more than 12 years before the present suit have been proved. The landlord had a right to eject the tenants in the event of non payment of rent, but he did not exercise it. The mere fact that the landlord had such right could not cause a forfeiture of the tenancy, unless and until the landlord chose to exercise that right (cf. S. 111 (g), Transfer of Property Act). It was urged that for the purposes of limitation time runs against a lessor from the date of breach of the conditions of the lease and not from the date when he decides to take advantage of it. Reference was made in this connexion to p. 429 of the Commentaries on the Transfer of Property Act by Shephard and Brown. But the proposition laid down therein has reference to Art. 143, Limitation Act. The learned counsel has himself argued the case on the assumption that it was governed by Art. 139. But even if Art. 143 were to be applied, it would appear from the terms of the lease that the landlord would have a recurring cause of action on the non-payment of rent every month.

It was finally argued that on the death of the original tenant at any rate the tenancy came to an end as the lease was not for a fixed period and was therefore, not heritable. No authority in point was cited in support of this contention. Reference was made to the definition of a lease, but it does not appear to follow therefrom that a lease for an indefinite period is not heritable. S. 111, Transfer of Property Act, also does not lay down that a lease terminates on the death of a lessee. The general rule is that a lease is heritable (c.f. Gour's Law of Transfer in British India, Vol. 3, para. 2804.)

I find no good ground in the circumstances of the case to hold that the tenancy determined on the death of the original lessee. I dismiss the appeal with costs.

R.K. *Appeal dismissed.*

(4) A. I. R. 1922 Lab, 43=2 Lab. 300.

A. I. R. 1928 Lahore 938

BHIDE, J.

Ranga Ram-Thakur Das—Plaintiffs—Appellants.

v.

Raghbir Singh and *another*—Defendants—Respondents.

Second Appeal No. 2069 of 1927, Decided on 11th September 1928, from decree of Dist. Judge, Lyallpur, D/- 11th April 1927.

Contract Act, S. 8—Surety definitely asking by letter to advance morey—Communication of acceptance not contemplated—Advancement of money itself amounts to acceptance of the proposal of guarantee.

Where a surety definitely asks a creditor by letter to advance money to a debtor upto certain amount and holds himself responsible for that amount, and where the letter does not contemplate any communication of acceptance the advancement of money amounts to acceptance of the proposal and the contract of guarantee is complete: *McIver* v. *Richardson*, 1 *M. & S.* 557, *Dist.* [P 939 C 1]

Mehr Chand Mahajan—for Appellants.

Govind Ram Khanna—for Respondents.

Judgment.—This was a money suit for recovery of Rs. 540 against one Imam Din and his surety Raghbir Singh. The trial Court passed a decree against both, but on appeal the learned District Judge held that Raghbir Singh's liability as a surety was not established and modified the decree accordingly so as to exonerate Raghbir Singh. From this

decision plaintiff has filed a second appeal.

The only point for decision is whether Raghbir Singh was legally liable as a surety for the loan advanced to Imam Din. It is alleged by the plaintiff that the loan was advanced on the basis of a letter given by Raghbir Singh to Imam Din, which was brought to the plaintiff by the latter. The letter ran as follows:

Please pay to my tenant Imam Din whatever money he requires and settle your account every harvest, because he would require money for agricultural and seed purposes. I am responsible for the amonnt borrowed by Imam Din. Please do not pay more than Rs. 500. However as the requirement would be more for potato seed, hence do not pay him more than Rs. 1,000.

The learned District Judge held that this letter contained a proposal which should have been accepted by the plaintiff and that as no acceptance was communicated with in a reasonable time no contract was completed. The contention of the learned counsel for the appellant is that the contract was completed by the performance of the conditions mentioned in the letter, namely, the advance of money to Imam Din. The learned counsel for the respondent on the other hand relied on a ruling *McIver* v. *Richardson* (1) quoted in Anson's Law of Contract at p. 31 according to which a contract of guarantee is not complete unless the acceptance of the offer is communicated to the proposer. In that case, however, the surety had only expressed his willingness to guarantee advances made to the debtor. In the present case the terms of the letter are much more explicit. The surety definitely asked the plaintiff to advance the money to his tenant Imam Din from time to time and held himself responsible for any amount so advanced up to Rs. 1,000. The letter does not appear to contemplate any communication of acceptance at all. According to Ss. 7 and 8, Contract Act, it would appear that the performance of the conditions of the letter would in itself amount to acceptance of the proposal in the circumstances of the case. I, therefore, hold that the contract of guarantee was completed by the advances made to Imam Din by the plaintiff.

The learned counsel for the respondent attempted to support the decree of the learned District Judge on certain other grounds. Firstly he contended that all the terms of the proposal were not complied with inasmuch as the plaintiff was asked to settle accounts every harvest, but he failed to do so. It does not, however, appear from the wording of the letter that this was an essential condition of the proposal. The plaintiff was no doubt asked to settle accounts every harvest but the only reason given for this was that the tenant would require money for agricultural and seed purposes. The surety did not say in the letter that unless the accounts were settled every harvest he would not be responsible. The second contention put forward was that there was a material alteration in the document in respect of the date and hence the document cannot be acted upon. It is true that there was a pencil alteration in the date, but the learned District Judge has not been able to find definitely who was responsible for it. In any case he does not consider that the plaintiff was responsible for the alteration. Further it appears to me that the alteration was not material in the circumstances of the case. The alteration was in respect of the date of the letter, but the letter contemplated advances from harvest to harvest and not within any fixed time after the date of the letter.

Lastly it was contended that the contract of suretyship came to an end because the creditor extended time. There is, however, no evidence to show that any extension of time was definitely given by the plaintiff. It is true that the accounts are not shown to have been settled every harvest but this does not necessarily mean that the plaintiff voluntarily gave any extension of time.

After fully considering the facts of the case and the arguments advanced I am of opinion that the contract of suretyship was complete and Raghbir Singh was rightly held liable by the trial Court I accordingly accept the appeal with costs and restore the decree of the trial Court.

W.S./R.K. *Appeal accepted.*

(1) 1 M. & S. 557.

A. I. R. 1928 Lahore 940

ADDISON AND BHIDE, JJ.

Kamir—Plaintiff—Appellant.

v.

Haidar and *others*—Defendants—Respondents.

Second Appeal No. 2009 of 1923, Decided on 9th May 1928, from decree of Dist. Judge, Jhang, D/- 1st March 1923.

Custom (Punjab)—Power to will established by custom though parties were Musalmans—Mahomedan law—Applicability.

Where power to will is established under customary law, the Court has no power to assume that the principles of Mahomedan law applied to wills, merely because the parties are Musalmans by religion. [P 940 C 2]

Niaz Mohammad—for Appellant.

Fakir Chand—for Respondents.

Addison, J.—The plaintiff sued his mother for possession of land which came from his maternal grandfather Yara. Yara died in March 1886, and the plaintiff's case was that he made a will in 1881 bequeathing his land to his widow for life and thereafter to the sons of his daughters. The widow of Yara, that is, the grandmother of the plaintiff, remained in possession up to some three years before the suit when she gifted the land to her daughter, the plaintiff's mother, in whose favour it was mutated. Yara had two other daughters but they have had no issue. The collaterals of Yara sued the mother of the plaintiff for possession of the land on the ground that they were the heirs and were entitled to succeed in preference to the plaintiff's mother. They obtained a decree for possession against the mother but did not, however, execute this decree within limitation and when they applied to do so it was held that the execution was barred by time.

The plaintiff's case further was that the will in question had been concealed for some time that Mt. Fatima, his mother's sister at the time of her death gave it to the plaintiff He, therefore, claimed that he was entitled to possession against his mother in accordance with the will as he was the only son of the three daughters of Yara and he also joined the collaterals as defendants in the suit as they had at one time obtained a decree against his mother which they were, however, unable to execute. It was common ground between the parties that they were Qadri Chisties and followed agricultural custom. The collaterals, however, contended that under custom there was no right of will and that, in any case, the plaintiff could derive no benefit under the will as he was not born at the time of Yara's death. They also denied the factum of the will.

Both Courts held that Yara deceased made the alleged will and that under custom he had the power to bequeath his land by a will. The trial Court further found that the will was not invalid under custom for the reason that it was in favour of a person who was alive, and, after her of persons who were not then born but who were born before the first person died. The learned District Judge, however, on appeal, after having upheld the decision of the lower Court that under Customary Law, Yara was competent to make a will devising his property, suddenly went on to decide that under Mahomedan law the will was void as the bequest was made to a child not born. He, accordingly, accepted the appeals of the collaterals and dismissed the suit against them leaving the decree against the mother to stand. Against this decision the minor plaintiff has preferred a second appeal and has also put in a revision petition to the effect that the lower appellate Court should be directed to grant a certificate under S. 41 (3), Punjab Courts Act, for further appeal.

The learned District Judge clearly erred in law in holding that in accordance with Mahomedan law, the will could not take effect because the second person to succeed under it was not born at the time of the death of the testator, seeing that both sides claimed that they followed Customary Law. The trial Court held that such a devise was valid under Customary Law and in this connexion discussed certain evidence. The value of this evidence has not been determined by the lower appellate Court and in fact it is not even mentioned by it. In these circumstances the lower appellate Court had certainly no power to assume that the principles of Mahomedan law applied to wills which the testator had power to make under Customary Law merely because the parties were Mussalmans by religion. In this case the power to will is established under Customary Law

and obviously the limits to such power should be looked for in Customary Law, at least in the first instance. What should be done if the Customary Law is silent on this point does not arise at this stage and need not be discussed as it may never arise. Both counsel agreed that for these reasons this second appeal must be accepted and the appeal returned to the District Judge to decide the question in the way described. In this view of the case there is no necessity for a certificate under S. 41, Punjab Courts Act. I would, therefore, dismiss the revision petition as being unnecessary but would leave the parties to bear their own costs in it and I would accept the appeal, set aside the order of the District Judge and remand the appeal to him to be decided in accordance with law, as indicated above. Court-fee in this Court will be refunded. Other costs will be in the discretion of the lower appellate Court.

Bhide, J.—I concur.

W.S./R.K. *Case remanded.*

A. I. R. 1928 Lahore 941

BHIDE, J.

Chandrawati—Appellant.

v.

Jagan Nath Singh and *others*—Respondents.

Misc. First Appeal No. 3122 of 1927, Decided on 28th March 1928, from order of Dist. Judge, Delhi, D/- 10th November 1927.

Guardians and Wards Act, S. 17—Considerations—Widow of the deceased young and inexperienced—Ill-treatment accorded by her to minor stepchildren—Lack of managing capacity in her—Cousin of deceased on amicable terms with deceased and put in management of property during his lifetime—The cousin of the deceased is the proper guardian.

It is not an inflexible rule of law that a pardanashin lady should not be appointed guardian of the property and person of a minor. But each case must obviously depend upon its circumstances. [P 943 C 1]

A died leaving behind him considerable property, his minor children, his widow and a cousin brother. The widow was young and inexperienced and ill-treated her stepchildren the minors. She could not manage the property satisfactorily. On the other hand, the cousin of the deceased was on good terms with the deceased, who in his last days had entrusted the management of his property to him.

Held: that there was necessity for the appointment of a guardian and that the cousin of the deceased is a suitable person to be so appointed in preference to the stepmother: 42 *Cal.* 953; 62 *P. L. R.* 1913; 60 *P. W. R.* 1913; and 17 *C. L. J.* 405; *Dist.* [P 942 C 1]

Sardha Ram—for Appellant.

Moti Sagar—for Respondents.

Judgment.—The pedigree-table of the parties in this case is as follows:

[See p. 942 for pedigree-table.]

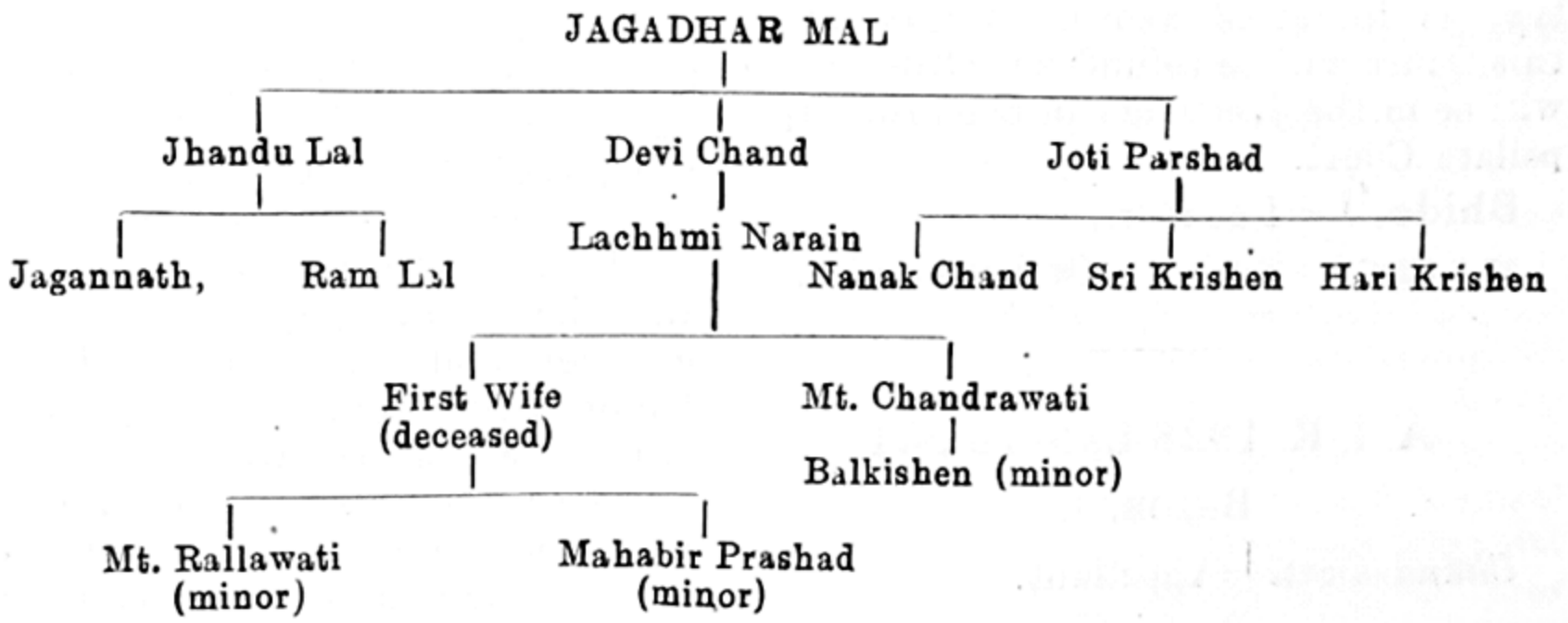
On 12th July 1924, Lachmi Narain died leaving considerable landed property (about 700 bighas of land, two gardens and houses) in the Ambala District and a house and a commission agency shop at Delhi. In December 1924, Lala Jagan Nath applied for the guardianship of the person and property of his minor children. The application was first instituted in the Court of the Senior Subordinate Judge, Ambala, but was subsequently transferred to the Court of the District Judge on the application of Mt. Chandrawati, the widow of Lachhmi Narain. Mt. Chandrawati opposed the application of Jagan Nath on the grounds that she was the proper guardian of the minor children and was able to manage satisfactorily the property left by the deceased. The learned District Judge has, however, appointed Jagan Nath guardian of the person of Mt. Rallawati and Mahabir Prashad and of the property of Balkishen and Mahabir Parshad by order dated 10th November 1922. From this order Mt. Chandrawati has appealed.

The two main contentions urged on behalf of the appellant were that no necessity for the appointment of a guardian has been established and that Lala Jagan Nath is, in any case, not a suitable person to be appointed a guardian. As regards the first question, prima facie there are circumstances in this case which indicate the necessity of appointing a suitable guardian for the welfare of the minors. The appellant is a young widow, aged 20 or 21, with little or no education and no experience of business. The deceased has left landed property and a commission agency business, in which a capital of over 2 lacs is said to have been invested. The appellant has some relations who could help her but the evidence on the record shows that they are in straitened circumstances, the whole of their proverty being under mortgage (vide P. W. No. 9). The respondent has besides produced witnesses including near

relations of the deceased, who have deposed that Mt. Chandrawati is incapable of managing the property satisfactorily. It is significant that Mt Chandrawati has made no attempt to rebut this evidence by proving that she has made satisfactory arrangements for the management of the property and that the management has been, as a matter of fact, successful during the period of about three years or so that has elapsed since the death of the deceased.

As regards the guardianship of the person of the minors the learned District Judge has only appointed, Lala Jagan Nath to be the guardian of the stepchildren of the appellant. There is some oral evidence on the record about the ill-treatment of these children, which again stands unrebutted.

As regards the litigation with Joti Parshad's sons, one of them, viz., Nanak Chand (P. W. 7). has appeared as a witness on behalf of Jagan Nath and deposed that the suit against Jagan Nath had been filed at the instigation of an enemy and that Jagan Nath is the best person to look after the property of the minors. There is no other evidence on the record with respect to that litigation. It is true that a large sum of money was found to be due to Joti Parshad's sons and was not paid at once, but that may have been the result of circumstances beyond the control of Jagan Nath and not of any mala fides on his part. Lastly the fact that Jagan Nath has a rival business concern cannot by itself be considered to be sufficient to disqualify him for the appointment. The evidence on the record shows that Jagan Nath has advanced large sums of money for repayment of the debts due from the deceased and has also helped in the realization of his debts. Moreover, it must be remembered that his management of the property will now be subject to supervision by the Court and I have no doubt that the fact Jagan Nath owns a rival concern will not be lost sight of in the scrutiny of the accounts from time to time.



The next question for consideration is whether Lala Jagan Nath is a suitable person for appointment as a guardian. It was urged that his application is not bona fide, that he misappropriated the property of the minor sons of Joti Parshad, which led to litigation and finally that he has a rival business concern of his own at Delhi and cannot, therefore, be expected to look after the business of the minors, with due regard to their interests. I do not see any good grounds for holding that the application of Lala Jagan Nath is not a bona fide one. He is a near relative of the deceased and the evidence on the record shows that his relations with the deceased were amicable and that during his last days, the deceased had actually entrusted to him the management of his business. The fact that the application was made in the first instance at Ambala does not indicate any mala fides on his part, as the deceased left considerable landed property in the Ambala District.

The learned counsel for the appellant cited *Sarala Sundari Debi* v. *Hazari Dasi Debi* (1), *Partab Kaur* v. *Jawala Shah* (2), *Deoki* v. *Bakhat Mal* (3) and *Sundar Moni* v. *Bangsidhar Patnaik* (4) in support of his arguments. The first ruling seems to have no bearing at all on

(1) [1915] 42 Cal 953=28 I. C. 972=19 C. W. N. 513.
(2) [1913] 62 P. L. R. 1913=19 I. C. 428=12 P. W. R. 1913.
(3) [1913] 60 P. W. R. 1913=19 I. C. 783=118 P. L. R. 1913.
(4) [1912] 17 C. L. J. 405=16 I. C. 900=18 C. W. N. 160.

the facts of this case. In *Partab Kaur* v. *Jawala Shah* (2) where the mother was appointed a guardian in preference to an uncle, the latter was found to have been not on good terms with the father of the minor. The minor was, moreover, an infant; the applicant was the child's own mother, and there was no evidence to show that the mother was incapable of managing the property left by the father. In *Deoki* v. *Bakhat Mal* (3) it was held that if the mother was actually managing the property satisfactorily no other guardian need be appointed In the present instance, the appellant has carefully refrained from producing any evidence about her management of the property. In *Sundar Moni Dasi* v. *Bangsidar Patnaik* (4) it was laid down that it is not an inflexible rule of law that a pardanashin lady should not be appointed guardian of the property and person of a minor. But each case must obviously depend on its circumstances. In the present instance I do not think the appointment of the appellant as a guardian will be in the interest of the minors.

Finally, it was urged that the security ordered to be furnished by Jagan Nath, Rs. 30,000 is inadequate. But there is no evidence on the record to show that the annual income will exceed this amount. I do not think it was necessary to demand security equivalent to the full value of the property left by the deceased. The guardian will, of course, not be able to alienate any property without the sanction of the Court. The Court can, moreover, ask for further security if and when it thinks fit. I see no reason at present to interfere with the discretion exercised by the learned District Judge in this matter.

I dismissed the appeal with costs.

W.S./R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 943

BHIDE, J.

Gujar Singh—Judgment-debtor—Appellant.

v.

Babu Ram — Decree-holder—Respondent.

Misc. Second Appeal No. 3140 of 1927, Decided on 3rd April 1928, from order of Dist. Judge, Sialkote, D/- 30th August 1927.

Civil P. C., S. 60—Press and karah are implements of husbandry and cannot be attached

The press and karah which are used for making *gur* from sugarcane grown in the field are implements of husbandry and as such are not liable to attachment and sale: *A. I. R. 1924 Bom 294, Foll.* [P 944 C 1]

J. N. Talwar—for Appellant.

Judgment.—This appeal was heard ex parte as no one has appeared on behalf of the respondent.

During the course of the execution proceedings two buffaloes, a house, a vacant site, a karah and a belna belonging to the appellant were attached. The appellant objected to the attachment on the ground that the property was exempt from attachment under S. 60, Civil P. C. The objection has been upheld in respect of the house, but has been disallowed by the learned District Judge in respect of the rest of the property. The judgment-debtor has filed a second appeal.

As regards the buffaloes, the learned District Judge has recorded a finding after consideration of the evidence that the animals were not used for agricultural purposes. On the face of this finding no second appeal is competent in respect of the attachment of the buffaloes. With respect to the attachment of the karah and the belna, the learned District Judge remarks that sugarcane was not exempted under the provisions of S 61, Civil P. C., by a notification and that when sugarcane itself was not exempt, the juice of sugarcane or gur manufactured therefrom, could not be exempt and that, therefore, it followed that any machinery for manufacturing gur would also not be exempt. I am unable to see that S. 61, Civil P. C., has any bearing on the point at issue. That section only lays down that the Local Government may by general or special order declare that such portion of agricultural produce or of any class of agricultural produce as may appear to the Local Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family shall be exempted from liability to attachment and sale. In the present instance, the point for decision was whether the karah and the sugar-cane were exempt from attachment as implements of husbandry. It has been held by the Bombay High Court in *Lakshman Mhasu* v. *Narhari*

Dadasi (1) that a charak (sugar-cane press) and a kadhai used by an agriculturist for the purpose of extracting sugar juice from sugar cane from his own field are implements of husbandry within the meaning of Cl. (b), S. 60, Civil P. C. In the present instance also it appears that the press and the karah are used by the appellant for making gur from sugar-cane grown in his own field. I am, therefore, of opinion that these articles were not liable to attachment and sale.

As regards the open site, it appears from the plans on the record that it is of considerable size and separate from the house itself. It does not, therefore, appear to fall within the purview of Cl. (c), S. 60, Civil P. C.

I accordingly accept the appeal (ex parte) only with respect to the attachment of belna and karah and direct their release. Appellant will get one third of his costs.

W.S./R.K. *Appeal allowed in part.*

(1) A.I.R. 1924 Bom. 294.

A. I. R. 1928 Lahore 944

BROADWAY, AG. C. J. AND BHIDE, J.

Rattan Chand-Duni Chand — Petitioner.

v.

Income-Tax Commissioner — Respondent.

Civil Mics. Appln. No. 89 of 1927, Decided on 22nd June 1927.

Income-Tax Act, S. 66 (3)—Whether a blank return is a return or not within S. 23 (4) is a question of law—Income-tax Act, S. 23 (4).

The assessee was served with a notice under S. 22 (2) of the Act, calling upon him to furnish a return of income. He signed a prescribed form and, refraining from making any entries in the various columns, wrote the word "blank" against the item "total." This was accompanied by a covering letter, in which it was explained that the assessee carried on no business in the place and received no income at that place, and that the writing of the word "blank" on the prescribed form meant that the assessee had no income of any kind whatsoever.

Held: that the question whether such a return accompanied by such a covering letter was "no return" for the purposes of assessment under S. 23 (4) is one of law which should be referred to the High Court. [P 945 C 1]

Mehr Chand Mahajan — for Petitioners.

Jagan Nath Aggarwal—for Respondents.

Broadway, Ag. C. J.—The firm of Messrs. Rattan Chand-Duni Chand have certain premises in the Guru Bazar in Amritsar. They have also business in Kashmir. They were served with a notice under S. 22 (2), Income-tax Act, calling upon them to furnish a return of their income. They signed a prescribed form and, refraining from making any entries in the various columns, wrote the word "blank" against the item "total." This "return" was sent by them to the Income-tax Officer with a covering letter, in which it was explained that they carried on no business in Amritsar and received no income at that place, and that the writing of the word "blank" on the prescribed form meant that the firm in Amritsar had no income of any kind whatsoever. The Income-tax Officer then issued a notice to this firm under sub-Cl. (4), S. 22, calling upon them to produce all their accounts in connexion with their business. This notice was issued on 15th August 1925, but was not served. A similar notice was issued on 9th September 1925, but was served on a wrong person with the result that another one had to be issued on 12th September 1925, of which service was duly effected. A member of the firm appeared before the Income tax Officer, and there made certain statements to the effect that they kept no accounts of any dealings they might have had in Amritsar and that the main accounts in any case were in Kashmir. After further time had been given by the Income-tax Officer (and it may be that another notice issued calling for account books regarding which there is some question), the Income-tax Officer treated the case as a "no return case" and made the assessment under S. 23 (4). This assessment was appealed against and ultimately taken up to the Income-tax Commissioner who was asked either to review the proceedings or under the provisions of S. 66 (2), Income-tax Act, refer certain questions of law to this Court. The Income-tax Commissioner held that there was no question of law involved which could be referred to this Court, with the result that Messrs. Rattan Chand-Duni Chand have moved this Court for a mandamus under Cl. 3, S. 66.

It appears to me that in the present case one question of law does arise, a question which admittedly forms the

basis of all the other points taken by the petitioners in their petition. This question is whether a " return " such as was made in this case namely, the signing of a prescribed form without any date with all the various columns left blank and the word " blank " written against the item " total," accompanied by a covering letter such as has been referred to above is " no return " for the purposes of assessment under S. 23 (4). I think that this question should be referred to this Court and I would direct accordingly. No order as to costs.

Bhide, J.—I concur.

D.D. *Order accordingly.*

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* A. I. R. 1928 Lahore 945

TEK CHAND, J.

Amar Nath—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1122 of 1928, Decided on 5th October 1928, from the order of Dist. Mag., Gurdaspur, D/- 13th April 1928.

(a) *Criminal P. C., S. 439—Power under, by quashing proceedings should be sparingly used.*

The power of the Court to take action under S. 439 by quashing proceedings is undoubted though such power will be exercised in exceptional cases only : 33 *P. R.* 1910 *Cr.* ; *A. I. R.* 1927 *Lah.* 825 ; and *A. I. R.* 1927 *Lah.* 731 ; *Foll.* [P 946 C 1]

(b) *Criminal trial—Courts' duty—No criminal offence disclosed on complaint—Proceedings should not be continued.*

Where on facts as alleged by the complainant himself no criminal offence is disclosed, it will be an abuse of the process of Court to allow criminal proceedings to continue. [P 946 C 1]

* (c) *Penal Code, S. 417—Decree against the judgment-debtors — Two declared insolvent—Creditor getting his name in Schedule—Creditor obtaining fresh bond from the third party and debt also paid by Receiver subsequently—There is no criminal offence—Criminal trial—Civil dispute.*

The accused had obtained a decree against three judgment-debtors. Two out of them had subsequently applied to be adjudicated as insolvents. The accused got his name entered in the list of creditors and proved his debts against them. He then proceeded against the third and obtained from him a fresh bond. Subsequently the Official Receiver made payment to the accused.

Held : that the receipt of the amount cannot in any way render the accused criminally liable. It is a matter for adjustment in a civil Court. [P 945 C 1]

Shamair Chand—for Petitioner.

Devi Dayal—for the Crown.

Judgment.—This is an application under S. 439, Criminal P. C., on behalf of Amar Nath accused, praying that the charges under S. 417/384 framed against him by the Tehsildar-Magistrate of Shakargarh be quashed.

The relevant facts are that Achhru father of Babu Ram, complainant, owed to the petitioner a sum of Rs. 300 on a bond carrying interest at 9 per cent per annum and payable by annual instalments of Rs. 25. Default having been made in paying the first three instalments, Amar Nath instituted a suit for recovery of Rs. 75, the amount of these three instalments, plus Rs. 55 as interest, or Rs. 130 in all, against Achhru and his two sons Relu and Babu. On 6th May 1926, an ex-parte decree for the sum claimed together with Rs. 21-6 costs was passed in favour of Amar Nath against all the three defendants. Some time after the decree-holder, Amar Nath took out proceedings in execution of his decree and got warrants of arrest issued against Relu judgment-debtor only. In the meantime Relu and his father Achhru had applied to the Insolvency Court for being adjudicated as insolvents. In those proceedings Amar Nath appeared and got himself entered in the schedule as a creditor of Achhru and Relu insolvents, to the extent of the amount of the decree aforesaid and the balance due on the original bond. Later on he applied to execute the decree against the third judgment-debtor Babu Ram and a warrant for his arrest was issued. This warrant was executed on 7th November 1927, when a compromise was arrived at between Babu Ram and the decree-holder and a fresh bond for Rs. 155, the amount of the decree, costs of the suit and costs of the execution was executed by Babu Ram in favour of the decree-holder payable by instalments of Rs. 5 per mensem each.

Subsequently, on 20th December 1927, the Receiver, who was administering the estates of Achhru and Relu insolvents, sent by money order the sum of Rs. 41-14-0 to Amar Nath as his pro rata share of the assets of the aforesaid insolvents. The next day, i, e., 21st December 1927, Babu Ram lodged a complaint under S. 417, I. P. C., against the decree-holder Amar Nath alleging that the accused had cheated him by first getting the amount of

the decree entered in the schedule of creditors of Achhru and Relu insolvents and then executing the decree against Babu Ram and getting a bond executed by him on 7th November 1927. After recording the evidence of the complainant, the petition-writer and Achhru insolvent, the learned Magistrate framed charges against the petitioner under S. 417/384.

The petitioner has preferred a revision to this Court urging that on the allegations made in the complaint and on the facts as disclosed in the prosecution evidence no criminal offence under Ss. 417/384 or any other section of the Penal Code or any other law has been disclosed and that the proceedings be quashed.

Mr. Devi Dayal for the respondent objects that this Court ought not to interfere on the revision side at this stage. It is, however, well established that the power of this Court to take action under S. 439 by quashing proceedings is undoubted, though such power will be exercised in exceptional cases only. See *Emperor* v *Bishen Das* (1), *Tahiru* v. *Jallu* (2) and *Tarak Singh* v. *Emperor* (3).

Mr. Devi Dayal does not controvert the facts as disclosed above. Now there can be no doubt that on the facts as alleged by the complainant himself, no criminal offence is disclosed and it will be an abuse of the process of the Court to allow the criminal proceedings to continue in a case like this. The petitioner had obtained a decree against three judgment-debtors and if two of them had subsequently applied to be adjudicated as insolvents and the creditor had proved his debt against these two, there was nothing in law to prohibit him from proceeding to recover his decree from the third. The payment by the Receiver was made subsequent to the execution of the bond by Babu Ram, and receipt of this amount cannot in any way render the petitioner criminally liable. It is a matter for adjustment in a civil suit, when the petitioner sues the complainant on the bond.

It is noteworthy that though the complaint was under S. 417 only the learned Magistrate added a charge of extortion under S. 384 also. I cannot see on what grounds such a charge could possibly be supported.

I accept the petition, quash the charges and set aside the proceedings against the petitioner.

W.S./R.K. *Charges quashed.*

(1) [1910] 33 P. R. 1910 Cr.=8 I. C. 1161=57 P. L. R. 1911.
(2) A. I. R. 1927 Lah. 825.
(3) A. I. R. 1927 Lah. 731.

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* A. I. R. 1928 Lahore 946

ADDISON, J.

Khushal Chand—Accused—Petitioner.

v.

Emperor — Complainant — Opposite Party.

Criminal Revision No. 908 of 1928, Decided on 5th July 1928, reported by Addl. Sessions Judge, Lahore.

(a) *Criminal P. C., S. 537—Cantonment Board lodging a complaint signed by execution officer filing no authority but having power to file such complaint—Affidavit filed in the revision Court showing that he had an authority to do so—Omission to file is curable—Contonment Act, S. 266.*

A complaint was lodged by the Cantonment Board, through a Sub-Overseer, signed by the Executive Officer of the Board. The Executive Officer never appeared before the Magistrate. Sub-Overseer did not hold any power of attorney on behalf of the Board. No power of authority was filed to show that the Executive Officer had any authority to lodge such a complaint. On conviction the accused filed a revision. The Executive Officer filed an affidavit that he had an authority to file the complaint.

Held, that failure to file the authority is an omission curable under S. 537; 116 *P. L. R.* 1907, *Foll.* [P 947 C 1]

* (b) *Criminal P. C., S. 556—Scope.*

Cantonment Magistrate can try a complaint lodged by Cantonment Board even though the Magistrate is a member of the Board. [P 947 C 1]

Tulsi Das—for Petitioner.

Ram Lal Anand—for the Crown.

Facts.—The petitioner was convicted by the Cantonment Magistrate under S. 118, Cantonment Act, for having stacked some bricks on the foot-path and was fined Rs. 5. The revision is forwarded to the Hon'ble Judges of the High Court on the following :—

Grounds.—the complaint was lodged by the Cantonment Board, Lahore, through Alaud-Din, Sub-Overseer. It was signed by the Executive Officer of the Cantonment Board. The Executive Officer never appeared before the Magistrate. Alaud-Din does not hold any power-of-attorney on behalf of the Cantonment Board and neither any general or special order on behalf of that body was shown to the Court that the Executive Officer was authorized to prosecute the petitioner.

S. 266, Cantonment Act, clearly provides that no Court shall proceed to the trial of any offence, punishable under this Act, except on the complaint of the Cantonment Authorities or a person authorized by the authorities by a general or special order in this behalf. The Cantonment Authority is defined in S. 2 (5) as a Board and the constitution of the Cantonment Board is given in S. 14. An Executive Officer is not a member of the Cantonment Board. His duties are explained in S. 24 and he is required to perform those duties as the Cantonment Board may impose upon him. His special powers are given in S. 25 and, in my opinion, he too must have a special power-of-attorney from the Board or at least file in Court a copy of a resolution passed by the Board which could entitle him to lodge a prosecution. In this case therefore, the complaint was not launched by a competent person.

It is further brought to my notice that the Cantonment Magistrate who tries this case, was also a member of the Cantonment Board and the learned counsel for the respondent has admitted that this fact by itself excluded the Magistrate to take cognizance of this offence and to try this case. The case should, therefore, be remanded for a fresh trial and should be heard by a Magistrate who is not a member of the Cantonment Board. The Executive Officer would be required by the Magistrate to show him a special or general power of the Board which had authorized him to lodge this prosecution.

Order.—The case was tried without any objection being raised that the Executive Officer had no authority to file a complaint. There is now an affidavit on the record that he had such authority and that the Magistrate and petitioner knew of this. In these circumstances it is too late to say that the authority should have been on the record. At the most it was an omission, curable under S. 537, Criminal P. C., and in any case as no prejudice has been shown, interference by me is unnecessary *Ala Dya* v. *King-Emperor* (1).

As regards the second point, there is no force in it. It was admitted that the Magistrate could try the case though a member of the Board. This may have been a ground for transfer at the most, but that was never asked for.

I decline to interfere. Let the records be returned.

A.L./R K. *Order accordingly.*

(1) [1906] 5 P. R. 1906 Cr.=116 P.L.R. 1907.

A. I. R. 1928 Lahore 947

DALIP SINGH, J.

Feroze A.Cooper—Plaintiff—Appellant.

v.

Secretary of State—Defendant—Respondent.

Second Appeal No. 3162 of 1927, Decided on 12th May 1928, from decree of Addl. Judge, Lahore, D/- 13th October 1927.

(a) *Civil P. C., O. 22, R. 3—Decree in favour of joint plaintiffs—Appeal against one is incompetent.*

Where a joint declaratory decree has been passed in favour of all the plaintiffs, it is not open to the defendant to implead only one in appeal. The Court is wrong in accepting such appeal: 19 *C. W. N.* 290; 34 *I. C.* 138; and 29 *C. L. J.* 461; *Foll.* [P 948 C 1]

(b) *Civil P. C., O. 41, Rr. 20 and 33—Rules should be used only when no justice can be done otherwise or whole question is reopened—Civil P. C., O. 41, R. 33.*

Order 41, Rr. 20 and 33, should be sparingly used in cases where the appellant omits to implead the necessary respondents through oversight. It is only in cases where full justice cannot be done or where the appeal anyhow reopens the whole of the question decided that the powers under O. 41, R. 33, should be exercised. [P 948 C 2]

(c) *Court-Fees Act, S. 19 (i)—Question whether property is or is not trust property falls under S. 19 (i) and not 19 (g).*

The question whether a certain property is or is not a trust property comes under S. 19 (i), and an order in respect of that property by a Financial Commissioner under S. 19 (g) without proceeding under S. 19 (h) is ultra vires: 33 *Mad.* 93 (*F.B.*), *Foll.* [P 949 C 1]

Durga Das—for Appellant.

Ram Lal—for Respondent.

Judgment.—In this case four persons applied for probate of the will of Mrs. N. A. Cooper and a Court-fee stamp of Rs. 2895 was paid in for the said probate. The High Court granted the application for probate on 30th May 1924. On 19th July 1926, the Financial Commissioner passed an order under S. 19 (g), Court-fees Act, to recover from the plaintiff a penalty of Rs. 1437-11-0. The Collector in pursuance of this order directed the plaintiffs to remit Rupees

1437-11 within 15 days or steps would be taken to recover the said sum by attachment. Thereupon the plaintiffs, the four executors brought a suit for a declaration to the effect that the order of the Financial Commissioner was ultra vires; that the plaintiffs had paid a full Court-fee stamp as required by law and prayed for a perpetual injunction restraining the defendant the Secretary of State, from enforcing the order of the Financial Commissioner.

The trial Court held that the civil Courts had jurisdiction on a plea being taken to that effect and further that the procedure of the revenue authorities was not in accordance with the provisions of law and consequently the order was ultra vires and without authority. It therefore decreed the plaintiff's suit for declaration as prayed for by them. For some reason or other no order as to perpetual injunction was granted It may have been because on the plaintiff's prayer for an ad interim injunction the Government Advocate who appeared on behalf of the Secretary of State had undertaken not to execute the order until the Court passed a decree.

Upon appeal by the Secretary of State, only one of the plaintiffs executors was impleaded. The learned Additional District Judge evidently did not have his attention drawn to this fact at the hearing of the appeal but he noticed in his judgment that only one of the plaintiffs had been made a respondent. He held that the civil Courts had no jurisdiction to go into the question at all and that the order of the Financial Commissioner was not ultra vires on account of failure to follow any procedure because according to him no procedure at all was prescribed by .the Act. The plaintiff, who was the sole respondent before the learned Additional District Judge, has come in appeal and his counsel contends that as a joint declaratory decree had been passed in favour of all the four executors, it was not open to the Secretary of State to implead only one in the appeal to the learned Additional District Judge and that the learned Additional District Judge was therefore wrong in accepting the appeal and dismissing the plaintiffs suit.

In my opinion this contention has force. The only reason for not impleading the other three executors urged before me is that owing to an oversight the names of the other three were omitted from the appeal. The fact, however, remains that if the judgment and the decree of the learned Additional District Judge were allowed to stand, there would be two inconsistent decrees, one holding that the order of the Financial Commissioner was ultra vires and the other holding that it was intra vires, and a long series of decisions have affirmed that the Courts are reluctant to allow any such inconsistency.

Further, the counsel for the appellant has cited *Basir Sheikh* v. *Fazle Karim* (1), *Jogesh Chandra* v. *Bama Sundari Debi* (2), and *Sri Ramchandra Naik* v. *Hridoy Nath* (3), in which it was held that it was not open for a person, who had obtained a joint decree against certain persons, to implead only some of them in appeal and that the fact that he had a right to drop his case against certain of them did not affect the question. The learned counsel for the Crown has contended that if the attention of the learned Additional District Judge had been drawn to the matter he might have taken action under O. 41, R. 20 or O. 41, R. 33, Civil P. C. It is conceded that at the time of the hearing the appeal against the others would have been time barred, and it is well known that O. 41, R. 20 should only be sparingly used in such cases. Secondly, as regards O. 41, R. 33, it has been held that that also should be sparingly used and it is only in cases where full justice cannot be done or where the appeal anyhow reopens the whole of the question decided that the powers given under O. 41, R. 33, should be exercised. In any case this was for the appellate Court to decide and no section has been pointed out to me by which I can now add the other parties as parties to the appeal before the District Judge. The learned counsel for the Crown has asked for a remand for this purpose to the District Judge; but in the circumstances I am not prepared to accede to this request because I consider that S. 19 (g), Court-fees Act does not at all apply to the facts of this case. The contest in this case was as to whether certain property which had been put in Annexure B on the ground that it

(1) [1915] 19 C. W. N. 290=28 I. C. 703.
(2) [1916] 34 I. C. 138.
(3) [1919] 29 C. L. J. 461=51 I. C. 409.

was trust property was or was not trust property. Section 19 (g), Court-fees Act, has to be read with S. 19 (e) of that Act, the words used being identical, and the sections providing for similar cases. S. 19 (e) shows clearly that it refers to a wrong estimate of the property arising either from a mistake or from the fact that a certain property is not known to have belonged to the deceased. The learned counsel for the Crown contends that the words "not known at the time that some particular part of the estate belonged to the deceased" include both a mistake of fact as well as a mistake of law. If the word "estimate" does really cover both, then similarly the word "estimate" in S. 19 (h) also covers similar mistake and, therefore, the procedure is as prescribed for the revenue authorities where there is contest as to whether there is or is not such a mistake. If, as I am inclined to hold, the question does not at all include mistakes of law as in the present case, the matter is covered by S. 19 (i) and it would be for this Court to have decided before granting probate as to whether the property was or was not rightly included in Sch. B. I am fortified in this by reference to *Desu Manavala Chetty, In the matter of* (4), where it seems to have been assumed that the question whether a certain property was or was not trust property would come under S. 19 (i) and a general survey of the sections of the Act leads me to the same conclusion. But, be that as it may, in such a case even if the first view is adopted the order of the Financial Commissioner would be ultra vires. I, therefore accept this appeal and restore the decree of the first Court with costs throughout.

W.S./R.K. *Appeal accepted.*

(4) [1910] 33 Mad. 93=4 I.C. 10=4=19 M.L.J. 591 (F.B.).

A. I. R. 1928 Lahore 949

TEK CHAND AND AGHA HAIDAR, JJ.

Diala Ram—Plaintiff—Appellant.

v.

Sardha and *others*—Defendants—Respondents.

First Appeal No. 2444 of 1922, Decided on 11th September 1928, from the decree of the Sr. Sub-Judge, Mianwali, D/- 11th July 1922.

(a) *Contract Act, S. 16—Exorbitant rate of interest by itself is not sufficient to infer undue influence.*

It has been settled that the mere circumstance that a loan has been advanced at a very high or even an exorbitant rate of interest is by itself no ground for inferring undue influence. *A. I. R.* 1918 *P. C.* 48; *A. I. R.* 1918 *P. C.* 249; *A. I. R.* 1924 *P. C.* 60; and *A. I. R.* 1920 *P. C.* 65; *Foll.* [P 950 C 2]

(b) *Contract Act, S. 73—Grain debt—No time fixed for payment—Rate of grain for damages is the rate on date of bond and not date of suit.*

It is settled law that the amount due to a plaintiff either on a debt or for damages for breach of contract or in tort, is to be determined according to the rate prevailing at the date when the cause of action arises. Where, therefore, no time for repayment of a grain loan is fixed in the bond, the debt is payable on demand and consequently the quantity of grain secured by the bond must be valued at the rate prevailing on date of bond: *A. I. R.* 1921 *Cal.* 239; *A. I. R.* 1924 *Cal.* 778, *Rel. on.* [P 951 C 1]

Jagan Nath Aggarwal and *Lal Chand Malhotra*—for Appellant.

S. R. Laul and *Qabul Chand* for *Har Gopal*—for Respondents.

Tek Chand, J.—On 6th July 1916 the defendants-respondents executed a bond in favour of the plaintiff-appellant acknowledging liability for the sum of Rs. 67 received in cash, 218 maunds and 12½ seers of wheat and a certain quantity of gram (with which we are not concerned in the present litigation) and promising to pay interest at 18¾ per cent per annum on the cash amount and at Sudh Panchanti (37½ per cent per annum) on the grain. No period for the repayment of the loan was fixed.

On 21st March 1922, the plaintiff instituted the present suit admitting that the quantity of gram had been repaid and claiming Rs. 6,000 as due to him as follows:—

		Rs.	a.	p.
(a) Cash : Principal		67	0	0
Interest at 18¾ %		72	0	0
Rs. ...		139	0	0
(b) Wheat Principal 218 Mds. 12½ Seers Interest 470 Mds. 12½ Seers. Total 688 Mds. 25 Seers. at Rs. 9-4-0 per maund which was the market price on the date of the suit; ...		6,369	12	6
(c) Bhusa : 116 maunds at 1 per maund		116	0	0
Rs. ...		6,624	12	6
Remitted		624	12	6
Amount claimed ...		6,000	0	0

The defendants admitted execution of the bond but denied that it had been ex-

ecuted for consideration. They further pleaded that the rate of interest and the other conditions mentioned in the bond were penal and exorbitant and "the same constituted undue pressure." They also alleged certain repayments and stated that nothing was in reality due to the plaintiff.

The learned Senior Subordinate Judge found that the bond was for consideration, that nothing had been proved to have been repaid, but that interest claimed on the quantity of grain advanced was exorbitant. He accordingly allowed interest on cash and grain at a uniform rate of 18½ per cent per annum, and valuing the quantity of wheat thus due at 10½ seers per rupee, the rate prevailing on the date of the bond, granted to the plaintiff a decree for Rs. 1,973-13-3 with proportionate costs. He futher directed that the decretal amount be paid in six half-yearly instalments.

The plaintiff, being dissatisfied with this decree, has preferred a first appeal to this Court and prays that the decretal amount be enhanced to Rs. 6,000, the sum claimed in the plaint.

The case originally came up for hearing before Harrison and Dalip Singh, JJ. who framed the following additional issue and remanded it to the trial Court under O. 41, R. 25, Civil P. C., for enquiry and finding thereon:

Did the plaintiff not exercise undue influence over the father of the defendants and thereby induce him to execute Ex. P-1?

On the case coming up for final disposal before us, it was conceded by both sides, that there was no dispute now relating to the amount of cash advanced and the interest due thereon. The points debated before us are: (a) whether the plaintiff has succeeded in discharging the onus of the issue aforesaid, and if so at what rate should interest be allowed on the quantity of wheat for which liability had been acknowledged by the defendants in the bond and (b) whether the price of the wheat is to be calculated at the market rate on the date of the execution of the bond or on the date of the institution of the suit.

After a careful examination of the evidence led by the parties before and after remand, and, after giving full consideration to the arguments addressed by the learned counsel on both sides, we are of opinion that the plaintiff has succeeded in discharging the onus of the issue and in establishing that no undue influence was in fact exercised by him on the defendants. Both the scribe and the attesting witness gave evidence at the trial and deposed that the transaction was a perfectly straightforward one. The defendants were unable to elicit anything in cross-examination to shake the credit of these witnesses. Except for the small sum of Rs. 67 which was advanced in cash, the rest of the consideration consisted of the grain due on previous dealings between the parties, which were supported either by bonds executed by one or other of the defendants or by entries in the plaintiff's bahis thumb-marked by defendant 1. It was not alleged, much less proved, that any of these prior transactions had been brought about improperly. The rate of interest charged in these anterior dealings is the same as that mentioned in the bond, and there appears to be no reason why the defendants should have agreed to acknowledge and renew their liability so often if the transactions between them and the plaintiff had originally or at any intermediate stage been tainted with undue influence.

It is further significant that none of the defendants went into the witness-box either before or after remand, to depose to the nature of the undue influence alleged to have been exercised upon him or the circumstances in which the bond in question was executed or the previous transactions had taken place. No particulars of the alleged undue pressure were given at the trial or in the arguments before us. Indeed all that was stated in the jawab dawa was that because the rate of interest was exorbitant, the same constituted undue pressure. Now it has been settled by the highest authority that the mere circumstance that a loan has been advanced at a very high or even an exorbitant rate of interest is by itself no ground for inferring undue influence [See *Aziz Khan* v. *Duni Chand* (1), *Lala Balla Mal* v. *Ahad Shah* (2), *Raghunath Prasad* v. *Sarju Prasad* (3) and *Poosathurai* v. *Kannappa Chettiar* (4)]. Secondly there is ample

(1) A. I. R. 1918 P. C. 48.
(2) A. I. R. 1918 P. C. 249.
(3) A. I. R. 1924 P. C. 60=3 Pat. 279=51 I. A. 101 (P.C.).
(4) A. I. R. 1920 P. C. 65=43 Mad. 546=47 I. A. 1 (P. C.).

evidence on the record (see e.g., the statements of P. W. 6 Jetha Nand and P. W. 10, Thakat Das supported by a number of documents) that 37½ per cent is the usual rate charged in this locality on grain transactions. Thirdly, it is significant that the defendants' own witnesses, D. W. 1 Muhammad Hayat, D. W. 2, Faiz Ahmad and D. W. 3, Ghulam Muhammad, admit that the rate normally charged on such transactions is 25 per cent. For the foregoing reasons we must hold that the transaction was not brought about by undue pressure, that the terms of the contract must be given effect to and interest allowed at the rate specified in the bond.

The next question for decision is the calculation of the price of wheat. Both counsel admit that the quantity due is 218 maunds 12½ seers as principal and 470 maunds 12½ seers as interest, as stated already, the point in controversy is whether (as claimed by the plaintiff) the value is to be fixed at Rs. 9 per maund, the rate prevailing in March 1922 when the suit was brought, or (as allowed by the lower Court) at 10½ seers a rupee, the market value of July 1916, when the bond was executed. After fully considering the matter and having regard to the terms of the bond and the averments in the plaint, we are of opinion that the appellant's contention in this behalf must fail. As stated already no time for repayment of the loan had been fixed in the bond. It was a debt payable on demand and consequently, the entire, both cash and grain, became due immediately on the execution of the bond. Indeed, as stated in para. 5 of the plaint itself, the cause of action accrued to the plaintiff on 6th July 1916, the date on which the bond was executed. This being so, it is conceded by Mr. Jagan Nath for the appellant that the principal quantity of wheat secured by the bond must be valued at the rate prevailing on that date. It is settled law that the amount due to a plaintiff either on a debt or for damages for breach of contract or in tort, is to be determined according to the rate prevailing at the date when the cause of action arose. For an application of this principle : see *Owners of steamship Celia* v. *Owners of Steamship Volturno* (5), *Dakhari Tea Co Ltd.*, v. *Assam-Bengal Ry. Co. Ltd.* (6) and *Muller Maclean and Co.* v. *S. M. Ataulla and Co.* (7). In this view of the case, there can be no doubt that interest due on the "money-equivalent" of the quantity of grain advanced should be calculated at the rate allowed by us (37½ per cent) but not in grain, valued at the market rate prevailing on the date of suit. We are, therefore, of opinion that the lower Court was right in calculating the value of wheat at 10½ seers per rupee which, according to the Punjab Gazette for 1916, was the rate prevailing in the Mianwali market at the time.

The result is that the plaintiff is entitled to a sum of Rs. 889-7-0 as additional interest on the grain portion of the transaction over and above the amount allowed by the lower Court.

In the grounds of appeal objection was also taken to the lower Court having fixed instalments: but it was stated by Mr. Jagan Nath for the appellant and not denied by Mr. S. R. Laul for the respondents that, though the dates on which the various instalments fell due had passed, not a single pie had been paid so far by the defendants. They having failed to avail themselves of the concession allowed by the lower Court, it is not necessary for us to go into this question. We accordingly accept the appeal in part and pass a decree for is 2,663-4-3 with proportionate costs in both Courts. This amount will bear interest at six per cent per annum from the date of the decree of the lower Court till realization.

R.K. *Appeal accepted in part.*

(5) [1921] 2 A. C. 544.

(6) A. I. R. 1921 Cal. 239=48 Cal. 886.
(7) A. I. R. 1924 Cal. 778=51 Cal. 320.

A. I. R. 1928 Lahore 951

JAI LAL, J.

Emperor—Petitioner.

v.

Dhana Lal—Accused—Respondent.

Criminal Revn. No. 1765 of 1927, Decided on 11th May 1928, reported by Sess. Judge, Delhi, on 18th October 1927.

Criminal trial—Sentence — Enhancement of —High Court will interfere only where sentence awarded by trial Court is grossly inadequate in circumstances of the case — Criminal P. C., S. 439.

The High Court will not ordinarily enhance the sentence merely on the ground that if it were seised of the trial of the accused, it would

have awarded a longer sentence of imprisonment than that awarded by the Magistrate, but it will interfere only where the sentence awarded by the trial Court is grossly inadequate : 7 *P.R.* 1889 *Cr.*; 9 *A. I. Cr. R.* 504; and *A. I. R.* 1928 *Lah.* 926; *Ref.* [P 952 C 2]

Abdul Rashid—for the Crown.

Abdul Aziz and *Moti Sagar*—for Accused.

Order—Dhana Lal, respondent, was convicted by a Magistrate of the First Class under Ss. 420 and 468, I. P. C, for having cheated the Allahabad Bank Limited and the Central Bank of India Limited in respect of Rs. 34,000. In the case of Allahabad Bank he has been charged and convicted on three counts. In the case of Central Bank of India he has been convicted on one count. The sentence in the Allahabad Bank case in each of the counts is six months' rigorous imprisonment, to run consecutively and in the case of the Central Bank of India he has been awarded a similar sentence. The sentences in both the cases have been ordered to run concurrently. The convict has further been directed to pay fine of Rs. 200 on each count. This fine, if recovered, has been directed to be paid to the banks concerned in the manner mentioned in the judgment of the Magistrate. It is thus to be observed that the substantive term of imprisonment to which the convict has been sentenced is eighteen months' rigorous imprisonment.

An appeal was preferred by the convict to the Sessions Judge of Delhi who affirmed the conviction and dismissed the appeal. At the same time an application was made on behalf of the Crown to enhance the sentence. The learned Sessions Judge has referred the case to this Court with a recommendation that the sentence be enhanced so as to make it at least seven years' rigorous imprisonment.

It appears that before the reference by the Sessions Judge was received in this Court the convict applied for revision of the order of the Sessions Judge affirming his conviction. The petition was dismissed in limine by a learned Judge of this Court. The reference by the Sessions Judge was then placed before me for hearing and a claim was made on behalf of the respondent that he was entitled to show cause against his conviction. It was, however, contended on behalf of the Crown that this right the convict had lost by virtue of the dismissal of his petition for the revision of his conviction in this Court. I referred this question for decision by a Division Bench and the opinion of the learned Judges who heard that reference is that the convict is not entitled to show cause against his conviction. I must, therefore, determine the question of sentence accepting as correct the finding of the Court below that the respondent has committed the offence of which he has been convicted.

It appears from the judgment of the learned Sessions Judge that the convict has been guilty of systematic cheating for a long period and that the total amount in respect of which he has cheated the banks is something like two lacs against which it is alleged by his counsel that he left stationery and other property valued at Rs. 70,000 or Rs. 80,000 which has now deteriorated in value owing to the action of the banks in getting the police to take charge of the same and its consequent deterioration when stored by the police. It is also contended on behalf of the respondent that the time that has elapsed since the commission of the offence and the starting of the prosecution, and also the delay that has occurred in the completion of the trial, during most of which period the petitioner was in custody, should be taken into consideration. Finally the learned counsel cited some authorities of this Court which lay down that this Court will not ordinarily enhance the sentence merely on the ground that if it were seised of the trial of the accused it would have awarded a longer sentence of imprisonment than that awarded by the Magistrate but that this Court will interfere only where the sentence awarded by the trial Court is grossly inadequate.

Counsel for the Crown assents to this proposition and indeed it is not capable of being controverted. I have, therefore, to decide whether having regard to the principles laid down in the various authorities this is a fit case in which the sentence should be enhanced.

The authorities cited were *Empress* v. *Chuni Lal* (1), *Khana* v. *Emperor* (2) and *Emperor* v. *Khairati Lal* (3). It is not necessary for me to refer to these authorities in any detail as they depend on the peculiar facts proved in each. In considering the question whether the

(1) [1889] 7 P. R. 1889 Cr.
(2) [1927] 9 A. I. Cr. R. 504.
(3) A. I. R. 1928 Lah. 926.

sentence awarded by the Magistrate in this case was grossly inadequate, I have to bear in mind the fact that the accused created confidence with the banks in his favour by deceitful means and made them to advance to him large amounts on the security of goods which, as a matter of fact, did not exist. He started bogus firms in different towns to which nominal goods were despatched and railway receipts in respect thereof were discounted by the banks. The accused finally took delivery of the goods himself and again sent them to some other or the same bogus firm and took an advance from the banks against the railway receipts in the same manner. Finally, during the course of similar transactions which continued for a considerable time he cheated the banks to the extent of Rs. 34,000 in connexion with the four transactions alone in respect of which he has been convicted. I have given due weight to the considerations suggested by the respondents' counsel.

I consider that under the circumstances the sentence of six month's rigorous imprisonment on each count and the total imprisonment of eighteen months is grossly inadequate in this case. At the same time in the case relating to the three counts in respect of which he has been convicted for cheating the Allahabad Bank, the learned trial Magistrate could not award a sentence of more than four years' rigorous imprisonment i. e., double the term of imprisonment that a Magistrate of the First Class is ordinarily competent to award. I consider that it is a fit case in which the maximum term that the Magistrate was competent to award should have been awarded. Accepting therefore, this reference I enhance the sentence passed on Dhana Lal in the case relating to the three counts on which he has been convicted for cheating the Allahabad Bank Limited to four years' rigorous imprisonment, and in the case relating to the Central Bank of India Limited to two years' rigorous imprisonment. As directed by the Magistrate the sentence in both the cases shall run concurrently. The sentence of fine is maintained.

N.K. *Sentence enhanced.*

A. I. R. 1928 Lahore 953

DALIP SINGH, J.

Karam Chand—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 499 of 1928, Decided on 25th May 1928, from an order of Sess. Judge, Sialkote, D/- 3rd February 1928.

Criminal P. C., S. 540—Prosecution witness examined after the closing of defence—Procedure is bad and trial is vitiated—Criminal trial—Criminal P. C. S. 252.

Where a witness is examined as a prosecution witness after the whole of the defence evidence has been recorded, the procedure is contrary to the provisions of S. 252. Such a procedure though not objected to causes injustice to the accused and the whole trial is vitiated : *A. I. R. 1927 P. C. 44* and *25 Mad. 61, Rel. on.* [P 953 C

Shamair Chand—for Petitioner.

J. L. Kapur for *Government Advocate*—for the Crown.

Judgment.—The petitioner in this case was convicted under S. 457, I. P. C., and sentenced to 18 months' rigorous imprisonment by the learned Magistrate. On appeal, the learned Sessions Judge reduced the sentence for reasons which are not at all clear to me, to one year's rigorous imprisonment. In revision, I find on the record that one Asmat Ullah, who appeared as P. W. No. 5, was examined as a prosecution witness after the whole of the defence evidence had been recorded. This remarkable procedure seems not to have been objected to by anybody at the time. It is, however, clear that it is contrary to the provisions of the Code, see S 252 et seq. I must, therefore, hold that it vitiates the trial following *Abdul Rahman* v. *Emperor* (1) and *Subrahmania Ayyar* v. *King-Emperor* (2) Privy Council ruling, where the test laid down is in the case of a procedure prohibited by the Code that it might possibly have occasioned injustice. Obviously such a procedure might possibly occasion the greatest injustice to the accused. I, therefore, set aside the conviction and order that the trial shall proceed leaving the prosecution evidence as it stands up to P. W. No. 4. After that the evidence of P. W. No. 5 and the Court witnesses, C. Ws.

(1) A. I. R. 1927 P. C. 44=5 Rang. 63=54 I. A. 96 (P. C.).

(2) [1902] 25 Mad. 61=28 I.A. 257=11 M.L.J. 293=8 Sar. 160 (P.C.).

Nos. 1 and 2 will be taken and then the accused will be called upon to enter on his defence and may proceed to produce such evidence as he chooses, after which the Magistrate will give a finding on the evidence so recorded.

A.L./R.K. *Retrial ordered.*

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* A. I. R. 1928 Lahore 954 (1)

DALIP SINGH, J.

Mt. Rahmate—Defendant—Appellant.

v.

Nikka and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 2948 of 1927, Decided on 18th June 1928, from a decree of Addl. Dist. Judge, Lyallpur, D/- 18th August 1927.

* *Mahomedan Law—Marriage—Person renouncing Islam and converting into Christianity—Marriage under Mahomedan law is dissolved—Suit for restitution of conjugal rights—Motive of conversion whether genuine or a device to have the marriage dissolved is immaterial.*

Where a person who has formally renounced faith in Islam and has gone through the rites of baptizm, marriage under the Mahomedan law is dissolved by the formal recognition of admission into Christianity. In a suit for restitution of conjugal rights it is immaterial whether motive of conversion is genuing or a device to have the marriage dissolved. [P 954 C 1, 2]

B. P. Khosla for *Ghulam Rasul*—for Appellant.

Judgment.— In this case the plaintiff sued the defendant for restitution of conjugal rights. The defendant raised a plea that the marriage had been dissolved by her conversion to Christianity. The trial Court held on the evidence produced that the defendant had been duly converted to the Christian religion and baptized, therefore, her marriage was dissolved, the onus of the issue being on the plaintiff. It, therefore, dismissed the suit.

On appeal the learned Additional District Judge held that the conversion was not a substantial one and was nothing but a trick and. therefore, decreed the suit.

It seems to me that it is not within the province of the Court to enquire into the genuineness or otherwise of the conversion. So long as the defendant has formally renounced her faith in Islam and has gone through the rite of baptizm, the formal recognition of her admission into Christianity, the marriage must be held to have been dissolved according to law, and it is immaterial whether her motive is a genuine conversion, or a device to have the marriage dissolved, so far as I can see.

I, therefore, accept the appeal and dismiss the plaintiff's suit. I leave the parties to bear their own costs.

A.L./R.K. *Appeal allowed.*

A. I. R. 1928 Lahore 954 (2)

TEK CHAND AND JOHNSTONE, JJ.

Abdul Rahman — Defendant—Appellant.

v.

Ghulam Ali and *others* — Plaintiffs — Respondents.

First Appeal No 867 of 1923, Decided on 7th May 1928, from decree of Sr. Sub-Judge, Rawalpindi, D/- 26th February 1923.

(a) *Custom (Punjab) — Member of agricultural tribe carrying on contract work in another town—Presumption of applicability is not rebutted.*

The mere fact that a certain member of an agricultural tribe has given up agriculture as a profession in his native village and carries on contract work in some other town, is by itself insufficient to rebut the presumption that he was governed by customary law. [P 956 C 2]

(b) *Civil P. C., S. 34—Grant of interest is a matter of discretion.*

The grant of interest on any sum decreed is a matter within the discretion of the Court. [P 955 C 2]

Govind Das and *Des Raj Sawhny*—for Appellant.

Niaz Muhammad and *Muhammad Amin*—for Respondents.

Judgment.—Abdul Rahman, defendant-appellant, carried on business in partnership with Kazim Ali, brother of plaintiffs 1 to 4 and husband of plaintiff 5. The partnership owned considerable cash and immovable property. Kazim Ali died sonless on 15th June 1914. On 11th September 1914, his widow Mt. Allah Rakhi executed a registered deed of relinquishment (Ex. P-1) in favour of Kazim Ali's brothers, plaintiffs 1 to 4 and Nur Ali (since deceased) admitting that she had only one sixth share in the property left by Kazim Ali and that his five brothers owned the remaining five-sixths. Subsequently on 2nd December 1914, a deed of dissolution of partner-

ship was executed between Abdul Rahman on the one side and Nur Ali acting for himself and as the agent of his brothers plaintiffs 1 to 4 and Mt. Allah Rakhi, plaintiff 5, on the other. By this deed the properties belonging to the partnership were divided between the contracting parties, Abdul Rahman being given the southern portion of two houses numbering 317 and 318 situate in Rawalpindi Cantonment and Kazim Ali's heirs being given one-half share of house No. 317 and the eastern portion of house No. 318. This deed was presented for registration by Abdul Rahman, but on objection being raised by Nur Ali registration was refused. Abdul Rahman soon after instituted a suit under S. 77, Registration Act, to have the deed compulsorily registered. This suit remained pending for nearly six years as some of the parties were serving under "war conditions". Eventually on 1st March 1921, the suit was decreed and the document registered on 30th March 1921.

On 28th July 1921, the plaintiffs instituted the present suit for possession of house No. 424 (of which the previous number was 317), alleging that this house had fallen to their share according to the deed of dissolution, but that Abdul Rahman had continued to be in wrongful possession of it as well as of the adjoining house No. 425 (=318 previous number). They also claimed an account of the mesne profits up to the date of the suit and tentatively valued them at Rs. 1,366. In addition to this a prayer was made for mesne profits from the date of suit till realization and costs.

The suit was resisted by Abdul Rahman on various pleas, only two of which are material for the purpose of the present appeal, namely; (1) that plaintiffs 1 to 4 were not the heirs of Kazim Ali in the presence of his widow, and plaintiff 5 had no locus standi to sue and (2) that house No. 424 was not the property of the partnership but had been purchased by the defendant with his own funds and had been in his exclusive possession since 1908. It was also pleaded at a later stage that Kazim Ali was not governed by custom but by Mahomedan law.

The learned Subordinate Judge decided all these points against the defendant and passed a decree for possession of house No. 424/317 together with Rs. 720 as mesne profits up to the date of the institution of the suit. He also directed that this sum of Rs. 720 shall carry interest at 6 per cent. per annum from the date of the suit till that of realization, and that the plaintiffs shall further get mesne profits at the rate of Rs. 20 per mensem till the defendant makes over possession of the house to them. Against this decree the defendant has preferred a first appeal to this Court and we have heard Mr. Govind Das on his behalf at length.

The first contention raised is that Kazim Ali, though belonging to the Bhatti caste of Rajput, was a resident of the town of Rawalpindi and was carrying on contract work, and, therefore, must be held to be governed by Mahomedan law and not by custom. After giving full consideration to the arguments of Mr. Govind Das in this behalf, we are of opinion that the lower Court has come to a correct conclusion in holding that the appellant has failed to discharge the onus which undoubtedly lay upon him to prove that Kazim Ali was governed by Mahomedan law. It is admitted that he originally belonged to a village called Bijnial, which is owned almost exclusively by Bhatti Rajputs. The two lambardars of the village belong to the same tribe, and some of the plaintiffs had been actually tilling land. There is evidence on the record that Bhatti Rajputs of this village form a compact village community and have been notified as an agricultural tribe under the Punjab Alienation of Land Act. The mere fact that a certain member of this tribe had given up agriculture as a profession and carried on contract work in the town of Rawalpindi is by itself insufficient to rebut the presumption that he was governed by customary law. The evidence produced by the defendant in support of his contention consists of the oral testimony of a few witnesses, who were unable to cite any instance in which customary law had not been followed. This contention, therefore, fails and is overruled.

Mr. Govind Das next argues that if the parties are governed by custom, plaintiffs 1 to 4, who are the brothers of Kazim Ali, are not his heirs in the presence of his widow Mt. Allah Rakhi, plaintiff 5 and of his daughter who would succeed Mt. Allah Rakhi on her death. Mt. Allah Rakhi, however, has admitted

that she owned only one-sixth share in the property in dispute and has relinquished her rights in the remaining five-sixths in favour of the brothers of her husband and there is no dispute between the plaintiffs 1 to 4 and plaintiff 5 inter se as to their respective shares in the property left by Kazim Ali.

Further, it is not necessary to pursue this matter at any length because Abdul Rahman himself had, in the deed of dissolution (Ex. P 6) executed on 2nd December 1904, and registered at his instance after a great deal of litigation in 1921, admitted plaintiffs 1 to 5 and Nur Ali deceased as entitled to the share of Kazim Ali in the partnership property and had entered into a settlement with them as his representatives. The plaintiffs are suing on the basis of this deed and there is no dispute inter se between them as to their respective rights. In these circumstances we are of opinion that the suit has been rightly instituted by plaintiffs 1 to 5 jointly.

Mr. Govind Das has not supported before us the plea which was put forward on behalf of his client in the Court below that the house in dispute belonged exclusively to him, nor has he contended that he had acquired any title in it by adverse possession.

His main contention, however, has been that according to the deed of dissolution the plaintiffs had been given one-half of house No. 424/317 and the eastern portion of house No. 425/318, whereas they had instituted the suit in respect of the whole of No. 424, claiming no share in No. 425. He argues, therefore, that the lower Court should not have passed a decree in favour of the plaintiffs in respect of the whole of house No. 424. We find, however, that in the jawabdawa no plea was raised by the defendant that the plaintiffs were entitled only to one-half of house No. 424 and that the suit as to the whole was not maintainable. Nor did the defendant, after the lower Court had passed a decree for the entire house No. 424, raise this point specifically in the grounds of appeal filed in this Court. We cannot, therefore, allow the matter to be agitated for the first time at this stage. The two houses adjoin each other and it is quite possible that some adjustment has been made by the parties as to the portions held by each. It is not shown on the record that house No. 424 is more valuable than house No. 425, the whole of which continues to be owned and possessed by the defendant-appellant, as a result of the decree of the lower Court.

The last point taken is that the lower Court ought not to have allowed interest on mesne profits Rs. 720. The grant of interest on any sum decreed was, however, a matter within the discretion of the lower Court under S. 34, Civil P. C., and we cannot say that this discretion has not been rightly exercised in this case.

Accordingly the appeal fails on all the points and we dismiss it. Having regard to all the circumstances of the case we leave the parties to bear their own costs in this Court.

W.S./R.K. *Appeal dismissed.*

** A. I. R. 1928 Lahore 956

ADDISON, J.

Amar Nath—Defendant—Appellant.

v.

Mt. Ved Kaur—Plaintiff—Respondent.

Second Appeal No. 485 of 1928, Decided on 24th September 1928, from decree of District Judge, Amritsar, D/- 2nd February 1928.

** *Hindu law — Succession — Bandhus — Mitakshara School of Hindu law prevailing in the Punjab—Father's sister is not a Bandhu or an heir.*

According to the Mitakshara School of Hindu law which prevails in the Punjab, father's sister is not a "Bandhu" or an heir. She is a total stranger and is not entitled to sue: 161 *P. R.* 1919 and 163 *P. W. R.* 1915, *Dist.*; *A. I. R.* 1921 *Lah.* 149 and 1 *Lah.* 608, *Ref.*

[P 957 C 2]

Shuja-ud-Din—for Appellant.

L. C. Mehra—for Respondent.

Judgment. — The plaintiff is the father's sister of the deceased. The defendant claimed to be an adopted son of the deceased and that the deceased made a will in his favour. In a contest for a succession certificate the defendant was successful. The plaintiff then sued him for recovery of the amount on the ground that she was heir, being the father's sister. The Courts below have not believed the defendant's allegations and held that the plaintiff is the father's sister of the deceased and, therefore, his heir. They have, accordingly, decreed

the suit and the defendant has preferred this second appeal.

The only question that arises in it is whether the father's sister is an heir according to the Mitakshara School of Hindu law which prevails in the Punjab. According to the books and the reports it is clear that in Bombay and Madras both the sister and the father's sister are female bandhus in Madras and are also heirs in Bombay where the Mayukha prevails, but that where the Benares School of Hindu law is in force neither of these persons is an heir or a bandhu. On this point Mayne's Hindu Law is completely against the father's sister, and the sister and the same view is taken in Mulla's Hindu law. At p. 17 of the latter work only five females according to the Benares School are recognized as heirs, namely, the widow, daughter, mother, father's mother and father's father's mother. The bandhus are given at p. 49. They do include the father's sister's son but not the father's sister or the sister. At pp. 74 and 75, however, it is stated that both these are heirs according to the Bombay and Madras views.

It is true that in *Nanak Gir* v. *Mt. Kishen Kaur* (1), it was held that under Hindu law sisters could succeed as bandhus. The same Judges, however, who decided that case held in *Tirath Ram* v. *Mt. Khan Devi* (2), that according to the Mitakshara law the plaintiff who was a sister was not entitled to succeed against the defendant who was the daughter's son. The previous ruling was not dissented from but only distinguished. Another Bench of this Court in *Mt. Sujan Devi* v. *Jagiri Mal* (3), took the view that the later ruling dissented from the previous ruling though this had not been specifically said. It would appear that the 1919 decision is the only decision which has recognized sisters as bandhus according to the Benares School of the Mitakshara. Only one other ruling need be referred to, that is, *Sunder Singh* v. *Mt. Gurdevi* (4). There it was held that the plaintiffs who were the father's sister and her sons were entitled to inherit as bandhus under the Mitakshara School of Hindu law and could therefore contest the alienation. In that ruling, apart from the Madras cases which do not apply *Nanhi* v. *Gouri Shankar* (5) was relied upon. It, however, is only an authority for the proposition that the fathers sister's son is a bandhu. This has been settled law for very many years. I do not think that it can be said that the question whether the father's sister was a bandhu was clearly before that Bench and it was unnecessary to decide it as the other plaintiffs who were her sons were clearly bandhus.

For the reasons given I hold that the father's sister is not a bandhu or an heir and she must thus be held to be a total stranger who is not entitled to sue. In these circumstances I accept the appeal and dismiss the suit but I only allow the appellant his costs in this Court. Parties will bear their own costs in the Court below.

A.L./R.K. *Appeal accepted.*

(1) [1919] 161 P. R. 1919=58 I. C. 815.
(2) A. I. R. 1921 Lah. 149=1 Lah. 588.
(3) [1920] 1 Lah. 608=59 I. C. 124.
(4) [1915] 163 P. W. R. 1915=31 I. C. 27.
(5) [1905] 28 All. 187=2 A. L. J. 654=(1905) A. W. N. 242.

A. I. R. 1928 Lahore 957

TEK CHAND, J.

Fateh Muhammad — Plaintiff — Appellant.

v.

Ghulam Muhammad and *another*—Defendants—Respondents.

Second Appeal No. 2240 of 1927, Decided on 23rd June 1928, from decree of District Judge, Rawalpindi, D/- 9th June 1927.

Co-sharer — Adverse possession — Suit by transferee of cosharer after 12 years—No ouster of transferor or transferee—Suit is within time.

A suit instituted by transferee of a cosharer for possession and partition, after 12 years from the date of transfer, is not barred by time, the possession of one cosharer being on behalf of all the cosharers or their transferees in the absence of express ouster: *A. I. R.* 1918 *P. C.* 1, *Rel. on* : *A. I. R.* 1924 *All.* 131, *Dist.* [P 958 C 2]

Ram Chand Manchanda—for Appellant.

Muhammad Monir—for Respondents.

Judgment.—Two brothers Hayat and Allah Dad jointly owned a house. On 18th June 1900, Allah Dad sold his undivided half-share in it to his son-in-law Mehdi by a registered sale-deed ; but the other brother Hayat continued to

be in possession of the whole. Mehdi died a few years later and was succeeded by his son Fateh Muhammad, appellant who was a minor at that time. In 1925 the descendants of Hayat began to rebuild the house and a few months later Fateh Muhammad instituted this suit against the descendants of Hayat, claiming possession of one-half of the house by partition. The defendants denied that Fateh Muhammad, or his vendor Allah Dad had a share in the house, and also urged that the suit was barred by limitation.

Both the Courts below have concurrently found that the house originally belonged jointly and in equal shares to Hayat and Allah Dad and that Allah Dad had validly sold his half-share in it to Mehdi, the father of the plaintiff. But they have dismissed the suit holding it to be barred by time.

On second appeal it was not denied for the respondents that the title in the half-share in question is with the plaintiff. The only point argued was whether the suit is within time.

Now as stated above Hayat and Allah Dad were two brothers, who jointly owned the house, and they being cosharers, Hayat's exclusive possession of it could not, without any overt act, have extinguished the rights of Allah Dad. Therefore, if Allah Dad had been alive he, or if he were dead and his share had descended to his legal heirs, they would still be cosharers in the house and in the absence of any denial of their title at a time beyond twelve years from the suit, their rights would not have become barred. If this be so, I fail to see how the position of a transferee for valuable consideration of Allah Dad's undivided half-share should in the circumstances disclosed on the record be different. From the moment of the sale he stood in the shoes of his transferror and became a cosharer in the house with Hayat. In view of the fact that the sale-deed was duly registered and the vendee was the son-in-law of Allah Dad, Hayat must be fixed with the knowledge of the transfer. He never denied the title of the vendee or his son, the plaintiff, nor did he ever claim the whole house as exclusively his own.

In support of his contention, the respondents' counsel has referred me to a single Bench ruling of this Court reported as *Mahadeo Prasad* v. *Emperor* (1) the head-note of which is certainly in his favour. On sending for the record of the case from the office and examining it I find that a Letters Patent Appeal (No. 70 of 1924) was preferred against the judgment of the learned Judge, and was dismissed on the finding separately recorded by the learned Judges of the Letters Patent Bench that the transferror had himself no subsisting interest in the property at the time of the sale. This being so, his transferee could not be in a better position than himself and claim a share in the property. On these facts, the case cited is no authority in support of the respondents' contention. The plaintiff and Hayat being cosharers and no ouster of himself or his transferee having been proved the possession of the respondents must be presumed to be that of the appellant. *Hardit Singh* v. *Gurmukh Singh* (2). The suit is consequently within time.

For the foregoing reasons, I accept the appeal and setting aside the decree of the learned District Judge pass a preliminary decree for possession by partition of one-half share in the house in dispute in favour of the plaintiff-appellant against the defendants-respondents, but leave the parties to bear their own costs throughout.

The defendants have admittedly rebuilt the house and are entitled to be reimbursed for the amount spent on the plaintiff's half-share. The total cost of these improvements was estimated by the local Commissioner appointed by the Subordinate Judge at Rs. 483-3-0, and this estimate was accepted by both parties as correct. The Court, at the time of passing the final decree, should apportion this sum on the parts of the house allotted to each party and order the plaintiff to pay his proportionate share of the improvements before he can get actual possession of it.

W.S./R.K. *Appeal allowed.*

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(1) A. I. R. 1924 All. 131=45 All. 690.
(2) A. I. R. 1918 P. C. 1.

* A. I. R. 1928 Lahore 959

JAI LAL, J.

Mamman—Defendant—Appellant.

v.

Kallu Mal—Plaintiff—Respondent.

Second Appeal No. 3229 of 1927, Decided on 8th June 1928, from decree of District Judge, Delhi, D/- 30th July 1927.

* (a) *Adverse possession—Relationship of landlord and tenant alleged to be only ground of permissive possession — Relationship not established—Possession is adverse.*

Where the relationship of landlord and tenant was not found to exist between the parties and that being the only ground on which defendant's possession was alleged to have been permissive in its inception, it must be assumed that it was in defendant's own right and therefore adverse to the plaintiff: *A. I. R.* 1926 *Lah.* 13; *A. I. R.* 1927 *Lah.* 70; *A. I. R.* 1926 *Mad.* 177; *A. I. R.* 1927 *All.* 799; *A. I. R.* 1927 *Lah.* 777; and 41 *All.* 669; *Dist.* [P 959 C 2]

(b) *Possession—In absence of evidence it is presumed to be in one's own right.*

Ordinarily a person in possession of property must be deemed to be so in his own right unless this presumption can be displaced by proving facts which are sufficient to rebut it.

[P 959 C 2]

Shamair Chand—for Appellant.

Sardha Ram—for Respondent.

Judgment.—In 1926 Kallu Mal, respondent instituted a suit against Mamman, appellant for ejectment of the latter from a house and for the recovery of the arrears of rent from him on the allegation that he was his tenant. This suit was dismissed as the Court found that the relationship of landlord and tenant did not exist between the parties.

Thereupon the suit out of which this second appeal has arisen was instituted by Kallu Mal for possession of the house and also for recovery of Rs. 25-4-3 as mesne profits calculated at the same rate as the rent was alleged in the former plaint to have been fixed. The trial Court dismissed the suit but the learned District Judge on appeal has decreed it and the defendant has come up to this Court on second appeal.

It is to be borne in mind that in the present plaint also the plaintiff states that the defendant was originally his tenant, and that his cause of action has arisen on the denial by the defendant of his title in the previous suit. The learned District Judge has found, and this finding is not contested before me by either party, that the plaintiff was originally the owner of the house and that the defendant has been in possession thereof for about 30 years. He has reversed the decree of the trial Court on the ground that mere non-payment of rent does not amount to adverse possession and that the respondent's (defendant's) possession has never been more than permissive.

In my opinion the view of the learned Judge is not correct on the facts found by him. It having been found that the relationship of landlord and tenant did not exist between the parties and that being the only ground on which the defendant's possession was alleged to have been permissive in its inception, it must be assumed that it was in defendant's own right and, therefore, adverse to the plaintiff. Ordinarily a person in possession of the property must be deemed to be so in his own right unless this presumption can be displaced by proving facts which are sufficient to rebut it.

The counsel for the respondent cited *A. I. R.* 1926 *Lah.* 13, *A. I. R.* 1927 *Lah.* 70, *Bhadrayya* v. *Jaggaraju* (1), *Ram Surat Singh* v. *Badri Narain Singh* (2), *Dullah* v. *Mt. Sardarani* (3) and *Jai Chand* v. *Giridar Singh* (4) and also several other cases all of which, however, are distinguishable from the present case. The cases are clearly distinguishable where the question is whether Art. 142 or 144, Sch. 1, Lim. Act, applies or whether it is for the plaintiff to prove his possession within 12 years of the suit or the defendant has to prove his adverse possersion for more than 12 years. There is further a clear distinction between this case and the cases where the factum of the defendant's possession is in issue or where the Courts have, in the absence of clear proof to the contrary, held that possession must be deemed to be with the lawful owner of the property in dispute. In the present case the defendant is admittedly in possession and the District Judge has found that this possession has continued for about 30 years. The real question to determine, therefore, is the nature of the defendant's possession.

The cases cited are no authority for the proposition that the defendant's possession if proved to have continued for

(1) A. I. R. 1926 Mad. 177.
(2) A. I. R. 1927 All. 799.
(3) A. I. R. 1927 Lah. 777.
(4) [1919] 41 All. 669=52 I. C. 966=17 A. L. J. 814.

more than 12 years must in every case be deemed to be under the person in whom the title in the property vests. In my opinion if the defendant succeeds in proving his exclusive possession for more than 12 years, he is entitled to a decree unless the plaintiff can prove affirmatively that such possession was derived from him or was with his permission. In this case, therefore, the defendant having proved his possession for more than 30 years and the plaintiff having failed to prove the permissive nature of such possession, the suit should have been dismissed.

I accept the appeal, set aside the decree of the learned District Judge and restore that of the trial Court with costs throughout.

W.S./R K. *Appeal allowed.*

A. I. R. 1928 Lahore 960

JAI LAL, J.

Har Kaur—Plaintiff—Petitioner.

v.

Chamba—Defendant—Respondent.

Civil Revn. No. 84 of 1928, Decided on 4th October 1928, from the order of the Addl. Dist. Judge., Ferozepore, D/- 18th October 1927.

(a) *Civil P. C., O. 25, R. 1—Pauper suit allowed—Security for costs demanded—No exceptional circumstances disclosed for demanding security—Order to furnish security is a material irregularity—Ground that the claim is based on oral evidence is irrelevant.*

Where a plaintiff is allowed to sue in forma pauperis but is ordered to furnish security on an application by defendant for costs without exceptional circumstances being disclosed, the order for furnishing costs is a material irregularity as virtually he is deprived of the benefit of the order since it is almost impossible to furnish security. The ground that the case is based on oral evidence is irrelevant at this stage. 12 *C. W. N.* 163, *Expl.*; *A. I. R.* 1923 *Rang.* 244, *Appr.* [P 960 C 2]

(b) *Civil P. C., O. 25—Scope.*

The provisions of O. 25 are very wide and circumstances should be taken into consideration for ordering security to be furnished. [P 960 C 2]

Duni Chand—for Petitioner.

Gullu Ram—for Respondent.

Judgment.—The petitioner was permitted to sue in forma pauperis and on the application of the defendant the trial Court directed her to give security for the costs of the defendant under O. 25, R. 1, Civil P. C. This security not having been furnished according to the directions of the Court, her suit was dismissed and an application to restore the same was also dismissed. This petition for revision has been presented by the plaintiff and it is contended on her behalf that the Court is not legally competent to direct a plaintiff, who has been permitted to sue in forma pauperis to furnish security under O. 25, and reliance is placed on *Hafizan* v. *Abdul Karim* (1), in which it is laid down that the Court has no power to direct a pauper plaintiff to give security under O. 25, R. 1, Civil P. C, as such an order would practically mean depriving the plaintiff of the benefit of the order permitting him to sue as a pauper. I agree with this last remark. But, as at present advised, I am not prepared to hold as the Calcutta High Court has done, that the Court has no legal power to direct a plaintiff under such circumstances to furnish security. The provisions of O. 25 are wide enough to cover the case of every plaintiff.

In my opinion the view taken by the Rangoon High Court in *Ma Saw* v. *Mg. Shwe Gon* (2) is more reasonable. It has been held in that case that except in exceptional cases security should not be taken from a plaintiff, who has been permitted to sue in forma paupris. In the present case no exceptional circumstances have been disclosed to entitle the Court to demand security. The plaintiff applied for permission to be allowed to sue as a pauper because she had no immovable property sufficient to pay Court-fee stamp on the plaint, and ordinarily it would be almost impossible for her to furnish security. The order passed by the trial Court virtually deprives her of the benefit of the order made in her favour under O. 33. The ground mentioned in the order dismissing the application for restoration that the plaintiff's case rested on oral evidence is irrelevant at the present stage. I consider that in this case the Court below has acted with material irregularity in directing the plaintiff to furnish security.

I accept this petition and setting aside the order of the Court below restore the plaintiff's suit to its original number and remand it to the trial Court to proceed with it in accordance with law. There will be no order as to the costs of these proceedings.

A.L./R.K. *Case remanded.*

(1) [1908] 12 C. W. N. 163=7 C. L. J. 312.
(2) A. I. R. 1923 Rang. 244.

A. I. R. 1928 Lahore 961

SHADI LAL, C. J.

Emperor—Petitioner.

v.

Shahzad Ahmad—Accused — Respondent.

Criminal Revn. No. 1580 of 1928, Decided on 19th October 1928, reported by the Dist. Mag., Karnal, D/- 21st August 1928.

Criminal P. C., S. 439—High Court can interfere with sentence inflicted by lower Court, if it is manifestly inadequate — Additional sentence can be imposed even though the accused served out the sentence inflicted upon—Conviction under S. 409, Penal Code—Sentence of one day's imprisonment till the rising of Court and fine of Rs. 100 was held inadequate and enhanced.

The Court of revision is slow to interfere, where interference involves the imprisonment of a person already discharged from jail, but that circumstance alone cannot be allowed to operate as an insuperable obstacle to the enhancement of a sentence. The test is that the Court should not interfere if the sentence passed involves substantial punishment, but that it should interfere if the sentence is manifestly inadequate. It is competent to the High Court to impose an additional sentence of imprisonment on revision, even where the accused has served out the sentence of imprisonment inflicted upon him by the lower Court. 7 *P. R.* 1889 and *A. I. R.* 1926 *Bom.* 256, *Rel. on.*

S was charged with criminal breach of trust under S. 409, Penal Code, and sentenced to simple imprisonment till the rising of the Court and a fine of Rs. 100.

Held: that the penalty imposed was wholly inadequate and should be enhanced.

[P 962 C 1]

Bishan Narain for *Government Advocate*—for the Crown.

S. M. Haq—for Respondent.

Facts. — The accused, on conviction by Khan Sahib Chaudhri Miran Bakhsh exercising the powers of a Magistrate of the 1st Class in the Karnal District, was sentenced by order, dated 6th August 1928, under S. 409, I. P. C to undergo simple imprisonment till the rising of the Court and a fine of Rs. 100 or in default to undergo further simple imprisonment for four months.

The facts of this case are as follows:

Shahzad Ahmad, accused, an Assistant Moharir working in Police Station, Smalka, District Karnal, has been charged with committing criminal breach of trust, in taking Rs. 10-8-0, while acting under colour of office on 21st July 1928. Ten full grown camels and three young ones were impounded by Shahzad Ahmad, who released them after recovering Rs. 15. Out of this sum he credited only Rs. 2 as fine and Rs. 1-9-0 as feeding charges. He did this by forging the registers and making false entries, as is fully set out in the judgment of the Magistrate. The accused pleaded guilty and implored for pardon and mercy. He was convicted under S 409, I. P. C. and sentenced to simple imprisonment till the rising of the Court and a fine of Rs. 100.

The proceedings are forwarded for revision on the following grounds:

The offence of criminal breach of trust by a Government servant is a very serious one and not one which can be passed over lightly. The sentence in such a case should be deterrent. The sentence imposed in the present case far from being deterrent is, in my opinion, calculated to encourage the commission of similar offence.

The Magistrate has been unduly influenced by the family record of the accused. Considering the family record, I think the offence of the accused becomes all the more glaring and deserving of severe punishment by contrast.

The accused is nearly 29 years of age and has more than four years' service in the police force. Under these circumstances the Magistrate's remarks regarding his age and inexperience are not justified.

The Magistrate attaches undue weight to the fact of admission of guilt by the accused. As a matter of fact the case against the accused was so clear that he had no alternative.

The amount misappropriated is irrelevant; the fact of misappropriation is the important point.

I submit that in the public interest a substantial sentence of imprisonment should be inflicted on the accused.

Order.—The evidence on the record leaves no doubt whatsoever, and indeed it is admitted by the accused himself, that he committed the offence of criminal breach of trust in respect of a sum of money which he had received on behalf of Government in his capacity as an officer-in-charge of a police station. He has accordingly been convicted under S. 409, I. P. C and sentenced to a fine of Rs. 100 and simple imprisonment "till the rising of the Court." The District Magistrate has referred the case to this Court with a recommendation that in

view of the serious nature of the offence a deterrent sentence should be imposed.

I have listened to the able arguments advanced by the learned counsel for the convict, and after examining all the facts bearing upon the question of punishment I have reached the conclusion that the sentence passed by the trial Magistrate is manifestly inadequate. It is true that the Court of revision is slow to interfere, where interference would involve the imprisonment of a person already discharged from jail; but, as pointed out by Plowden, J. in *Gohar* v. *Mahammad* (1), upon which the learned counsel has placed his reliance, that circumstance alone cannot be allowed to operate as an insuperable obstacle to the enhancement of a sentence. The test laid down in that case is that the Court should not interfere if the sentence passed involves substantial punishment, but that it would interfere if the sentence is manifestly inadequate. Indeed, it has been held by the Bombay High Court in *Emperor* v. *Shankar Narayan* (2), that it is competent to the High Court to impose an additional sentence of imprisonment on revision, even where the accused has served out the sentence of imprisonment inflicted upon him by the lower Court.

It is true that the conviction in the present case will entail loss of service, but that is an inevitable result in every case of conviction of a public servant under S. 409, I. P. C. It is to be remembered that the law prescribes transportation for life or imprisonment for ten years as the maximum punishment to be imposed upon an offender of this character. The convict in this case, not only misappropriated the money, but also forged several entries in the registers kept by him, and the conclusion is irresistable that the penalty imposed by the trial-Magistrate is wholly inadequate. Having regard to all the pros and cons of the case I am of opinion that the accused should suffer rigorous imprisonment for a period of one year, and I order accordingly.

A.L./R.K. *Sentence enhanced.*

(1) [1889] 7 P. R. 1889.
(2) A. I. R. 1926 Bom. 256.

A. I. R. 1928 Lahore 962

ADDISON, J.

Abdur Rahman—Defendant—Appellant.

v.

Rura and *others*—Plaintiffs and—Defendants—Respondents.

Second Appeal No. 276 of 1928, Decided on 24th September 1928, from decree of Dist. Judge, Gurdaspur, D/- 3rd November 1927.

(a) *Punjab Alienation of Land Act* (13 *of* 1910)—*Applicability—Non-agriculturist creditor inducing agriculturist to take liabilities of his agriculturist debtor and take a mortgage of debtor's land—Mortgage is not prohibited.*

It is not the object of the Alienation of Land Act to prevent a non-agriculturist from recovering money due to him from an agriculturist by any legal means in his power. Where, therefore, such a person induces an agriculturist, to pay off a debt due from the debtor agriculturist, and take a mortgage of land from him as security for himself, there is nothing in law to prevent such a course. It is immaterial whether the mortgagee pays in cash or gives his bond, nor has he anything to do with the correctness of the account or real amount due from the debtor beyond what the debtor himself admitted and asked the mortgagee to pay; 119 *P. L. R.* 1916, *Foll.* [P 963 C 2]

(b) *Contract Act, S.* 43—*Joint-debtors.*

Where the debts are jointly incurred the liability of each is for the whole amount. [P 963 C 2]

(c) *Hindu Law — Widow — Debts—Interest entered in bond—Admission by widow is valid.*

Where the interet on the amount charged is clearly entered in the bond, it cannot be said that the widow of the debtor was wrong in admitting the interest charged. [P 963 C 2]

(d) *Hindu Law—Widow—Debts—Husband's property can be charged with debts left by him.*

Where the husband has left debts his widow is perfectly entitled to acknowledge them and charge her husband's land with those debts; 17 *P. R.* 1919 (*F. B.*), *Foll.* [P 964 C 1]

Nawal Kishore—for Appellant.

Ghulam Mohiuddin—for Respondents.

Judgment.—This was a suit by the reversioners for a declaration that a mortgage for Rs. 500 effected by Mt. Jano, a widow, in favour of Abdul Rahman should not affect their reversionary rights, as it was without consideration and necessity. The defence was that the mortgage was incurred to pay off her deceased husband's debts and thus it was for a necessary purpose. The trial Court dismissed the suit, considering that the defence had been established. The District Judge, on appeal, has decreed the suit, holding that neither

necessity nor consideration had been proved on certain findings arrived at by him. Against this decision the mortgagee-defendant has preferred this second appeal.

The learned District Judge stated that a number of points had been brought out in the evidence, though not raised in the pleadings and he summarized them as follows :

(1) The deceased husband of the widow was not the sole debtor of Kaka Singh but he and one Sultan were joint debtors of Kaka Singh. He held that it was for the defence to show that the debts incurred jointly by Buta and Sultan were a valid charge against the estate of Buta alone.

The second point mentioned by the District Judge has no significance and need not be referred to.

The third point was that the principal was only Rs. 350 while the interest amounted to Rs. 142 at the rate of thirty-seven per cent per annum. He thought that such a high rate was more than the customary rate charged in such cases, and that the widow was not acting prudently in acknowledging interest to that extent. The fourth point was that the District Judge thought that the widow might have waited till the rabi crop was cut and paid her husband's debts out of her income. It may be noted that she alleged that, owing to a dispute between the widow and the reversioners, the land had not been watered and there was no crop.

The fifth point was that Mt. Jano as a witness had stated that the mortgage was in favour of Kaka Singh and not in favour of Abdul Rahman, and that, as Kaka Singh was a non-agriculturist, such a mortgage did not appear to be a good one.

Having mentioned the above points as having been brought out in evidence though not raised in the pleadings, the learned District Judge then went on as follows :

> My findings are; (1) that the debts have been proved to be due jointly from Buta and Sultan, so that they are not a charge in full against the estate of Buta, (2) that the circumstances of the mortgage are sufficiently suspicious to warrant my reporting them to the Deputy Commissioner for such enquiry as he may deem desirable. Kaka Singh is an Arora and a non-agriculturist, and though he would be justified in persuading an agriculturist to take up another agriculturist's liabilities the present mortgage is a very doubtful one. On these findings I hold that neither necessity nor consideration have been proved.

Apparently, therefore, the District Judge only came to these two findings mentioned above. I do not understand his second finding. It was held in *Haidar* v. *Fateh Khan* (1) that :

> It is not the object of the Alienation of Land Act to prevent a non-agriculturist from recovering money due to him from an agriculturist by any legal means in his power and if such a person can induce an agriculturist to pay off a debt due to him and to take a mortgage of land from his debtor as security for himself, there is nothing in this Act to prohibit such a course. It is immeterial whether the mortgagee pays in cash or gives his bond, nor has he anything to do with the correctness of the account or real amount due beyond what the debtor himself admits and asks the mortgagee to pay for him.

On the record it is perfectly clear that Abdul Rahman is the true mortgagee, and that Kaka Singh is not mortgagee. Abdul Rahman gave a bond to Kaka Singh it is true, but that is nothing, as pointed out in the above ruling. He has paid off part of the bond as admitted by the learned District Judge. The second finding, therefore, of the District Judge amounts to nothing and he erred in law in arriving at it.

The first finding of the District Judge was that the debts were not a charge in full against the estate of Buta as they were jointly incurred by Buta and Sultan. The liability, of each, however, is for the whole amount. This finding is also incorrect in law and cannot be accepted.

If these are the only two findings of the learned District Judge as categorically stated by him at the end of his judgment, it is obvious that this appeal must be accepted. I think it better, however, to discuss some of the other points which, he stated, were brought out in the evidence though not raised in the pleadings, even though they are not stated to be findings.

The first and second of these points are already dealt with when disposing of finding No. 1. Point No. 3 is about interest. It is quite clear that interest on the amount charged is clearly entered in the bond and it cannot be said that the widow was wrong in admitting the interest charged.

The fourth point was that the widow should have waited until the rabi crop

(1) [1916] 119 P. L. R. 1916=37 I. C. 193=114 P. W. R. 1916.

was ready. Apart, however, from there being evidence that there was no rabi crop, it is not the duty of a widow to wait until she receives sufficient income to pay off her husband's debts. It might be the case that if the income was sufficient and she was borrowing money for herself an enquiry may be directed as to whether she was entitled to borrow money seeing that the income she was receiving was ample for her ; but, where the husband has left debts, I know of no authority which lays down that the widow is not entitled to acknowledge them and to charge her husband's land with those debts : see in particular the remarks at p. 55 of 17 *P. R.* 1919 [*Mt. Mikor* v. *Chhaju Ram* (2).]

For the reasons given above it is obvious that the learned District Judge erred in law in finding that there was no necessity for the full amount, and that there was no consideration. I, therefore, accept the appeal and dismiss the suit with costs throughout.

W.S./R.K. *Appeal accepted.*

(2) [1919] 17 P. R, 1919=49 I. C. 281=6 P. W. R. 1919 (F.B.).

A. I. R. 1928 Lahore 964

JOHNSTONE, J.

Fateh Nur, and *others*—Plaintiffs and Defendants—Appellants.

v.

Jiwan—Defendant—Respondent.

Second Appeal No. 308 of 1928, Decided on 18th June 1928, from decree of Dist-Judge, Jhelum, D/- 10th Aug. 1927.

(a) *Limitation Act S. 5—Application for review on reasonable ground is a sufficient cause—Period should be excluded—Limitation Act, S. 14.*

Where an application for review is admitted to a hearing and there is a reasonable ground for review inasmuch as the Court had referred to statements that were not a part of the record of the suit, the application is prosecuted bona fide and the period should be exempted : *A. I. R.* 1917 *P.C.* 156, *Foll.* [P 965 C 1]

(b) *Practice — Appeal — Evidence — Point raised in grounds of lower Court—Documents disregarded—They can be referred to for supporting decision—Civil P. C., O.* 41, *R.* 22.

Where a party had raised a matter in his grounds of appeal in the lower Court, he can support the judgment of that Court in second appeal by referring to documents which that Court disregarded. [P 965 C 1]

(c) *Evidence Act, S.* 114—*Common ancestor appearing in pedigree table—His sons in joint possession in equal shares — Presumption is that common ancestor held the property.*

Where the name of the common ancestor appears in the pedigree-table and where his sons are found to be in joint possession of the property holding equal shares, the presumption is that the common ancestor held the property : 56 *P. R.* 1906 ; 41 *P. R.* 1914 ; and *A. I. R.* 1927 *Lah.* 847, *Foll* : *A. I. R.* 1927 *Lah.* 477, *Ref.* [P 965 C 2]

Mool Chand for *Gulam Rasul*— for Appellants.

Muhammad Khurshaid Zaman — for Respondent.

Judgment.—This appeal relates to a disputed succession to an occupancy holding of .57-14/20 kanals of land, a half-share in which was formerly held by Jiwan defendant. When Dadu, who held the other half died a year before the suit the revenue authorities mutated Dadu's share in the name of his first cousin Jiwan and the plaintiff proprietors then instituted the present suit for possession of Dadu's share on the ground that his rights were extinguished. Two proprietors did not join the suit and were made pro forma defendants. The trial Court, holding that Jiwan had failed to establish that the common ancestor of Jiwan and Dadu had occupied the land, granted the plaintiffs a decree for 14/30 of Dadu's land ; and the remaining 1/30, the share of the pro forma defendants was not decreed. Against that decree Jiwan appealed. The Officiating District Judge took an opposite view and dismissed the suit on 10th August 1927. Thereupon the plaintiffs filed an application for review on the ground that the Officiating District Judge had relied on statements in a record of 1856, which was not part of the record of the suit, and also because they had other documents which rebutted the evidence of the record of 1856. The application came before the permanent District Judge, who rejected it by his order dated 15th November 1927.

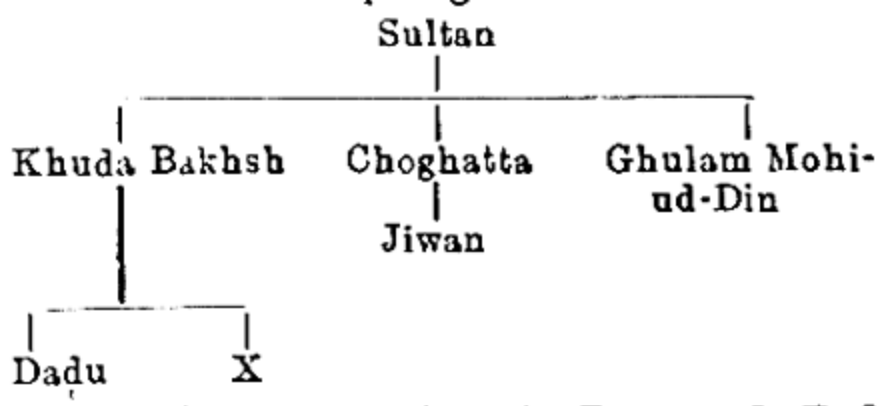
The plaintiffs have now instituted a second appeal and have also filed a petition for revision of the order dismissing the application for review. The second appeal was presented on 26th January 1928, and a preliminary objection has been taken by the learned counsel for the defendant Jiwan, that the appeal is barred by time. The plaintiffs had prayed for exemption under S. 5, Limitation Act, on the ground that the period spent by them in prosecuting their ap-

plication for review should not be counted in the computation of days. For the defendant it was argued that such a period should only be excluded if the grounds for review were reasonable and that three out of the four grounds for review were really grounds of appeal. Reliance was placed on one or two authorities. On the other hand, the application for review was admitted to a hearing and there was a reasonable ground for review inasmuch as the Officiating District Judge had referred to statements that were not a part of the record of the suit. I am satisfied that the plaintiffs prosecuted the application for review bona fide, and *Brij Indar Singh* v. *Kanshi Ram* (1), is a clear authority in favour of the plaintiffs. The preliminary objection regarding limitation is accordingly overruled.

I turn now to the merits of the appeal. Dadu being the last holder, the onus lay on Jiwan defendant to prove that a common ancestor of himself and Dadu had occupied the land. The case for Jiwan is that Sultan, the common grandfather of Jiwan and Dadu, did occupy the land, but the revenue records do not go so far back. The lower appellate Court relied on (a) an order in the record of 1856, and (b) the statements of certain witnesses. Now, neither the order nor the statements are to the effect that the suit land was the subject of occupancy rights; all that they show is that the ancestor of Dadu and Jiwan acquired occupancy rights in some land. Admittedly that land was not the land with which this litigation is concerned and the Officiating District Judge was manifestly wrong in drawing any kind of presumption as he did, from that circumstance.

On the other hand, the same Judge disregarded some documentary evidence, on which the defendant Jiwan had relied. That evidence, according to the defendant's case, raised a presumption in favour of the proposition that the common ancestor occupied the land. It is urged that the defendant cannot in second appeal support the judgment of the lower appellate Court by referring to documents which that Court had disregarded; but I do not consider that that contention has any force, for the defendant raised the matter in his grounds of appeal before that Court.

The first document is a *naql az muntakhib asamiwar* of 1860 (D-1) which shows that the three sons of Sultan held the suit land in equal shares as occupancy tenants. The second is a copy of the *tenqih haquq mazarian* of 1880 (d-2): in the column of tenants appear the names of Ghulam Mohi-ud-Din and Choghatta (sons of Sultan) holding one-third each, and of Dadu and another son of Khula Bakhsh (also a son of Sultan) holding the other one-third. The pedigree table is:



The Khasra numbers in D-1 and D-2 correspond. The third document is the *misl haqivat jamabandi* of 1900 (D-3), the tenants then being Chogatta and Dadu in equal shares; Ghulam Mohi-ud-Din's share went on his death to his widow and thence to the two persons just named. Here again the corresponding khasra numbers have been traced and correspond.

In view of these documents it is urged that the accepted one-step presumption should be applied, and reliance is placed on certain authorities: *Soba Singh* v. *Nand Singh* (2), *Jivan Singh* v. *Har Kaur* (3) and *Palo* v. *Bawa* (4). The principle laid down in those authorities is not overruled in *Chandra Singh* v. *Mt. Banto* (5). The point in the present case is that not only does the name of Sultan appear in the pedigree-table but in addition we find that in 1860 the sons of Sultan were in joint possession and held equal shares. The combination of the two facts does raise a presumption in favour of the defendant Jiwan and para. 1 of p. 591 of the last cited authority confirms the view expressed above.

I would hold, therefore, that the common ancestor of the deceased Dadu and Jiwan defendant occupied the land and

(1) A. I. R. 1927 P.C. 156=45 Cal. 94=44 I. A. 218 (P.C.).

(2) [1906] 56 P. R. 1906=101 P. L. R. 1906 70 P. W. R. 1906.

(3) [1914] 41 P. R. 1914=51 P. L. R. 1914= 22 I. C. 415=34 P. W. R. 1914.

(4) A. I. R. 1927 Lah. 847.

(5) A. I. R. 1927 Lah. 477=8 Lah. 584.

that the decision of the lower appellate Court, though not based on the evidence on which it should have been based, is correct. The appeal fails and is dismissed with costs.

W.S./R.K. *Appeal dismissed.*

A. I. R. 1928 Lahore 966

JAI LAL, J.

Kishan Singh—Plaintiff—Appellant.

v.

Faqir and *others*—Defendants—Respondents.

Second Appeal No. 266 of 1928, Decided on 1st October 1928, from decree of Additional District Judge, Amritsar, D/- 3rd October 1925.

(a) *Custom (Punjab) — Custom previously established — Instances showing continuity occurring after institution of suit relating to custom—Instances are important and should be relied upon—Evidence Act, S. 13.*

Where a custom has been established, instances showing that there has been no variation in the custom are important and should be relied upon, no matter if such instances relate to transactions which took place after the suit involving the question of custom had been instituted. [P 966 C 2]

(b) *Evidence—Value of—Summary proceedings—Decision in, is no strong evidence of custom.*

Where the proceedings of a case are necessarily summary as in objection proceedings much reliance cannot be placed upon the decision of the case as an evidence of any custom. [P 966 C 2]

Lala Hargopal—for Appellant.

Badri Das and *Shiv Charan Das*—for Respondents.

Judgment.—The main question involved in this case is whether the non-proprietors (kamins) of the village Jhabal Kalan in the Taran Tahsil of the Amritsar District have an unrestricted right to alienate the sites in their possession. The District Judge has answered this question in the affirmative, but has granted a certificate to the plaintiff, the proprietor, and consequently this second appeal has been preferred to this Court.

It is contended on behalf of the appellant that the general custom being to the effect that the non-proprietors have no right to alienate the sites in their possession, the burden of proving affirmatively that a custom to the contrary existed in this village was on the defendants, the vendees in this case. That is true, but the District Judge has held that the defendants have discharged that burden. In support of his conclusion the learned Judge has relied upon the judgment of Martineau, J., in a previous suit brought by the present appellant against one Jaggu and others in which the same question, as is involved in this case, arose and after considering the entire evidence the learned Judge came to the conclusion that the custom propounded by the vendees had been fully established by the evidence on the record. He cited a large number of instances in which alienation had taken place in the village and had not been objected to by the proprietors.

The learned District Judge on this occasion has made reference in his judgment to other alienations that took place after Martineau J., decided the previous appeal. An objection is taken by the appellant that such instances should not be relied upon because they relate to transactions which took place after the present suit had been instituted. In this contention I do not agree as the instances are important to show that there had been no variation in the custom and strengthen the vendee's case. It is to be observed that one of the cases relates to the attachment and sale of a site held by a non-proprietor in execution of a decree obtained by one of the proprietors. That is a very important factor in determining the custom.

The learned counsel then says that the District Judge did not discuss the important evidence relied upon by his client. He specially refers to the wajib-ul-arz of 1891-1892 in which a custom which is in accordance with the general custom of the province, is recorded. But the wajib-ul-arz of 1911-1912 makes no mention of such a custom.

Another document relied upon is Ex-P-4, which is an order by a Civil Judge dated 14th September 1907 upholding the objection of the proprietors to the attachment of a site belonging to a non-proprietor in execution of a decree. The case, however, does not appear to have gone further and the proceedings in such cases are necessarily summary and much reliance cannot be placed on this instance. The other documentary instances relied upon on behalf of the appellant do not call for any serious notice.

In my opinion the learned District Judge was fully entitled on the material

before him to come to the conclusion that a special custom, such as was set up by the vendees in this case, had been established and agreeing with his conclusions, I dismiss this appeal with costs. In view of the above, I do not think it necessary to give any finding on other matters that have been decided against the appellant by the District Judge.

The learned counsel in the end contended that, in any case, decree should have been given to the appellant for possession of a portion of the disputed land, which is not included in the sale-deed and which, it is alleged, the defendants, the vendees, took forcible possession of. But that was not the ground on which the plaintiff originally sought the relief. The plaintiff merely came to the Court on the ground that the non-proprietor was not entitled to sell the land in dispute. I do not, therefore, think that there is any force in this contention of the appellant.

W.S./R.K. *Appeal dismissed.*

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* A. I. R. 1928 Lahore 967

ADDISON AND BHIDE, JJ.

Kishan Chand—Plaintiff—Appellant.

v.

Narinjan Das and *others*—Defendants—Respondents.

First Appeal No. 436 of 1924, Decided on 11th June 1928, from decree of Sub-Judge, 1st Class, Lahore, D/- 5th January 1924.

* (a) *Civil P. C., S. 11, Expl. 4—Validity of will disputed in prior suit—Plea against specific provision of will not necessary in it—Subsequent suit against that specific provision will not be barred by constructive res judicata.*

A suit was brought by *S* against *P* to recover certain funeral expenses of the testator on the basis of his will which made provision for his funeral expenses. In this suit the validity of the will was disputed. The will also contained a provision for "election" under certain conditions which was now in dispute in another suit brought by *P* against *S*.

Held: that in the previous suit the validity of the whole will was in dispute but the specific plea against the provision for election in the will was not necessary in that suit and hence that suit did not operate as constructive res judicata against the present suit. [P 969 C 1]

* (b) *Hindu Law—Wills—Bequest of ancestral property not being illegal or against public policy is not void ab initio but only voidable.*

The bar to the disposition of ancestral property by will under Hindu law is not based on public policy and cannot be said to be a part of the general law of the country of which ignorance cannot be excused. The question is one of private rights under the personal law of the parties concerned. The bequest of ancestral property therefore not being illegal, is not void ab initio but only voidable: *Re Oliver's Settlement*, 1 *Ch.* 191; *Re Beale's Marriage Settlement*, 1 *Ch.* 256; *Re Wright*, 2 *Ch.* 288; and *Re Nash* 2 *Ch.* 450; *Dist.*: 40 *Mad.* 1122; 43 *Mad.* 824; and *A. I. R.* 1926 *Bom.* 378; *Ref.* [P 970 C 2]

(c) *N. W. F. Province Government Tenant Act (3 of 1893)—Transfer of Abadkari right in land—Subsequent sanction of Financial Commissioner—Transfer is not bad.*

Abadkari rights in certain land were granted by Government to a person *S. S* afterwards relinquished his rights and got the land transferred to his grandson. The transfer was made first and then the application for its sanction was made to the Financial Commissioner and the sanction was acquired.

Held: that the transfer of the Abadkari rights must be deemed to have been completed and become absolute after the sanction of the Financial Commissioner was given., The transfer was not bad because the sanction was not acquired prior to the transfer: 3 *P.R.* 1916 (*Rev.*), *Dist.*; 58 *P. R.* 1913 and 88 *P. R.* 1917, *Rel. on.* [P 974 C 2]

Mehr Chand Mahajan, Anant Ram and *Jagan Nath*—for Appellant.

Moti Sagar, W. Chandra Datt, Badri Nath and *S. L. Puri*—for Respondents.

Bhide, J.—The pedigree table of the parties concerned is as follows:

R. B. Gopal Das

R. S. Narinjan Das	R. S. Kishan Das, Plaintiff	Bishan Das	Devi Das

Narinjan Das, Defendant 1.

Narsingh Das, Defendant 2.

On 9th July 1912, Rai Bahadur Lala Gopal Das died at the ripe old age of about 80, leaving a will dated 12th January 1912 by which he made a complete and final disposition of all his property, ancestral as well as self-acquired. The will was apparently carefully drawn up with the help of a lawyer; but soon after his death it became unfortunately the subject-matter of litigation amongst his heirs which, in one form or another has lasted to this day.

The suit out of which the present appeal arises was lodged on 21st April 1921, and was for possession of one-fourth share in certain shops situated at Lahore and Amritsar and a large area of land with a right of occupancy situated in the Jhelum Canal Colony in the Sar-

godha District. The parties are Khatris and are governed by Hindu law. There had been disruption of the joint family and plaintiff was living separate from his father for several years before his father's death. The shops in dispute were, however, admittedly ancestral property and had not been partitioned. The land in the Sargodha Canal Colony had been acquired by Rai Bahadur Gopal Das as a grant from Government in recognition of his services. By the will, the shops in dispute were allotted to defendants 1 and 2 who used to live with Rai Bahadur Gopal Das and manage his property and were apparently his favourites. According to Hindu law, Rai Bahadur Gopal Das had no right to make a disposition of the ancestral property by will and he had foreseen the possibility of objections being raised to the will on that ground. But he had made a provision in the will for that contingency by giving a right of "election" to his heirs in the matter, on the lines of what is known in English law as the "doctrine of election." The provision was as follows:

If any of my heirs claims a right in the said property on the ground that it is ancestral property and does not act upon this my will, then the arrangement to be followed shall be this, that he shall have to give back all the self-acquired property to be taken by him as detailed above to my two grandsons Narinjan Das and Narsingh Das and that he shall be entitled to get only his share out of this ancestral property according to Hindu law. My descendants shall have title to my self-acquired property according to the conditions set forth above only in case they abide by my will in regard to this ancestral property and if they challenge my power of making a will with respect to the ancestral property they shall not be entitled to any of my self-acquired property and the will so far as it relates to the self-acquired property bequeathed to them as above shall be considered as cancelled and that property shall also go to my grandsons viz; Narinjan Das and Narsingh Das after my death.

Plaintiff's allegation in the plaint was that the above provision in the will was null and void in law and equity and was not binding on him. He, however, stated in para. 17 of the plaint that if the Court held the provision to be valid and binding, he elected to retain possession of the self-acquired property.

The land in the Sargodha Colony was not mentioned in the will. The defendants pleaded that abadkari rights in this land had been granted to Rai Bahadur Gopal Das in 1905, but the Rai Bahadur relinquished those rights and got the land transferred to defendant 1 with the sanction of the Financial Commissioner. The land was accordingly mutated in the name of defendant 1 on 14th September 1907, and he had been in possession ever since the transfer. Plaintiff disputed the genuineness as well as the validity of this transfer. His contentions were that the transfer had been fraudulently obtained by defendant 1 without the knowledge or consent of Rai Bahadur Gopal Das and was also void as it was not sanctioned by the Financial Commissioner in the manner required by law. A large number of other pleas were raised giving rise to as many as 24 issues, but it is unnecessary to go into them for the purpose of this appeal. The learned Senior Subordinate Judge found the material issues against the plaintiff and dismissed the suit. Plaintiff has appealed and the two main points for decision in appeal may be stated as follows:

(1) Is the provision in the will relating to the disposition of the ancestral property with the option of "election" given to the plaintiff as between the self-acquired and ancestral property null and void and not binding on the plaintiff?

(ii) Was the transfer of the land in the Sargodha Colony in favour of defendant 1 void for any reason and is plaintiff entitled to claim one-fourth share in it?

As regards the first point, it was contended on behalf of the respondents that the validity of the will had already been the subject-matter of litigation between the parties and the matter was therefore "res judicata." It appears that in the year 1916, defendants 1 and 2 sued the plaintiff for recovery of Rs. 737-12-2 on account of his share of the funeral expenses of his father and mother on the basis of a provision in the will to the effect that those expenses were to be shared by his sons and grandsons and were to be a charge on his entire immovable property. In that suit plaintiff pleaded inter alia that the will was the result of undue influence and therefore null and void, but did not specifically raise any objection to the provision in the will now under consideration. The contention of the learned counsel for the respondents is that owing to his failure to raise the objection in the previous suit, plaintiff is now pre-

cluded from raising it on account of Expl, 4, S. 11, Civil P. C. This contention does not appear to me to be sound. The claim in the previous suit was confined to a share of the funeral expenses, and that claim could only have been defeated by showing that the will as a whole or at any rate the provision in the will relating to the sharing of the funeral expenses was null and void. The provision with regard to "election" even if it were held to be inoperative, could not have rendered the whole will null and void or affected in any way the claim with regard to the share of the funeral expenses. In the circumstances I feel no hesitation in holding that the matter is not res judicata and the question must therefore be decided on its merits

The doctrine of "election" is an equitable rule of English law. It is now incorporated in Chap. 22, Succession Act, 1925, which applies to Hindus. But even before the doctrine was held to be applicable to Hindu wills: *Mangaldas* v. *Rachhoddas Bhagwan Das* (1): That doctrine has been stated by Jarman as follows:

That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument confirming to all its provisions and renouncing every right inconsistent with it. If therefore a testator has affected to dispose of property which is not his own and has given a benefit to the person to whom that property belongs the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if on the other hand he chooses to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him for the purpose of making satisfaction out of it to person whom he has disappointed by the assertion of his rights. (Vide Jarman on Wills Vol. 1, p. 532, 6th Edn.).

It will appear from the above that the option given to the plaintiff in the will in the present case as regards choice between the ancestral and self-acquired property was in conformity with the equitable doctrine of "election" as stated above. The learned counsel for the appellant has not attempted to challenge the applicability of that doctrine to Hindu wills generally but has argued that the doctrine is inapplicable in the present instance, as the provision with regard to "election" is "illegal." In support of this argument he has relied upon the decision of Farwell, J., in *Re Oliver's Settlement* (2), at p. 167 in which the following passage occurs.

The doctrine of election is a rule of equity by virtue of which the Court of equity compels a recipient of the testator's bounty to confirm to all the legal provisions of the will. It is somewhat startling that this Court should be asked to extend it to illegal provisions, and to apply its doctrines for the purpose of enabling a testator to evade a rule of law founded on public policy. Lord Northington puts it somewhat strongly. After referring to the various attempts that had been made at law to evade the rule against perpetuity, he says: 'It seems to me most surprising, that after these puerile attempts had been made upon the narrow, fettered and technical reasonings of Courts of law, and been rejected and exploded with contempt and derision, that it could ever have entered into the head of man to think, that he could subvert the fundamental principles of property, by the aid of this Court.' And Sir Richard Arden, M. R. in *Mainwaring* v. *Baxter* (3) where another attempt at evading the rule against perpetuities was made, said that he adopted Lord Northington's words. Kekewich, J., has said, and it is the basis of his judgment, that it is immaterial whether the appointment fails because it offends some rule of law, or because it offends the construction of the power. With all deference to him, the difference appears to me to be vital. In the one case the testator openly and avowedly breaks the general law, and asks the Court of equity to participate in his legal act by giving effect to it; in the other he merely attempts to exceed the limits set to his power by the donor thereof in the particular case—limits which the donor might have extended without any breach of general law. Thus, limitations which infringe the rule against perpetuity are void on the face of the will but a devise of Blackacre by a testator who has no interest therein is not illegal, nor is it void on the face of the will, but depends on an inquiry into the testator's title.

It is the well-known distinction pointed out by Lord Westbury in *Cooper* v. *Phibbs* (3) between the general law of the country, for ignorance of which no one is excused, and private rights which depend on the ascertainment of particular facts.

The contention of the learned counsel for the appellant is that an attempt to dispose of "ancestral property" under Hindu Law is "illegal" in the same sense as an attempt to dispose of property againt the rule of perpetuities under English law. This contention is not, I think, well-founded. The passage quoted above shows that the Court refused to give effect to the doctrine of "election" in *Re Oliver's Settlement* (2) because the testator had attempted to evade a rule based on public policy.

(1) [1890] 14 Bom. 498.

(2) [1905] 1 Ch. 191=74 L. J. Ch. 62=21 T. L. R. 61=53 W. R. 215.

(3) [1867] 2 H. L. 149=15 W. R. 1049=16 L. T. 678.

The learned Judge referred in this connexion to the distinction between :

> general law of the country for ignorance of which no one is excused and private rights which depend upon ascertainment of particular facts.

which was pointed out by Lord Westhury in *Cooper* v. *Phibbs* (3) while discussing the maxim "Ignorantia juris non-excusat". The point for decision therefore, is whether the rule according to which a person governed by Hindu Law has no power to dispose of joint "ancestral property" by will falls under the former category. I think it does not. The rule appears to be simply a result of the peculiar nature of joint ancestral property under Hindu Law, according to which the members of the family are coparceners with an undefined interest therein which accrues on birth and passes by survivorship on death. As a matter of fact there does not appear to be any specific rule of Hindu Law prohibiting disposition by a coparcener of joint ancestral property by will. But the very nature of the interest of the coparcener in the property renders such disposition "ultra vires". But apart from this, no principle of public policy or equity appears to be involved in the rule. In fact Courts of justice have stepped in to modify the rigidity of Hindu Law in this respect and although "wills" were originally unknown to Hindu Law, testamentary power to a limited extent has now come to be recognized as a result of judicial decisions of the High Court and the Privy Council (cf. paras 404, 412 and 417 of Mayne's Hindu Law Edn. 9). It is now well-established that a Hindu may bequeath his self-acquired property and if there are no coparceners at all, there would be apparently nothing to prevent him from disposing of even his ancestral property by will : vide Mayne's Hindu Law para. 417, Edn. 9. In a Madras case *Appana Patrachariar* v. *Srinivasa Chariar* (4) it has been held on the basis of an obiter dictum of their Lordships of the Privy Council in *Brij Raj Singh* v. *Sheodan Singh* (5) (at p. 346) that a disposition of coparcenary property by a Hindu can be upheld if the consent of all the coparceners, being adults has been obtained. This would imply that the disposition is not absolutely void, but only voidable at the instance of other coparceners. The correctness of this decision has been doubted in some subsequent rulings : vide *Subba Rami Reddi* v. *Raman* (6) *Bhikhabhai Ojhaddas* v. *Purshottam Girdhar Das* (7) ; but howsoever that may be, it seems clear that the bar to the disposition of ancestral property by will under Hindu law is not based on public policy and cannot be said to be a part of the "general law" of the country of which ignorance cannot be excused. The question is merely one of private rights under the personal law of the parties concerned.

The English rule against perpetuities, on the other hand, was evolved by the Courts of equity to frustrate attempts to create unbarrable entails by means of bequests which were opposed to common law and is a part of the general law of England. It is founded purely on public policy. A "perpetuity" said Lord Guildford :

> is a thing odious in law and destructive to the common wealth ; it would put a stop to commerce and prevent the circulation of the riches of the kingdom and therefore not to be countenanced in equity : vide commentary at p. 321 of Gour's Law of Transfer in British India Edn. 5.

When therefore it was found that the doctrine of "election" was being abused to create estates prohibited by law on grounds of public policy, Courts refused to give effect to it.

The case-law in India on the subject of "election" seems to be rather meagre. No ruling of any High Court in India dealing with the precise point raised viz., the scope of the rule laid down in "*Re Oliver's Settlement*" (2) was cited. That rule appears to have been followed in some later English cases : see e. g., in *Re Beale's Marriage Settlement* (8), *Re Wright* (9) and in *Re Nash* (10). In the first two cases, the doctrine of election came into conflict with the rule against perpetuities as in *Re Oliver's Settlement* and it was not given effect to. In "Re

(4) [1917] 40 Mad. 1122=32 M. L. J. 364=5 M. L. W. 544=40 I. C. 118= (1917) M. W. N. 355.
(5) [1913] 35 All. 337=19 I. C. 826=40 I. A. 161 (P.C.).
(6) [1920] 43 Mad. 824=12 M. L. W. 249=59 I. C. 681=(1920) M W. N. 529.
(7) A. I. R. 1926 Bom. 378=50 Bom. 558.
(8) [1905] 1 Ch. 256=74 L. J. Ch. 67=21 T. L. R. 101=53 W. R. 216=92 L. T. 268.
(9) [1906] 2 Ch. 288.
(10) [1909] 2 Ch. 450.

Nash" the provision as to "election" came into conflict with another rule of the same category based on public policy the rule against "double possibilities" and was therefore held to be void. It would thus appear that in England the rule laid down in "*Re Oliver's Settlement*" has been followed only where there the doctrine of election came into conflict with a rule or general law of the country based on public policy. A bequest of "ancestral property", may not be permissible under Hindu law, but as stated already, no infringment of any rule of Equity or public policy seems to be involved. Such a bequest even if it be void, will not therefore be 'illegal" within the meaning of the rule laid down in "*Re Oliver's Settlement.*" The bequest of joint ancestral property by a person governed by Hindu law seems to stand on precisely the same footing as a bequest by a person of property not belonging to him along with his own which is the typical case falling within the scope of the "doctrine of election". The bequest of property belonging to another person is also void in law but not "illegal" in the above sense. I, therefore, hold that the rule in "*Re Oliver's Settlement*" does not apply to the present case.

It was next urged by the learned counsel for the appellant that the provision in the will with respect to "election" was null and void on other grounds viz., firstly because it was an attempt to divert the order of succession under Hindu Law, secondly because, the provision was opposed to an antecedent recital in the will conferring on the plaintiff absolute ownership in respect of certain self-acquired property of the testator and lastly because the provision was in the nature of what is known in English law as a condition "in terrorem". None of these contentions seems to have any force. The first contention only relates to another aspect of the question whether a Hindu testator is entitled to dispose of ancestral property by will and needs no further discussion. In support of the second contention *Mohan Lal* v *Narian Das* (11) was cited as an authority but that ruling appears to have no bearing on the facts of this case. In that case absolute ownership was conferred on a widow in respect of certain property and it was then provided that if she did not alienate the property during her lifetime the property would pass to certain reversioners. It was held that this provision which was in the nature of a gift over of what might remain at the widow's death, was void for uncertainty and therefore inoperative. No such question arises in the present case. The will must obviously be read as a whole and the ownership of the house conferred on the plaintiff in the earlier part of the will must be taken to be subject to the condition that he did not claim any share in the ancestral property bequeathed to defendants 1 and 2. There was no uncertainty in the disposition so far as the testator was concerned, nor could any uncertainty arise by the action of third parties. It was for the plaintiff himself to decide whether he would or would not take the self-acquired property of the testator on the condition specified in the will. Unless he accepted the condition the property could not vest in him at all. No question of "uncertainty" or "divesting" of a "vested" estate appears, therefore, to arise. As to the last contention viz., that the condition was merely "in terrorem" there is nothing in the will to indicate that the condition was inserted merely to "frighten" away objectors and was not really intended to be acted upon. The testator in fact made a suitable provision for the contingency of an objection being raised and this indicates that he really expected the contingency to occur. In *Cook* v. *Turner* (12) a condition of this nature was held to be perfectly valid and operative in law. In India also its validity appears to be recognized in S. 131, Succession Act : cf. illustration to that section.

I, therefore, hold that the provisions relating to "election" under discussion is valid and binding on the plaintiff. He has stated in the plaint that if this provision is binding on him he will retain the self-acquired property of the testator which was bequeathed to him and of which he is in possession. Consequently he is not entitled to claim any share in the ancestral property in possession of the defendants.

I now come to plaintiffs's claim to 1/4th share in the land in the

(11) A. I. R. 1921 Lah. 11=2 Lah. 175.

(12) 71 Revised Law Reports 808.

the Sargodha Colony. 'Abadkari' rights in this land were granted by Government to Rai Bahadur Gopal Das as a reward for his services in June 1905. On 8th November 1905, an application purporting to be signed by Rai Bahadur Gopal Das was sent to the Financial Commissioner, Punjab, requesting his sanction for the transfer of the land to Narinjan Das, which the applicant desired to make. The Financial Commissioner granted sanction subject to the consent of Narain Das, the eldest son of Rai Bahadur Gopal Das, who would have inherited the land according to the rule of primogeniture which governed succession to the land under Act 3 of 1893 which was then in force. Narain Das consented to the transfer and mutation of the land was eventually sanctioned on 14th September 1907. Ever since that date, the land stood in the name of Narinjan Das and after payment of all the instalments of the nazrana, occupancy rights in the land were also conferred upon him.

The fact that the land had been transferred to defendant 1, was known to the plaintiff, who along with his brother Devi Das had after the death of his father presented an application dated 16th September 1913 to the Financial Commissioner requesting cancellation of the transfer on the grounds that it has been fraudulently obtained by defendant 1 and that in any case it was void 'ab initio' as the consent in writing of the Financial Commissioner had not been obtained before the transfer as required by S. 8 of Act 3 of 1893 : vide pp. 56-58 of the paper book printed on 4th November 1926—hereafter called paper book A. The Financial Commissioner rejected this application on 30th September 1913. The plaintiff's claim to the land in the present suit is based on the same grounds, but plaintiff carefully avoided any reference to the above facts in the plaint as though he were ignorant of them. It was in his 'replication' put in by way of reply to the defendant's pleas that he set up for the first time the plea of fraud; but even in that 'replication' the particulars of the 'fraud' were not stated in very clear terms : vide pp. 130 to 135 of paper book A. The fraud alleged, in substance, however, was that the application dated 8th November 1905, purporting to be signed by Rai Bahadur Gopal Das in which the Financial Commissioner was requested to sanction the transfer of the land to Narinjan Das, was in reality put in by Narinjan Das himself without the knowledge or consent of Rai Bahadur Gopal Das. Rai Bahadur Gopal Das did not know English and was seriously ill at the time. The suggestion was that Narinjan Das had either forged the signature of the Rai Bahadur or obtained it by some misrepresentation.

In support of his plea of 'fraud' plaintiff relies mainly on certain alleged suspicious irregularities in the proceedings in connexion with transfer of the land, e. g., that the application dated 8th November 1905 was not presented at the office of the Financial Commissioner but was handed over to Lala Har Narain, Clerk of the Court to the Financial Commissioner, at the house of the Rai Bahadur, that no statement of the Rai Bahadur was taken down in writing, and so forth. But the proceedings were not of a judicial character and I do not think these so-called irregularities are material. Certain discrepencies in the statement of the witnesses in connexion with the state of the Rai Bahadur's health etc., were commented upon ; but to these also much importance cannot be attached in view of the fact that the witnesses were giving evidence after the lapse of many years. There is nothing on the record to show that Lala Har Narain who was an officer of the standing of an Extra Assistant Commissioner, was interested or was a party to any fraud. The presumption is that the officers concerned satisfied themselves about the genuineness of the application and then passed orders. It was next urged that even after the date of the application, there is nothing to show that the Rai Bahadur ceased to have any connexion with the land. It was pointed out that in March 1906, Rai Bahadur Gopal Das presented an application to the Assistant Colonization Officer declaring one Ali Muhammad to be his agent for the management of the land : vide pp. 42-43 paper book A. But this fact can be easily explained as the land was not mutated in the name of Narinjan Das till September 1907. Plaintiff produced his own brother Devi Das as his solitary witness and the latter has deposed that he saw the produce from the Sargodha land being brought to his father's house even after 1907. But this evidence of an obviously interested witness, even if it

was believed, loses its significance as Narinjan Das used to live with Rai Bahadur Gopal Das and look after his affairs in his old age. Lastly it was urged that Narinjan Das had no resources of his own and that as a matter of fact the nazarana and other expenses in connexion with land were paid by Rai Bahadur Gopal Das. Narinjan Das, however, deposed that he had obtained Rs 4,000 from his mother and wife. Moreover, even if he was helped by grandfather with money (as is not unlikely in view of their relation), that fact alone cannot affect the validity of the transfer.

The transfer took place years ago, and was duly given effect to in the Government records. The burden of proof lay heavily on the plaintiff in the circumstances to establish his allegation of fraud by clear and cogent evidence; but he has entirely failed to adduce any such evidence. As a matter of fact, the plea of 'fraud' seems to me to be entirely without any foundation. As has been already mentioned, succession to the land was governed by the rule of primogeniture. The only person to be affected by the proposed transfer was therefore Narain Das, the eldest son of Rai Bahadur Gopal Das. It is significant that the Financial Commissioner sanctioned the transfer only after ascertaining that Narain Das agreed to it. It is true that the plaintiff was not informed but the obvious reason was that he was not interested. It is therefore altogether futile to suggest that there was any fraud, secrecy or underhand dealing in these proceedings. The Rai Bahadur lived for seven years after the transfer. During the course of this period, Narain Das, who had also obtained four squares of land from Government, bequeathed them to his younger son, Narsingh Das, as the eldest son Narinjan Das had already received five squares of his grandfather. In his will dated 29th October 1910 (Paper book A p. 53), Narain Das distinctly refers to the fact that Rai Bahadur Gopal Das had transferred his five squares to his eldest son Narinjan Das. On the death of Narain Das, Narsingh Das presented an application to the Colonization Officer requesting him to transfer his father's four squares to him in accordance with his father's will. On this application Rai Bahadur Gopal Das, made an indorsement as follows :

> Both my grandsons Narinjan Das and Narsingh Das, sons of Narain Das, and Mt. Malan widow of Narain Das have accepted this settlement before me of their own accord. This should now be acted upon : vide pp. 8 and 9—Paper book A.

This is a clear indication that Rai Bahadur Gopal Das was fully aware of the contents of the will of Narain Das and his reasons for transferring his own four squares to his younger son Narsingh Das. But if any further proof of the Rai Bahadur's knowledge of the transfer of his own land to Narinjan Das were needed, it is afforded by his own last will dated 12th January 1912. This document purports to be the 'final and complete' will of the Rai Bahadur and he had made therein detailed disposition of all his moveable and immovable property. But it is significant that in the will there is no reference whatever to the valuable land in the Sargodha Canal Colony. If the Rai Bahadur had not parted with his rights in the land, it cannot be believed for a moment that he would have omitted to mention it in the will. The obvious explanation of the omission seems to be that the Rai Bahadur having transferred the squares to his grandson years ago and the transfer having been given effect to in the Government records and acted upon, he did not even think of referring to it. The transfer had been apparently taken as a settled fact in the family and on the basis of it Narain Das had also transferred his own squares to his younger son. The plaintiff and other sons of the Rai Bahadur had no right whatever to the land under Act 3 of 1893, which was still in force, and the Rai Bahadur could not have even anticipated any possibility of the transfer being questioned by them after the lapse of so many years. But it so happened that just about a month before the Rai Bahadur's death, Act 3 of 1893 was repealed and Act 5 of 1912 came into force. Under the latter Act, the rule of promogeniture was done away with and taking advantage of this fact, the plaintiff seems to have been tempted to set up a claim, which he must have known to be utterly baseless and unjustifiable.

I, therefore, see no hesitation in holding that the land in dispute was actually transferred by Rai Bahadur Gopal Das to defendant 1. The next question for consideration is whether the transfer was valid in law. Narinjan Das defen-

dant when examined as a witness, deposed that the transfer of the land took place on the very day on which the application for permission to transfer was made to the Financial Commissioner i. e., on 8th November 1905. It is contended on behalf of the plaintiff that as no "previous consent in writing" of the Financial Commissioner was obtained as required by S. 8, Act 3 of 1893, the transfer was void ab initio. Reliance has been placed in this connexion on *Vir Singh* v. *Kala Singh* (13) a ruling of the Financial Commissioner, Punjab. That ruling dissents from a ruling of the Punjab Chief Court, in which it was held that a transfer without the written consent of the Financial Commissioner was binding on the parties concerned although it could be avoided by the Government : vide *Hussain Khan* v. *Jahan Khan* (14).

In *Hussain Khan* v. *Jahan Khan* (14), it was held that the written consent of the Financial Commissioner under S. 8, Act 3 of 1893, was only intended to safeguard the interest of Government as a landlord and that the absence of the written consent of the Financial Commissioner rendered a transfer voidable at the option of Government but not void. In *Vir Singh* v. *Kala Singh* (13) on the other hand it was held that a transfer without such consent in writing was void ab initio. In *Ganda Singh* v. *Bata Singh* (15), a Division Bench of the Chief Court followed *Hussain Khan* v. *Jahan Khan* (14) in preference to *Vir Singh* v. *Kala Singh* (13) which dissented from it though without discussion of its reasoning. The latter ruling does not appear to have been as yet expressly dissented from in any subsequent ruling of the Chief Court or this Court, but it may be pointed out that there is a significant difference in the language of S. 8, Act 3 of 1893 and that of S. 19, Act 7 of 1912 which corresponds to it. The latter section expressly lays down that a transfer without the consent in writing of the Financial Commissioner shall be void, while no such words are to be found in S. 8, Act 3 of 1893. However, I consider it unnecessary to discuss the above point further as the present case seems to be clearly distinguishable on facts from *Vir Singh* v. *Kala Singh* (13). In the latter ruling the consent of the Financial Commissioner for the transfer was never obtained. In the present case the consent was obtained but the contention of the plaintiff is that it did not precede the transfer and hence the transfer was void. I do not think that there is much force in this contention. The application dated 8th November 1905 makes it clear that even if the transfer was actually made on that dateas stated by Narinjan Das, it must be taken to be provisional and subject to the necessary sanction being granted by the Financial Commissioner. Both the transferrer and the transferee were evidently aware of the fact that the Financial Commissioner's consent was necessary and had been applied for and in the circumstances neither of them could have looked upon the transfer as absolute until the Financial Commissioner gave his consent. The transfer of the "abadkari" rights must therefore be deemed to have been completed and become absolute after the necessary sanction of the Financial Commissioner was given. In this view of the matter, it seems to me that there was no infringement of the provisions of S. 8, Act 3 of 1893 and the fransfer was therefore perfectly valid.

No other grounds of appeal have been pressed.

I would, therefore, dismiss this appeal with costs.

Addison, J.—I agree.

S.N./R.K. *Appeal dismissed.*

(13) [1915] 3 P.R. 1915 Rev.=31 I.C. 400=6 P.W.R. 1915 Rev.

(14) [1913] 58 P.R. 1913=48 P.L.R. 1913=18 I.C. 5=36 P.W.R. 1913.

(15) [1917] 88 P.R. 1917=42 I.C. 380=175 P. W.R. 1917.

A. I. R. 1928 Lahore 974

JAI LAL, J.

Bir Singh—Decree-holder—Petitioner.

v.

Mohindar Singh and *others*—Judgment-debtors—Respondents.

Civil Revn. No. 432 of 1928, Decided on 10th October 1928, from order of Sm. C. C. Judge, Lahore, D/- 14th January 1928.

(a) Civil P. C., Ss. 55 (4)—Surety undertaking to produce judgment-debtor on date fixed must produce even though decree-holder remains absent—Civil P. C., S. 145.

Where a judgment-debtor is arrested in execution of a decree and he furnishes a security bond whereby the surety accepts his liability

to pay the decretal amount on his failure to produce the judgment-debtor in the Court on the day fixed by the Court, the liability undertaken by the surety is not contingent upon the decree-holder's appearance in Court. It is the duty of the surety to produce the judgment-debtor on the date fixed even though the decree-holder remains absent, and if he does not do so, he is liable under the surety bond. [P 975 C 2]

(b) *Civil P. C., Ss. 55 (4)—Surety becomes liable where judgment-debtor fails to apply for insolvency within time fixed—Civil P. C., S. 145.*

When a judgment-debtor is arrested and states that he is applying to be adjudged insolvent and furnishes a security to appear in Court, the liability of the surety is matured if an application for insolvency is not made within the time given by the Court. [P 975 C 1]

Faqir Singh—for Petitioner.

Judgment.—In execution of a decree obtained by the petitioner against Ahmad Din the judgment-debtor was arrested. He stated that he wanted to apply to be adjudicated an insolvent. Consequently on 26th January 1927, a security bond was given by Mohindar Singh, respondent and another undertaking that within a month from that date the judgment-debtor would apply for being adjudicated an insolvent and would appear in Court when directed to do so and that if he did not so apply or the sureties failed to produce him in Court on the date on which the Court directed him to appear then they would be responsible for the entire decretal amount. This security bond was accepted by the Court and an order was passed on 27th January 1927 that the judgment-debtor be handed over to the sureties who should produce him in Court on 28th February 1927. On this last mentioned date neither the sureties nor the judgment-debtor appeared in Court and the execution proceedings were filed in the absence of the decree-holder. Later, an application was made by the decree-holder for the arrest of the judgment-debtor and for the realization of the security from Mohindar Singh, respondent. An objection was taken by the latter that as the decree-holder failed to appear in Court on 28th February 1927, and the execution proceedings, had, therefore, to be filed, he was absolved from liability. This objection has been accepted by the learned Judge, Small Cause Court.

The decree-holder has presented this application for revision. In my opinion having regard to the express terms of the security bond the view of the learned Judge, Small Cause Court, is erroneous. The sureties undertook that the judgment-debtor would appear in Court and that they would produce him on any date fixed by the Court for the purpose; and as the Court directed them to produce the judgment-debtor in Court on 28th February 1927, it was their duty to produce him and the liability undertaken by them under the security bond was not contingent upon the decree-holder's appearance in Court.

It may incidentally be mentioned that the judgment-debtor did not apply to be adjudicated an insolvent. The consequence was that the liability of the sureties matured before the 28th February 1927.

On both these grounds I am of opinion that the sureties were liable to be called upon to pay the decretal amount by virtue of the security bond.

I accept this petition, set aside the order of the Court below, and remanding the case, direct the lower Court to proceed with the execution of the decree in accordance with law. The petitioner will have his costs against the respondents.

A.L./R.K. *Case remanded.*

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* A. I. R. 1928 Lahore 975

JAI LAL, J.

Sikandar Lal Puri—Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Case No. 215 of 1928, Decided on 18th October 1928, for transfer of case.

(a) Criminal P. C., S. 526—Magistrate making ill-advised remarks about accused's evidence and holding out threats to accused—Transfer should be ordered although trial has reached advanced stage.

If good grounds for a transfer of a criminal case are made out, the Court ought not to refuse it merely because the case has reached an advanced stage or that the transfer may entail expense and trouble to all concerned. [P 976 C 1, 2]

A Magistrate made certain premature and ill-advised remarks regarding the testimony of certain defence witnesses and held out threats to the accused regarding the sentence and the effect of his application for transfer of a case. From all this it appeared that the attitude of the Magistrate towards the accused was hostile to them; and a reasonable apprehension was created in the mind of the accused that he

would not get justice from him. The trial of the case, however, was so far advanced that the entire evidence for the prosecution and the defence had been recorded and a date was fixed for the hearing of arguments.

Held : the case was a fit one for ordering a transfer : *Misc. Revn. No.* 104 *of* 1924 ; *Misc. Cr. Case No.* 78 *of* 1924, *Rel. on.* [P 977 C 2]

*(*b*) *Criminal P. C., S.* 363—*It is one thing to record remark about demeanour of witness and quite another to make or record remark or opinion about substance of deposition of witness—S.* 363 *makes incumbent on Magistrate the former but it does not entitle him to do the latter.*

Although S. 363, makes it incumbent on the Magistrate to record remarks, if any, as he may think material respecting the demeanour of a witness whilst under examination, yet it does not entitle him to make or record any remark about the substance of the deposition of that witness. Because the parties are entitled to claim that, unless expressly provided to the contrary by law, the Magistrate shall not prejudice their cases or form an opinion about the respective merits of their cases or about the depositions of the witnesses till they have been fully and finally presented to the Magistrate by counsel, if any, in their concluding arguments and after the entire evidence has been recorded. [P 978 C 1]

(*c*) *Criminal P. C., S.* 526—*In dealing with application for transfer Court has to consider not only whether Magistrate's mind is biased but also and mainly whether applicant has justifiable apprehension that he will not get fair trial.*

In dealing with an application for transfer what the Court has to consider is not so much the question whether there has been any real bias in the mind of the presiding Judge against the applicant, but it is the question whether by the remarks of the Judge a reasonable apprehension is created in the mind of the applicant that he would not have an impartial trial : *A. I. R.* 1925 *Lah.* 361, *Foll.* [P 978 C 2]

B. R. Puri—for Petitioner.

C. H. Carden Noad—for the Crown.

Order.—These are four applications under S. 526, Criminal P. C., for transfer of criminal cases pending against the applicants under Ss. 420 and 161/109, I. P. C., in the Court of Mr. P. C. David Special Magistrate of Simla and Delhi. The complaints were instituted at the instance of the Finance Department of the Government of India and the trials are so far advanced that the entire evidence for the prosecution and the defence has been recorded and a date is fixed for the hearing of arguments. One, therefore, feels reluctant to order a transfer which might entail considerable expense and trouble to the Crown, the accused and the witnesses. But if good grounds for a transfer are made out, the Court ought not to refuse it merely because the cases have reached an advanced stage or that the transfer may entail expense and trouble to all concerned.

The accused in these cases are G. J. Piper, Sikandar Lal Puri, and Tara Chand. They all alleged that owing to the attitude taken up by the Magistrate with regard to some of their witnesses and the consequent remarks made and the threats held out by him to the witnesses and the accused, they have reason to apprehend that the Magistrate is prejudiced against them and, therefore, that they do not expect justice in his Court. It is alleged that on 15th September 1928 when Kesar Singh, a defence witness was being examined, the Magistrate told him: *tum jhuti gawahi de rahe ho* (i. e., you are giving false evidence), that on 21st September 1928, the Magistrate took up a very hostile attitude towards Kirpa Singh, a defence witness and, after recording his statement, said to the defence counsel in open Court : "Do'nt you think he is a liar" and addressing the witness said : *tum ne bahut zulm kia hai* (probably meaning, "you have done a great wrong"); and finally *bewaquf ka bachcha tum jhut bolte ho, bhag jao* (i. e., son of a fool, you speak falsehood, run away) and then asked Sikandar Lal accused whether he did not realize his stupidity in bringing such witnesses. On the same day it was found that a defence witness, i. e., the Manager Royal Typewriter Co., Delhi, had not been served, therefore the Magistrate addressing Sikandar Lal said :

> If I find you give up the witness afterwards, I can tell you, I shall double your sentence if I find you guilty. I find that the defence has been playing these tactics and I shall certainly take account of this fact when passing orders.

It is alleged that on this threat being held out, the defence abandoned their remaining witnesses. Then on 24th September 1928, the accused informed the Magistrate that he intended to move this Court for the transfer of the cases from his Court and it is alleged that the Magistrate remarked :

> It is most inconvenient for me. You must remember this is a double edged weapon.

It is on these grounds that the accused apprehend that the Magistrate is prejudiced againt them.

Five affidavits have been filed in support of the above allegations. Two are by the accused Sikandar Lal and Piper ; the remaing three are by Jaswant Singh,

an employee in the Legislative Department of the Government of India, Muhammad Zia, an employee of the Finance Department of Government of India and Sulakhan Mal Seth, a Government pensioner of Simla respectively. All these affidavits are identical and fully support the allegations of the accused.

The Magistrate has submitted an explanation. With regard to the incident of 15th September 1928 he states that the allegations are not true "as far as I can remember" ; he says that a note on the record must have been made if he had disbelieved the witness and as this has not been done, it is unlikely that he disbelieved him. In view of the unsatisfactory and vague explanation of the Magistrate as to this incident and having regard to the definite allegations made by the five deponents in their affidavits, I must accept the accused's version to be true.

With regard to the incidents of the 21st and the 24th September, the Magistrate admits that in substance he used the words imputed to him, but he states that in the case of Kesar Singh after he had remarked to the defence counsel "I think you will agree with me that the man is a liar" and after having spoken to the accused Sikandar Lal as alleged he called the witness Kirpa Singh before him after the day's proceedings in the case had been finished with a view to consider the question of making a complaint against him for giving false evidence but on being questioned Kirpa Singh asked for forgiveness, it was then that the Magistrate told him that "it was *zulm* for him to speak a lie in Court" and it was on this occasion that he called Kirpa Singh a *bewaquf ka bachcha* "for laying himself open to prosecution in this way."

With regard to the incident relating to the Manager of the Royal Typewriter Co., the Magistrate admits that after some preliminary conversation he pointed out to Puri that out of the 28 witnesses named by him in his list he had been giving up from 1 to 8 at each hearing and this might be considered as savouring of deliberate intent to delay and that, if this were found to be so, no Court could overlook such tactics, but would be bound to take such conduct into account in awarding punishment, if it eventually found the accused to be proved guilty even to the extent of doubling the sentence.

The Magistrate says that this was purely an advice given by him for the petitioners' own good.

Now, with regard to what happened on 29th September 1928 the Magistrate admits that he did observe to the defence counsel that "transfer would be a double-edged weapon in this case." He then goes on to explain what he meant by the "transfer being a double-edged weapon."

It would thus appear that, except with regard to the incident relating to Kirpa Singh, there is no substantial difference as to what was said by the Magistrate on the 21st and 24th September. Even with regard to Kirpa Singh the Magistrate merely differs from the accused as to the occasion on which the words complained of were used by him. I will assume that the version of the Magistrate is substantially correct as to these incidents.

The question then is whether the above facts are sufficient to raise a reasonable apprehension in the mind of the accused that the Magistrate is prejudiced against them. In *A. I. R* 1928 *Lah.* 180 (*Gopal Singh* v. *Emperor*) a learned Judge in Chambers of this Court transferred a case on the ground that the Magistrate started proceedings against a witness of the accused immediately after his statement had been recorded and before the case against the accused had been concluded with a view to file a complaint for giving false evidence under S. 476, Criminal P. C. It was held that the action of the Magistrate was likely to create an apprehension in the mind of the accused that he had prejudged the case against him as the action under S. 476 amounted to an expression of opinion that the witness had given false evidence. The learned Judge followed a judgment of a Division Bench of the Calcutta High Court in *Ghulam Bari Ghazi* v. *Yar Ali Khan* (1) where a case was transferred from the Court of a Magistrate because he had made a remark at the close of the testimony of a witness as follows :

The witness falters and from his demeanour it appears that he has not told the truth.

Before me reference was also made to a judgment of the Patna High Court in *Sheodhari Rai* v. *Jhingur Rai* (2) in which a transfer was ordered because in the course of the examination of the prosecution witnesses, the Magistrate trying the case had made observations which

(1) Misc. Revn. No. 104 of 1924.
(2) Misc. Criminal No. 78 of 1921.

went to show that he was not favourable to the prosecution.

It is no doubt true as contended by the learned Governmsnt Advocate, who appeared to oppose the application for transfer, that S. 363, Criminal P. C., makes it incumbent on the Magistrate to record remarks, if any, as he may think material respecting the demeanour of a witness whilst under examination, but in my opinion it is quite a different thing to record a remark about the demeanour of the witness and to make or record a remark or opinion about the substance of the deposition of that witness. The parties are entitled to claim that, unless expressely provided to the contrary by law, the Magistrate shall not prejudge their cases or form an opinion about the respective merits of their cases or about the depositions of the witnesses till they have been fully and finally presented to the Magistrate by counsel, if any in their concluding arguments and after the entire evidence has been recorded. Any opinion formed and expressed by the Magistrate at the earlier stage of the case is bound to be prejudicial to the party concerned. Proceedings under S. 476, Criminal P. C., when they relate to the merits of the statement made in Court by a witness, if started before the close of the case are calculated to seriously affect the case of the party who called him, as they are bound to frighten the remaining witnesses who must assume them as an indication of the treatment that they themselves are likely to receive if they make a similar statement in Court.

I have considered the question whether as the learned Government Advocate urged, these were not really ill-advised and premature observations made by the Magistrate without properly weighing their import and therefore they did not represent his finally considered opinion which would be formed after the arguments of counsel have been heard. The remarks were certainly ill-advised and premature, but I am unable to take the view which the learned Government Advocate wishes me to take of these incidents. It was on more than one occasion that the Magistrate expressed his opinion about the testimony of the witnesses. His threat to the accused regarding the sentence and the effect of his application for transfer is an indication of his attitude towards them which at that stage appears to have become hostile. It is hardly necessary for me to observe that the use of the words "*bewaquf ka bachcha*" to one of the witnesses by the Magistrate is indefensible but that would by itself be no ground for the transfer of the cases. At the same time it must be taken into consideration along with the other incidents.

So that as it may, even if I assumed that the Magistrate's remarks were hasty and did not represent his real and considered opinion of the case of the accused and that his threats about the sentence were not intended to be made seriously and that by describing an application for transfer as a double-edged weapon the Magistrate meant something else than was understood by the accused, though I feel that I would be assuming too much under all the circumstances disclosed, it is not so much the real mind of the Magistrate that determines the question but it is the impression that is reasonably created in the mind of the accused by the remarks and the conduct of the Magistrate In this respect I cannot do better than quote the following remarks from the judgment of the learned Chief Justice in *Amar Singh* v. *Sadhu Singh* (3) :

> It is, at the same time clear that in dealing with an application for transfer what the Court has to consider is not merely the question whether there has been any real bias in the mind of the presiding Judge against the applicant, but also the further question, whether incidents may not have happened which though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Judge, are nevertheless such as are calculated to create in the mind of the applicant a justifiable apprehension that he would not have an impartial trial. As observed by Lush, J., in *Sargeant* v. *Dale* (4), the law has regard, not so much perhaps to the motives which might be supposed to bias the Judge, as to the susceptibilities of the litigant-parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is essential to social order and security.

Applying the above test to the facts of this case I have no doubt that the accused have a reasonable apprehension that they will not be fairly dealt with by the Magistrate. They are entitled to claim that if they are found guilty they should be punished for the offence committed by them and having regard to all the cir-

(3) A. I. R. 1925 Lah. 361=6 Lah. 396.
(4) [1877] 2 Q. B. D. 558.

cumstances under which it was committed, and they are equally entitled to claim that no extraneous considerations such as their conduct of the defence or the application for transfer made by them should weigh with the Magistrate in judging of their guilt or otherwise and in determining the measure of their punishment. Yet this is the threat that they reasonably apprehend has been held out to them by the Magistrate.

The learned Government Advocate commenced his arguments by stating that the attitude of the Magistrate was in fact unduly favourable to the accused and unfavourable to the prosecution, in so much that in recording the statement of some of the defence witnesses the Magistrate scratched out the statement made by them earlier in the cross-examination when such statements had been contradicted by the prosecution by documentary evidence. As an instance of this he read out the statement of a witness who had made a different statement earlier but when the Crown counsel confronted him with some documents he admitted that what he had stated before was stated under some misapprehension. The Magistrate instead of recording his statement as given later, scratched out the earlier statement and substituted therefor the one made later. This of course is an inexcusable irregularity and no Magistrate who knows his work ought to be guilty of it. The learned Government Advocate stated that those concerned with the prosecution of the cases in the Court below were not satisfied with the conduct of the cases by the Magistrate, and that a transfer would be advantageous to the prosecution but he could not ask for one. The result is that before me both the Government Advocate and the counsel for the accused adversely criticized the impartiality of the Magistrate and his grasp of proper procedure and the correct rule of evidence. The cases are important both from the point of view of the prosecution and the accused and it is desirable that they should be heard by a more competent Magistrate in whom both parties have confidence.

I, however, felt reluctant to transfer the cases at this stage, but Mr. E.R. Puri, who appeared for the applicants, stated that if the cases were transferred, his clients would not ask for de novo trials under S. 350, Criminal P, C., but that they would only ask that two witnesses for the defence be examined, i.e., the Manager of the Royal Typewriter Company and one Mr. N. C. Mehta. This would obviate the difficulty that I felt in transferring these cases at this stage The prosecution is not entitled to claim a de novo trial, but a discretion is given to the Magistrate under S. 350 to act either on the evidence recorded by his predecessor or partly recorded by his predecessor and partly by himself.

In view of what I have stated above, I consider that these are cases in which a transfer is desirable in the interests of justice I have considered the question of the place where the cases should now be heard. The Government of India are about to move to Delhi soon. I think it will, under the circumstances, be convenient and less expensive both to the prosecution and the accused if the cases are heard in Delhi. I accordingly withdraw the cases from the Court of Mr. P. C. David, Special Magistrate, and transfer them to the Court of Mr. P.J. Anderson, Additional District Magistrate, Delhi I do not think that there is any question as to the jurisdiction of Mr. P. J. Anderson to try these cases, but if there is any such question, I have no doubt that the Government will issue the necessary notification conferring the requisite powers on him. With the exception of recording the statement of the Manager Royal Typewriter Company and Mr. N. C. Mehta, if the accused so desire, the Magistrate shall not hold de novo trial at their instance. I do not of course wish to fetter the discretion of the Magistrate under S. 350, Criminal P. C., to recall any witness whose evidence which has already been recorded he may find himself unable to follow or whom he may desire to call or recall.

S.N /R.K. *Order for transfer made.*

A. I. R. 1928 Lahore 979

SHADI LAL, C. J.

Banwari Lal—Petitioner.

v.

Emperor—Opposite Party.

Civil Revn. No. 253 of 1928, Decided on 26th September 1928.

(a) Civil P. C., O. 16, R. 12—Failure of witness to attend due to lawful excuse—Fine should not be imposed—Witness missing the train—Sending a telegram—Fine imposed—Order of fine was quashed.

The law punishes a refractory witness who

without lawful excuse, fails to comply with the summons. Where the failure of the witness to attend on the date fixed was due to his missing the train and he sent a telegram intimating that fact to the Court.

Held: that there was no ground to assume that he did not intend to attend Court and that the order imposing fine should be quashed. [P 980 C 2]

(b) *Civil P. C., O.* 16, *R.* 12—*Attachment is not a condition precedent to fine. (obiter).*

Attachment of property is not a condition precedent to the infliction of the fine under R. 12: 31 *C. L. J.* 363, 57 *I C.* 302, *Diss., from*: *A. I. R.* 1925 *Mad.* 1247, *Foll.* [P 980 C 2]

Moti Sagar—for Petitioner.

Judgment.—The petitioner Banwari Lal was a witness in a civil case, and has been fined Rs. 20 for his failure to attend the Court on the date fixed for the recording of his evidence. The relevant facts may be shortly stated: On 6th January 1928, Banwari Lal appeared in the Court of the Subordinate Judge at Delhi in compliance with the summons, but it appears that the Court did not record his evidence on that date and adjourned the case to 18th January 1928. On that date, the witness failed to attend the Court, because he missed the train to Delhi by a few minutes and informed the Court of that fact by a telegram. The Subordinate Judge, however, issued a bailable warrant for his attendance on 10th February 1928, and on that date imposed upon him a fine of Rs. 20 for his failure to appear on 18th Jan. 1928.

The learned Judge has purported to act under O. 16, R. 12, Civil P. C., though he does not expressly say so in his order. It is contended by Mr. Moti Sagar that the order was ultra vires because the Court had not first taken action under O. 16, R. 10. A perusal of that rule shows that where a witness has failed to appear in compliance with the summons issued to him, the Court may adopt one of the two alternatives: (a) It may issue a proclamation as prescribed by sub-R. (2), R. 10 or (b) issue a warrant and also make an order for the attachment of the property of the witness, as laid down in sub-R. (3), R. 10.

Now, in this case a warrant was undoubtedly issued: but, as there was no attachment of the property, it is urged that the failure to comply with that requirement of the law deprived the Court of its jurisdiction to impose a fine under R. 12. A judgment of the Calcutta High Court in *Ram Gopal* v. *Secy. of State* (1), which has been followed by that Court in *Ashutosh Mullick* v. *Secy. of State* (2), no doubt supports this contention; but the contrary view has been taken by the Madras High Court in *Narasayya, Peta, In re* (3). As at present advised, I am of opinion that the attachment of the property was not a condition precedent to the infliction of the fine under R. 12, but it is unnecssary to make a final pronouncement on the subject because the merits of the case do not warrant the order passed by the Subordinate Judge.

It will be observed that the law punishes a refractory witness who, without lawful excuse, fails to comply with the summons. But in the case before me, the petitioner's failure to attend the Court was due to an accident. There is no reason to disbelieve his version that he missed the train; and could not, therefore, attend the Court on the date fixed. It is to be remembered that he had appeared in the Court on 6th January 1928, and there is no valid ground for assuming that he did not intend to attend the Court on 18 Jan. 1928. I accordingly accept the application and quash the order imposing fine upon the petitioner.

A. L./R.K. *Order quashed.*

(1) [1920] 31 C. L. J. 363=55 I. C. 425.
(2) [1920] 57 I. C. 302.
(3) A. I. R. 1925 Mad. 1247=48 Mad. 941.

A. I. R. 1928 Lahore 980

BHIDE, J.

Sohan Singh—Plaintiff—Appellant.

v.

Jagat Singh and *others*—Defendants—Respondents.

Second Appeal No. 2727 of 1927, Decided on 26th September 1928.

(a) *Easement—Obstruction to light and air—Injunction can only be granted when closure amounts to actionable nuisance—Deprivation of light and air must make the living uncomfortable—Easements Act, S.* 15.

Injunction for the protection of the easement of light and air can only be granted when their closure amounts to an actionable nuisance. It is not enough that the light has been reduced. There must be a substantial privation of light enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the occupier from carrying on business as beneficially as before. *Colls* v. *Home* and *Colonial Stores*, (1904) *A.C.* 179; 8 *P.R.* 1909; 39 *Cal.* 59; and *A. I. R.* 1914 *P. C.* 45; *Ref.* [P 981 C 2]

The existence of other sources of light should be taken into consideration. *Colls* v. *Home*

and Colonial Stores, (1904) *A. C.* 179 and 13 *Bom.* 252, *Ref* [P 982 C 1]

(b) *Civil P. C., S.* 100—*Finding as to privation of light not inconveniencing user so as to entitle him to injunction, is a finding of fact.*

The finding that the privation of light has not resulted in any such appreciable inconvenience as would entitle the user of such light to an injunction is a finding of fact and cannot be challenged in second appeal. [P 982 C 1]

(c) *Specific Relief Act, S.*54—*Principle of A. I. R.* 1925 *Rang.* 327 *is not necessarily restricted to crowded cities.*

The principle laid down in *A. I. R.* 1925 *Rang.* 327 (i. e, to issue injunction where pecuniary compensation would not afford adequate relief, is not restricted necessarily to crowded cities. [P 982 C 2]

(d) *Specific Relief Act, S.* 54 (c)—*Court has discretion to grant injunction—Whether pecuniary compensation is an adequate relief is a crucial point.*

The crucial point for determination whether injunction should be granted or not is whether pecuniary compensation would afford adequate relief. Granting of an injunction is discretionary with the Court. [P 982 C 2]

Mehr Chand Mahajan—for Appellant.

Jagan Nath Aggarwal and *Hem Raj*—for Respondents.

Judgment.—This is a second appeal arising out of a suit for injunction to restrain the defendants from closing up a window (marked *A*) and ventilators marked "*B*" and "*C*" in the southern wall of the second storey of the plaintiff's house. Both the Courts below have concurred in finding that the window and the ventilators had been in existence for over 20 years before the suit and that the plaintiff had acquired a right of easement in respect of them. They have also concurred in finding that the rooms in which the window *A* and the ventilator "*C*" are situated are otherwise sufficiently well-lighted and that the plaintiff had not suffered any such appreciable inconvenience as would entitle him to an injunction. As regards the ventilator "*B*" it has been found that the room in which it is situated has not the advantage of other good sources of light and that the obstruction of this ventilator by the wall erected by the defendant has reduced the light and air in the room so as to make it uncomfortable and dark. The trial Court gave an injunction in respect of this wall. The lower appellate Court, however, following the principle laid down in *Mahomed Auzam Ismail* v. *Jagannath Jamnadas* (1), held that award of damages would sufficiently meet the ends of justice and granted plaintiff only a decree for Rs. 250 as damages in lieu of the injunction granted by the trial Court. From this decision plaintiff has appealed and the defendant has filed cross-objections.

The main contentions of the learned counsel for the appellant are as follows:

(1) The Courts below having found that the plaintiff has a right of easement should have granted a decree for injunction in respect of the window as well as the ventilators; (2) The finding of the trial Court as regards the rooms in which the widow *A* and the ventilator "*C*" are situated being otherwise well-lighted is vague and that of the lower appellate Court is based on no evidence and is also erroneous according to law; (3) The principle laid down in *I.L.R.* 3 *Rangoon* 230 was not applicable to the facts of this case; (4) The damages granted have been arbitrarily assessed and are inadequate.

As regards the first point there seems to be no doubt in view of the principles laid down in the leading English case *Colls* v. *Home and Colonial Stores* (2), which have been followed in this country: cf. *Vir Bhan* v. *Ramji Das* (3), *P. C. Paul* v. *William Robson* (4), and *P. C. Ernest Paul* v. *William Robson* (5), that the plaintiff could not be held to be entitled to the injunction prayed for unless the closure of the window and ventilator amounted to an actionable nuisance. It is not enough that the light has been reduced. There must be a substantial privation of light enough to render occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of the business premises) to prevent the plaintiff from carrying on his business as beneficially as before. In the present case the house in question is used only for residential purposes and both the Courts below have held as regards window *A* and ventilator "*C*" that the privation of light has not resulted in any such appreciable inconvenience as would entitle the plaintiff to an injunction. This is a finding of fact and is really not open

(1) A. I. R. 1925 Rang. 327=3 Rang. 230.

(2) [1904] A. C. 179=73 L. J. Ch. 484=20 T. L. R. 475=53 W. R. 30=90 L. T. 687.

(3) [1909] 8 P. R. 1909=20 P. W. R. 1909=1 I. C. 441=33 P. L. R. 1909.

(4) [1912] 39 Cal. 59=12 I. C. 60.

(5) A. I. R. 1914 P. C. 45=42 Cal. 46=41 I. A. 180 (P.C.).

to challenge in second appeal. But it has been urged that the finding of the trial Court is of an indefinite character and that of the lower appellate Court is based on no evidence. The trial Court's finding is not perhaps as definite as it might have been, but that is not a matter of much importance in view of the fact that the lower appellate Court's finding is definite. The contention that it is based on "no evidence" cannot be upheld. The plan on which the lower appellate Court has relied was certainly a piece of evidence in the case. It shows that the rooms in which the window and ventilators are situated have other sources of light and the lower appellate Court was entitled to take this fact into consideration in coming to a decision as to whether the plaintiff was entitled to the injunction prayed for. It has not been shown that there was other evidence of much importance. The existence of other sources of light is not denied. It has been urged that the light available through other sources cannot be taken into consideration at all. But this contention does not seem to be correct: cf. *Colls* v. *Home and Colonial Stores* (2) and *Dhunjibhoy Cowasji* v. *Lisboa* (6).

Finally it was urged that the lower appellate Court has erred in law in not considering the question whether the plaintiff has acquired a prescriptive right of easement in respect of the other sources of light, or whether they are liable to be closed at the option of his neighbours. But the plaintiff has in his statement dated 14th May 1926 clearly stated that he has acquired such a right and that none of his neighbours could close his windows or ventilators. I, therefore, do not see sufficient justification in the circumstances of the case to interfere with the finding of fact arrived at by the lower appellate Court.

As regards the ventilator "C", it is true that the case reported in *Mahomed Auzam Ismail* v. *Jagannath Jamnadas* (1) relates to a crowded city like Rangoon but I do not think the principle is necessarily restricted to crowded cities.

It has been pointed out in *Dhunjibhoy Cowasji* v. *Lisboa* (6) that in this country the grant of injunction in such matters is governed by S. 54, Specific Relief Act, and according to that section a Court may grant an injunction only when pecuniary compensation would not afford adequate relief vide Cl (c) of that section. The crucial point for consideration therefore is whether in the present instance pecuniary compensation will afford adequate relief. In the present case the room in which the ventilator "*B*" is situated has already another source of light and air. The lower appellate Court has assessed compensation on the assumption that by making structural alterations it will be possible to improve the light further. It was urged in the memo of appeal that it is impossible to make any such alterations, but the point was not pressed in arguments. Besides, it seems from the plan that a portion of this room adjoins an open space and it should be easy enough to construct one or two windows on that side at a moderate cost. In these circumstances I do not see why pecuniary compensation should not be held to afford "adequate relief". It will certainly give plaintiff a chance of improving the light in the room if he cares to do so. In any case, the grant of an injunction being discretionary, the Court is, I think, entitled to take this aspect of the matter into consideration in deciding whether an injunction should issue.

The lower appellate Court has not given any reasons for assessing the compensation at Rs. 250. Apparently no suggestion on this point was made by the parties in that Court and none has been made before me. The assessment of damages in a case of this kind cannot be very exact and a remand at this stage is not likely to serve any useful purpose. The circumstances of the case do not appear to require the award of any heavy damages. It seems easy enough for the plaintiff as stated above to construct one or two windows at a moderate cost in the room so as to provide more air and light for it. I do not consider the amount fixed viz. Rs 250 to be unreasonable or inadequate.

The cross objections filed by the respondents have not been pressed. I dismiss the appeal as well as the cross-objections, but in view of all the circumstances leave the parties to bear their costs.

A.L./R.K *Appeal dismissed.*

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(6) [1889] 13 Bom. 252.

A. I. R. 1928 Lahore 983

ADDISON, J.

Mt. Dhan Kaur—Appellant.

v.

Arjan Singh—Plaintiff—Respondent.

Second Appeal No. 2846 of 1926, Decided on 13th February 1928.

(a) Custom (Punjab)—Among Jats of Ludhiana District a woman who remarries before the death of her son cannot succeed to her son's property inherited from his father.

A mother succeeds as widow of her deceased husband and not as mother of her son. A widow who has remarried before the death of her son is no longer the widow of her deceased husband and she is not an heir entitled to succeed upon the death of her son: 64 *P. R.* 1910; 46 *P. R.* 1891 and 117 *P. R.* 1888, *Rel. on.* [P 984 C 1]

(b) Custom (Punjab)—Reversionors.

There is no reversion to the collaterals of the donor so long as the defendants of the donee, whether in the male or female line, are existing: 82 *P. R.* 1918 and 68 *P. R.* 1911, *Foll.*

Anant Ram—for Appellant.

Deo Raj Sawhney—for Respondent.

Judgment.—The following pedigree table is necessary for the appeal:

Mt. Bhagan
|
Ballu
|
Sahib Ditta
|

Mt. Bishni	Mt. Manti	Mt. Bisanti	Labhu
|	Deft. 3	Deft. 2	m. Mt. Dhan Kaur Deft. 1
Arjan Singh plaintiff			|
			Shaman deceased.

The land in dispute was gifted to Mt. Bhagan by her brothers. On the death of her grandson Sahib Ditta it came to Labhu, his only son, to the exclusion of Labhu's three sisters. On Labhu's death it went to his son Shaman. On Shaman's death it was mutated in favour of Shaman's mother, Mt. Dhan Kaur. Thereupon the reversioners, that is, the descendants of the donors, brought a suit for possession of the land against Mt. Dhan Kaur on the ground that she was not entitled to it, having remarried many years before. They failed in their suit because of the existence of Labhu's sisters who were held to be the heirs. Thereupon the present plaintiff Arjan Singh, son of one of the sisters, brought the present suit against Mt. Dhan Kaur for possession of one-third of the land on the ground that she had no right to it as she had remarried long before the death of her son Shaman. The other two sisters of Labhu were impleaded as defendants and supported the plaintiff though they did not themselves sue for possession of their two-thirds share. The Courts below have concurred in decreeing the plaintiff's suit. The District Judge has given a certificate on the following question of custom, namely, whether the mother of the last male proprietor among Jats forfeits her right of succession by her remarriage (prior to the succession opening out) and is excluded from succession by her deceased husband's sister's son. On this certificate this second appeal has been admitted.

A preliminary objection was taken that the appeal was incompetent because in the certificate the words "conflicting and" had been deleted. S. 41 (3), Punjab Courts Act, however, is only to the effect that no second appeal shall lie regarding the validity or existence of any custom or usage unless the Judge of the lower appellate Court has certified that the custom or usage is of sufficient importance and that the evidence regarding it is so conflicting or uncertain that there is such substantial doubt regarding its validity or existence as to justify such appeal. The words as printed in the certificate are "so conflicting and uncertain." This is a mistake. "Or" should have been written instead of "and." The District Judge was, therefore, competent to delete the words "conflicting and" and to grant the certificate that the evidence regarding it was so uncertain, etc. I overrule this preliminary objection.

There is no doubt that if Mt. Dhan Kaur had not remarried before the death of her son she would have been entitled to succeed. There is also no doubt that if Mt. Dhan Kaur is not entitled to succeed then the plaintiff is entitled to possession of one-third and his two aunts to possession of two-thirds. This is because of the well-known principle that there is no reversion to the collaterals of the donor so long as the descendants of the donee, whether in the male or female line, are existing: see *Tara* v. *Tara Chand* (1) and *Lachhman* v. *Bhagwan Sahai* (2). The real question, therefore, is whether Mt. Dhan Kaur who remarried immediately after Labhu's death long before the death of her son Shaman was entitled to succeed Shaman.

(1) [1918] 82 P. R. 1918=109 P. L. R. 1918=47 I. C. 373=160 P. W. R. 1918.
(2) [1911] 68 P. R. 1911=160 P. L. R. 1911=10 I. C. 277=203 P. W. R. 1911.

A Full Bench of the Punjab Chief Court held in *Mt. Desi* v. *Lehna Singh* (3) that according to custom the plaintiff was not entitled to succeed as mother but as the widow of her husband and further according to custom she was no longer the widow of the father of the deceased as she had remarried before the death of her son and therefore she had no title to the estate in dispute against the reversioners. In the present case the plaintiff is in the same position as a reversioner on account of the special custom of succession regarding gifted land. Before this it had been held in *Jai Devi* v. *Harnam Singh* (4) that among Sus Jats of Hoshiarpur by custom a mother is excluded from succession to her son's estate when she has contracted a second marriage before her son's death. In that case no instances could be given on either side but there was oral evidence to that effect. In the case before me there is no oral evidence. In *Harnam Singh* v. *Mohan Kuar* (5), a Division Bench of the Punjab Chief Court held, following the last two mentioned rulings, that among Hindu Sikh jats of Ferozepore District a widow having remarried her husband's brother no longer remained the widow of her first husband and consequently after the death without issue of her husband's son she could not succeed to a life interest in her deceased husband's estate in preference to his brother who was the next heir. The principle was again ennunciated that a widow having remarried no longer remains the widow of her first husband. The cases deciding whether or not a widow forfeits her estate upon remarriage after having succeeded to the estate are not in point and need not be referred to.

According to para. 22 of Rattigan's Digest of Customary Law, the rule is that in default of a male lineal descendant and of a widow the mother of the deceased succeeds to a life interest provided she has not remarried. This general rule of custom is, therefore, in favour of the plaintiff. In remark (1) under para. 22 it is said that she succeeds as the widow of her son's father. In *Bissi* v. *Hira Singh* (6) a Division Bench held that the weight of authority was largely in favour of the view that the presumption was that the mother succeeded as widow of her husband and that it was for her to prove that she succeeded as mother of her son. That was a case where the mother remarried after succeeding to the estate but it is important in view of the principle stated above.

For these authorities it follows that the mother succeeds as widow of her deceased husband and not as mother of her son. It cannot be said that a widow who has remarried before the death of her son is any longer the widow of her deceased husband. For this reason in my opinion it must be held that she is not an heir entitled to succeed upon the death of her son. The result is that the plaintiff is heir to one-third and his suit was properly decreed.

The answer to question 42 of the Customary Law of the Ludhiana District is that marriage whether in the family or to a stranger destroys the right of the widow over her first husband's estate, while the answer to question 48 is that the mother has the same rights as the widow I think that the only possible interpretation of this statement of custom is that the mother succeeds as the widow of her first husband and that by remarriage she loses all rights of succession to him. The Customary Law of the Ludhiana District is, therefore, in favour of the view I have taken above.

It was contended on behalf of the appellant that it was for the plaintiff to prove that her remarriage deprived the mother (or widow) of any future rights of inheritance to which she would have been entitled but for such remarriage. It is clear that under Hindu Law a widow who has remarried is not debarred from succeeding to the estate of her son by her first husband. It was further contended that, as a custom to the contrary had not been made out in the present case, Hindu Law should be followed and the suit of the plaintiff dismissed. I have already held that the statement of custom given in the riwaj-i-am of the district is evidence that the mother cannot succeed if she has remarried, and this is also the general rule of custom throughout the province. The contesting defendant, therefore, cannot be allowed to fall back upon Hindu Law.

For the reasons given I dismiss this appeal with costs.

A.L./R.K. *Appeal dismissed.*

(3) [1891] 46 P. R. 1891.
(4) [1888] 117 P. R. 1888.
(5) [1910] 64 P. R. 1910=113 P. L. R. 1910=7 I. C. 484=1910 M. W. N. 1910.
(6) [1917] 75 P. R. 1917=42 I. C. 338=141 &

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